

Testimony of John M. Palatiello
Administrator
Council on Federal Procurement of Architectural & Engineering Services (COFPAES)
before the
House Committee on Small Business
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Madam Chairman, members of the Subcommittee, I am John Palatiello and I serve as Administrator of the Council on Federal Procurement of Architectural and Engineering Services (COFPAES). COFPAES was formed in the 1960s to serve as the unified voice of the architectural, engineering and related (A/E) services profession on issues related to Federal contracting. Our member organizations are the American Congress on Surveying and Mapping (ACSM), American Institute of Architects (AIA), American Society of Civil Engineers (ASCE), Management Association for Private Photogrammetric Surveyors (MAPPS) and National Society of Professional Engineers (NSPE). Throughout its history, COFPAES has focused on ensuring quality and competence in procuring professional A/E services. COFPAES serves the American public by assisting Congress and Federal agencies in ensuring that projects to satisfy the building, infrastructure, resource, defense, and security needs of our Nation are conducted in an efficient and quality manner. The Council is the major policy advocate for the "Brooks Act" (40 U.S. Code 1101 et. seq. and part 36.6 of the Federal Acquisition Regulation (FAR)), the qualifications based selection (QBS) process that governs Federal procurement of A/E services. While acting as a sounding board on federal procurement procedures, policies, and regulations, COFPAES has stimulated the development of SF254 and SF255 questionnaires, and their successor, the SF330, and published guides to contracting with the federal government. COFPAES also hosts a forum for the exchange of information between public servants and private practitioners on issues affecting A/E procurement.

Thank you for this opportunity to share our views on "Are New Procurement Methods Beneficial to Small Business Contractors?"

The Federal Government has an annual construction budget (direct and grant-in-aid) of more than \$55 billion and contracts for A/E services of more than \$5 billion. America's architects, engineers, surveyors and mapping professionals, in large business and small, are the world's leaders and they contribute to the health, welfare and safety of the American people.

Brooks Act Qualifications Based Selection (QBS)

The basis for present statutory authority for procurement of personal and professional services, and the use of QBS, can be traced back to an 1861 Appropriations Act. 12 Stat. 214 (1861). This Act provided for the appropriation of funds for various purposes, including the compensation of civilian surveyors. Section 10 directed that all contract for supplies or services be made by advertising for proposals "except for personal services." Id. at 220. A year later, the Attorney General ruled that a contract for surveying was a contract for personal services within the meaning of the Act and, therefore, could be made without advertisement and competitive bidding. 10 Op. Atty. Gen. 261 (1862). In reaching his decision, the Attorney General observed:

"...although this policy (price competition) is certainly desirable in all cases, there are yet some to which it cannot well be applied. Such are contracts for services which require special skill and experience... In all contracts for services which presuppose trained skill and experience, the

public officer who employs the service must be allowed to exercise a judicious discrimination, and to select such as, in his judgment, possesses the required qualifications.

Of this class are contracts for surveying the public lands. The service to be performed requires not only fidelity and integrity, but a certain kind of skill and knowledge, and the officer whose duty it is to let the contract, is bound to know that the person he employs possesses these qualifications. It is not half so important to have the work done cheaply as to have it done well, and the price to be paid for it, whilst it should be but fair and reasonable, ought to be far from controlling consideration". (Id. at 262 (emphasis added)).

The process was codified in 1972 in Public Law 92-582 and amendments to the Brooks Act were enacted in 1988 in section 724 of Public Law 100-656 and section 8 Public Law 100-679. Congress has clarified or applied the Brooks Act to Federal agency activities, or Federal grant programs, in a variety of laws, including the 1982 Military Construction Codification Act, 1983 Supplemental Appropriations Act, 1983 Competition in Contracting Act, 1986 Superfund Amendments, Section 119(f), 1986 Water Resources Act, Section 918, 1986 Defense Appropriations Act, Section 8087, 1987 Defense Appropriations Act, 1987 Highway Act, Section 111(2)(A), 1987 Airport and Airway Safety and Capacity Expansion Act, Section 109(g), 1988 Energy and Water Development Appropriations Act, Section 377(b), 1997 Omnibus Consolidated Appropriations Act, and the 1999 Department of Defense Appropriations Act.

This time-tested and proven process is also codified in more than 40 state "mini-Brooks Acts," and is recommended in the American Bar Association's Model Procurement Code for State and Local Government.

The need for the Brooks Act was articulated by then-Representative Albert Gore, Jr., as Chairman of the Subcommittee on Investigations and Oversight of the House Committee on Science and Technology -

"Federal procurement practices that lead to or promote the selection of architects and engineers on a "low-bid" basis should be changed to require prequalification of bidders, with greater consideration given to prior related experience and past performance of the parties seeking the contract award...The government should also ensure that all necessary architectural and engineering design and on-site services in public construction projects are furnished by licensed professionals who are qualified and experienced to assure the construction of safe structures." ("Structural Failures in Public Facilities," March 15, 1984)

When the Brooks Act was being debated in the Congress in 1972, the rationale for qualifications based selection was articulated by several members.

Mr. Jackson: This legislation would not establish any new policy regarding the procurement of architect-engineer services by Federal agencies, but it would confirm long-established existing practices whereby such professional services are secured by a professional selection and negotiation process under which the emphasis is on professional qualification and expertise for the specialized services which are needed from time to time for the Federal agencies to carry out their missions ... we have over the years excluded professional services from the normal competitive bidding requirements for government purchase of services (41 U.S.C. 252(c), 10 U.S.C. 2304(a), 41 U.S.C. 5). 118 Cong. Rec. 36182 (1972).

Mr. Randolph: Ask 10 A/E firms to bid on the design of a particular facility and many agencies will take the easy way out and select the low bidder. Under such circumstances, we may end up with a technically capable architect or engineer, but one who, for lack of experience or because of a desire to stay within his bid reduces the time spent on field surveys or in the preparation of detailed drawings, or in providing inspection services. As a result, the government may have saved itself a half of one percent to the cost of construction, operation or maintenance. Id. at 36188.

Congress provided clear and unambiguous statutory authority clarifying Brooks Act application to surveying and mapping in Public Law 98-63, a bill making supplemental appropriations for FY 1983.

"Contracts for architect and engineering services, and surveying and mapping services, shall be awarded in accordance with title IX of the Federal Property and Administration Services Act of 1949 (40 U.S.C. 541) et. seq)." (H.R. 3069, page 11, 98th Congress, 1st Session)

As a result of that language, the Corps of Engineers (civil work division, which is not a title 10 agency) returned to the Brooks Act procedure for surveying and mapping procurements. The Corps also promulgated a broad and expansive definition of surveying and mapping subject to Brooks Act procedures (SEE EFARS 36.601-4).

In providing an explanation of the provision, Congress appeared to have intended to make the authority both permanent and government-wide. Although the relevant language is provided in the Corps of Engineers section of the bill's accompanying report, (H. Rept. No. 98-207, 98th Congress, 1st Session. (at pp. 40 & 100)), the language is repeated under a section entitled "Changes in the Application of Existing Law" (at p. 111) without qualification or limitation of its application.

This fact was underscored by the Congress when the Competition In Contracting Act first passed the Senate. Prior to its inclusion in the Budget Deficit Reduction Act, (P.L. 98-369), the Senate considered and passed S. 338, the original Competition in Contracting Act, on November 11, 1983. During Senate debate on the bill, Senator Cohen, the bill's sponsor, and Senator Percy, a Senate manager of the Brooks Act in 1972, engaged in a colloquy to clarify the intent of Congress with regard to the application of the Brooks Act to surveying and mapping services:

"Mr. Percy. Mr. President. I rise with an inquiry. The Competition In Contracting Act would revise the Federal Property and Administrative Services Act to broaden the requirements for competition, but the language of section 303 contains the words "...except as ...otherwise authorized by law..." carrying forward a very important distinction made in the Brooks Act, 40 U.S.C. 541. The distinction provides that architect and engineering services, defined 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," may be procured by competitive negotiation -- a time-tested method for acquiring professional services of this kind. Am I correct that this important distinction will be preserved under the language of section 303?

Mr. Cohen. Yes; it would be preserved.

Mr. Percy. I thank the Senator. I have also been concerned that the Comptroller General has given an overly restrictive interpretation to this definition of architecture and engineering

services, and has decided on several occasions that surveying and mapping services are not included. However, the issue has been more recently addressed in the Supplemental Appropriations Act for 1983. The section of that act appropriating funds for the Corps of Engineers of the Department of the Army provides that "contracts for architect and engineering services, and surveying and mapping services, shall be awarded in accordance with title IX of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 541 et seq.)..." Under this language, the Corps of Engineers will award contracts for mapping and surveying in accordance with the Brooks Act.

Mr. Cohen. That is a positive step. I think it is important to note, moreover, that this language does not only apply to the Corps of Engineers, but to all Government procuring agencies.

Mr. Percy. Would the Competition in Contracting Act then carry forward the construction of the Brooks Act contained in that language from the Supplemental Appropriations Act?

Mr. Cohen. That is correct.

Mr. Percy. I thank the Senator from Maine for his most helpful clarification."

See: Cong. Rec. (Daily Edition) Vol. 129, No.155, November 11, 1983, p. S.16007

It is apparent Congress intended to make application of the Brooks Act to surveying and mapping services permanent and government-wide. This is not only evident by the aforementioned colloquy between Senators Percy and Cohen, but also by the construction of the provision in the 1983 Supplemental Appropriation (Public Law 98-63).

The fact that Congress defined the QBS process for A/E selection as a "competitive procedure" in the Competition in Contracting Act (codified in 10 U.S.C. 2302(2)(A) and 41 U.S.C. 259 (b)(1)) underscores the comments made by Senator Gurney during consideration of the Brooks Act in 1972, when he said,

"Any Federal procurement officer...will tell you that competition based on professional-technical qualifications is every bit as hot and demanding as competition based upon price." (118 Cong. Rec. 36185 (1972)).

When the Brooks Act was amended in 1988 (section 742 of PL 100-656 and section 8 of PL 100-679), the definition of A/E services was modified to provide:

"The term "architectural and engineering services" means—
professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;
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
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.” (emphasis added).

Congress provided no limitation to this provision. The legislative history shows Congress intended a broad, government wide application of the provision. In debate in the Senate, Senator Breaux said:

“By surveying and mapping, I am referring to the many professional services the Government obtains from private surveying and mapping firms. This includes activities associated with measuring, locating, and preparing maps, charts, or other graphical or digital presentations depicting natural or man made features, phenomena and legal boundaries of the Earth, performance of which, under this provision, is provided by licensed, certified or otherwise qualified professionals, such as surveyors, geodesists and photogrammetrists. Under this provision, if there is an applicable State licensing law, it shall be followed.”

(SEE: Congressional Record, Daily Edition, October 18, 1988, p. S16672-3.)

In the House, Rep. Myers commented:

“(s)ince the measure known as the Brooks Act was enacted in 1972, there have been a number of Comptroller General decisions which have had the effect of narrowing the application of the law, particularly in the field of surveying and mapping. The purpose of the new definition in the bill before us is to recognize the realities of current professional practice and new technology in engineering and related disciplines. It also clarifies the intent of Congress with regard to those relevant GAO decisions ... It is the intent of the new definition and an identical provision in the House-passed OFPP Act ... to clarify and make permanent the application of the Brooks A/E Act to the services of surveying and mapping firms and other appropriate services for all Federal agencies.”

(SEE: Congressional Record, Daily Edition, October 12, 1988, p. H10058-9.)

Also in the House, Rep. Livingston commented:

“The provision in title VII will clarify and make permanent the application of the Brooks A/E law to services of surveying and mapping firms and other appropriate services to all Federal agencies ...”

(SEE: Congressional Record, Daily Edition, October 12, 1988, p. H10056.)

When the House gave final approval to one the bills amending the Brooks Act, Rep. Mavroules raised questions concerning the new definition’s applicability to the Defense Mapping Agency (later named the National Imagery and Mapping Agency and then the National Geospatial-Intelligence Agency). As a result of that colloquy, DMA viewed certain of its contracts for services as exempt. (SEE: Congressional Record, Daily Edition, October 12, 1988, p. H10613)

That single-agency exemption was later reflected in the FAR in 36.60-1. It read:

“However, mapping services such as those performed by the Defense Mapping Agency that are not connected to traditionally understood or accepted architectural and engineering activities or

have not themselves traditionally been considered architectural and engineering services shall be procured pursuant to provisions in parts 13, 14 and 15.”

(SEE FAR 36.601-4(a)(4), Federal Register, Daily Edition, June 25, 1991, p. 29129.)

Since the time that FAR provision was promulgated, Congress again repeatedly sought to change the provision and obviate the Marvoulos colloquy.

Congress clarified the aforementioned FAR provision when it enacted section 403 of Public Law 101-574. It provided:

“Pursuant to section 742 of Public Law 100-656, modifications to Part 36 of the Federal Acquisition Regulation (48 CFR Part 36) shall specify that the definition of architectural and engineering services includes surveying and mapping services to which the section procedures of Subpart 36.6 of the Federal Acquisition Regulations apply.”

Again, Congress did not exempt any agency, did not limit this provision to certain agencies and did not limit it to certain types of mapping services.

The application of the Brooks Act qualification based selection (QBS) process to DMA, and other agencies, was again reinforced by Congress in 1992:

“Solicitations for the award of contracts for architectural and engineering services 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.” (SEE Section 202(d) of Public Law 102-366.)

Congress again addressed the single agency exempted (Defense Mapping Agency) in FAR 36.601-4(a)(4), when it included language in the appropriations for that agency. (SEE H. Rept. 104-617, to accompany H.R. 3610, 104th Congress, the fiscal year 1997 Defense Appropriations bill and H. Rept. 104-863, to accompany H.R. 3610, Public Law 104-208; and H. Rept. 105-265 (H.R. 2266, PL 105-56, 105th Congress, the fiscal year 1998 Defense Appropriations bill.)

Moreover, the 1999 Defense Appropriations bill clearly and unambiguously settled the matter. It provided:

“None of the fund 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: 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 Committee on Appropriations of the House of Representatives and the Senate.” (SEE section 8101, Public Law 105-262)

Finally, in House Report 105-746, to accompany this language the Appropriations Conferees said:

“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 (48CFR 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 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.”

It should be noted that DMA/NIMA/NGA now uses the FAR part 36 process for its contracting for these services. It is also noted that the matter of application of this provision of law and regulation to surveying and mapping services has also been consistently upheld by the Comptroller General (SEE Forest Service, Department of Agriculture, Request for Advance Decision, B-233987, July 14, 1989; White Shield, Inc., B-235522, September 21, 1989; and White Shield, Inc., B-235967, October 30, 1989).

Nevertheless, OFPP and the FAR Council is not only authorized and justified, but indeed is required by law to revise the FAR in 36.601-4(a)(4) to read as follows:

“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 architectural or engineering service and is to be procured pursuant to 36.601. ~~However, mapping services such as those performed 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.~~ Contracts and subcontracts for surveying and mapping including activities associated with measuring, locating and preparing maps, charts, or other graphical or digital presentations depicting natural or man made features, phenomena, and legal boundaries of the Earth, performance of which, under this provision, is provided by licensed, certified or otherwise qualified professionals, such as surveyors, geodesists and photogrammetrists, including but not limited to surveys, maps, charts, remote sensing data and images and aerial photographic services, shall be awarded pursuant to 36.601.”

On April 19, 2005, the FAR Council issued a final determination on the public comments requested in 2004. COFPAES and other organizations that had been working on this issue throughout this period were deeply concerned about the conclusion of the FAR Council. The April 19, 2005 notice was replete with errors, misstatements of fact and inaccurate data. It misstated the legislative history of mapping in the Brooks Act, omitted major legislation that Congress enacted to broaden the application of QBS to mapping, erroneously characterized the NCEES model law, and was factually incorrect about the status of state law and regulation affecting architects, engineers, surveyors and mapping professionals.

After years of negotiation with OFPP and the FAR Council, the FAR was not amended to reflect the actions of Congress. Having exhausted all other remedies, a Complaint was filed in U.S. District Court in Alexandria, VA. It alleged the U.S. Government promulgated provisions in the Federal Acquisition Regulation (FAR) (48 CFR 36.6) that are in conflict with the Brooks Act (40 USC 1101) and seeks injunctive relief by directing the government to revise the FAR consistent with the Brooks Act as directed by Congress on numerous occasions and in several enacted provisions of enacted legislation.

The FAR currently provides that the Brooks Act applies to surveying, and to those mapping contracts “associated with the research, planning, development, design, construction, or alteration of real property” are considered to be an architectural and engineering services and subject to the Brooks Act. However the FAR goes on to say “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” are to be procured pursuant to price competition provisions of the FAR.

That last sentence was the subject of the legal action. The Brooks Act unequivocally applies to surveying, and requires QBS for services defined in the applicable state licensing law. Over several years, many states have revised surveying licensure laws to include a variety of mapping services, including many that were not considered architectural and engineering services prior to the enactment of the new licensing law. Not only did the legal complaint argue that Congress never enacted the limitation on mapping contracts spelled out in the FAR, but the FAR language is in conflict with itself.

In a July 18, 2006 reply to the complaint, the Government stated, “... federal contracting officials must use QBS when procuring mapping services in states that define engineering or surveying to include mapping.” Attorneys representing the profession have pointed out that while that is absolutely true, it is NOT practiced by the Government, and it is NOT reflected in the FAR.

The failure of the Government to follow that point of law was the crux of the litigation.

In many state licensing laws, surveying and mapping are indistinguishable. A wide variety of mapping services are part of the state licensing law definition of surveying, and require performance by a surveyor, or in some states, a surveyor or engineer. This fact is not being recognized in the FAR. Moreover, more than a dozen state licensing boards have ethics rules that prohibit licensed practitioners from securing work by competitive bidding. In Texas, for example, this ban even applies to private engineers who are seeking surveying services from a subcontractor. (See: http://www.txls.state.tx.us/sect01/news/ag_jc0374.html)

When the FAR Council issued its ruling that it would not revise its regulations, it administratively made a de facto new standard for determining Brooks Act application to a particular contract. It said it interprets the law to “leave to the contracting officer’s discretion the decision whether a specific procurement falls within the Brooks Act, considering whether the services, ‘independent of any project, or of an A/E nature which should logically or justifiably be performed by A/E professionals’.” What this passage fails to recognize is the fact that under the Brooks Act, a contracting officer is required to apply the QBS law to a project in which the services are “professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed,

registered, or certified to provide such services as described in this paragraph,” including surveying and mapping.

By eliminating from the April 19 ruling in the Federal Register the requirement for adherence with state licensing law, the FAR Council has established a new and dangerous loophole in the Brooks Act. It has given contracting officers carte blanche authority to make Brooks Act application decisions.

In a decision based entirely on process, the Federal District Court for the Eastern District of Virginia (1:06cv378, June 14, 2007) ruled that the plaintiffs did not have standing to bring the question of whether the FAR properly implemented the Brooks Act and its application to a broad scope of surveying and mapping, as repeatedly prescribed by Congress on numerous occasions and under numerous provisions of enacted law. By ruling on process, the Court did not address the legal merits and policy issues of the case as presented by the plaintiffs, which means the question of QBS applicability to mapping is unresolved and leaves the door open to further litigation.

However, the Court did reaffirm the fact that where an applicable state licensing law requires performance by a licensed surveyor, a Federal agency must abide by that state law and use QBS on the contract. This is an important victory with regard to programs, such as the U.S. Department of Agriculture’s National Agriculture Imagery Program (NAIP), and others. We are also heartened by the fact that the court noted, “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.” We strongly agree with this statement. It is the essence of the substance in the case.

The Court did not comment on the full legislative history, nor on the more than a dozen individual pieces of enacted legislation and Congressional legislative history in which Congress ordered QBS for mapping activities broadly defined, nor the various state law definitions of surveying that include mapping activities.

We urge Congress to work with OFPP and the FAR Council, administratively or legislatively, to remedy this important issue.

GSA Federal Supply Schedules

COFPAES is deeply concerned about efforts by the GSA to hire private sector firms for A/E services through Federal Supply Schedule (FSS) contracts.

We believe FSS’s actions result in waste, fraud and abuse. FSS has thwarted and undermined federal law and regulation and thereby threatens public health, safety and welfare by circumventing the government’s policy to select firms for architecture, engineering and related services on the basis of demonstrated competence and qualification for the type of professional services required.

COFPAES is extremely concerned and deeply frustrated that FSS is enabling and empowering agencies to violate the Brooks Act.

Specifically, the FSS multiple award schedule contracts, which are based on price, are being abused to facilitate to acquisition of A/E services, as defined in 40 USC 1101 et. seq. and FAR

Part 36.6. These include the FSS contracts for Professional Engineering Services, Environmental Services, and Information Technology Services, among others.

Since 1999, COFPAES has provided volumes of documents, included examples of violations, proposed solutions, draft solicitations and GSA document revisions, legal analysis, and other submittals to GSA, in a good faith effort to remedy this matter.

In May 2004, the FSS produced a draft white paper entitled, "Creating a New Architect-Engineer Services Government-wide Procurement Vehicle." This proposed new A/E schedule was intended to remedy the concerns that COFPAES and its member organizations have raised.

COFPAES is deeply concerned that notwithstanding the white paper (which has not been adopted nor implemented by FSS), FSS has not addressed the underlying problem -- Federal agencies seeking to bypass qualifications based selection when using the FSS contracts on Professional Engineering Services, Environmental Services, and Information Technology Services for services that meet the definition of A/E services in 40 USC 1101 et. seq. and FAR Part 36.6.

We respectfully request the Committee's investigation of the following:

- FSS maintains a Professional Engineering Services (PES) Schedule.

(http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_BASIC&contentId=10245&noc=T)

However, FSS has awarded contracts to a plethora of firms which are not licensed in their home state to do business in Professional Engineering, are not authorized by state law to offer Professional Engineering services, and do not have a Professional Engineer (PE) on staff and in responsible charge of engineering work, as required by state law.

Under the Brooks Act (40 USC 1101(3)(A)), contracts for architectural and engineering services are required to comply with state licensing laws. It states: "the term "architectural and engineering services" means - professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;"

"Professional Engineering" is a term of art defined by state law. FSS has ignored and superceded state law, both statutory and case law, by facilitating firms which are not legally authorized to offer or engage in Professional Engineering services under State law to do so under the auspices of a Federal agency.

- Although the Professional Engineering Services schedule includes a disclaimer that such schedule is not to be used for A/E services, as defined in the Brooks Act, FSS includes such A/E services on the schedule. For example, civil engineering, by its nature and definition, is engineering related to real property and improvements thereon, and are clearly Brooks Act services.

However, FSS has included on the Professional Engineering Services schedule the following:

"Civil Engineering (CI):

It includes but is not limited to planning, evaluation and operations of power generating plants, the production, furnishing, construction, alteration, repair, processing or assembling of vessels, aircraft or other kinds of personal property, including heating, ventilation and air conditioning for such vessels and/or aircrafts.

There are several specialties within the civil engineering discipline scope of work. The following is a partial list:

- Environmental*
- Geotechnical
- Structural*
- Surveying
- Transportation
- Water Resources”

It is inconsistent to require compliance with the Brooks Act for acquisition of civil engineering services on one hand, and for FSS to offer civil engineering services via a non-Brooks Act schedule on the other hand. To do so, we believe, is a violation of the law.

Moreover, the Federal Acquisition Regulation 36.601-4(a)(4) includes the following unequivocal statement: “Surveying is considered to be an architectural and engineering service and shall be procured pursuant to section 36.601 from registered surveyors or architects and engineers.”

Nevertheless, the FSS offers surveying services via the civil engineering portion of the Professional Engineering Services Schedule. Again, FSS provides a disclaimer that the surveying services offered via the civil engineering portion of the Professional Engineering Services Schedule exempts “Surveying as it relates to real property.”

It is inconsistent to require compliance with the Brooks Act for acquisition of surveying services on one hand, and for FSS to offer surveying services as part of civil engineering services via a non-Brooks Act schedule on the other hand. To do so, we believe, is a violation of the law.

▪ The Federal Acquisition Regulation 36.601-4(a)(4) includes the following statement, “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 section 36.601.” Nevertheless, the Environmental Services Schedule provides, “899-7 Geographic Information Services (GIS): Provide operational services, advice, or guidance in support of agencies’ environmental programs utilizing Geographic Information Services. Services include but are not limited to: mapping and cartography, natural resource planning, site selection, migration pattern analysis, pollution analysis, and emergency preparedness planning. Provide services to support geologic logs, topographic data, 3D/4D interactive visualization packages, and data interpretation.”

It is inconsistent to require compliance with the Brooks Act for acquisition of mapping services on one hand, and for FSS to offer mapping/GIS services as via a non-Brooks Act schedule on the other hand. To do so, we believe, is a violation of the law.

▪ The FSS for Temporary Administrative and Professional Staffing Services permits Federal agencies to procure services of architects via a Federal Supply Schedule.

It is inconsistent to require compliance with the Brooks Act for acquisition of architecture services on one hand, and for FSS to offer architects' services as via a non-Brooks Act schedule on the other hand. To do so, we believe, is a violation of the law.

- Although the practice of using the FSS for A/E services has been expressly and specifically prohibited by Congress with the enactment of section 1427(b) of PL 108-136, FSS has not implemented adequate reform, remediation, policing or enforcement to prevent violations of the law. FSS is still facilitating the ability of Federal agencies to violate the law by providing A/E services, as defined in 40 U.S.C. 1101 and FAR part 36.6.

Design-Build Contracting

Design-build ("D-B") is a form of project delivery in which an agency contracts with one entity to perform both the architectural/engineering and construction under one single contract.

Congress authorized Federal agencies (10 U.S.C. 2305a and 41 U.S.C. 253m) to utilize a design-build selection procedure as an alternative to the traditional design-bid-build or other authorized process in 1996. The D-B process has been used to a great extent by a number of Federal agencies (and state government, e.g. highway or transportation agencies, expending Federal funds), for both horizontal construction (highways) and vertical construction (buildings). D-B proponents claimed the process would save time and money by expediting the time for delivery of built projects.

For D-B to be successful, a design professional (licensed architect or engineer) must be retained by the government to prepare the project scope, description, function, standards, design criteria, analyses, reports and preliminary cost estimates for the proposed project. A sufficient level of detail should be produced to provide an adequate description of the project scope and level of quality expected by the government agency. The design-build team should include registered design professionals who are key components of the D-B team and who, likewise, are selected based on their qualifications and expertise.

The QBS process should be the primary means by which Federal agencies retain design professionals. COFPAES believes any acceptable alternative project delivery process should contain certain basic elements:

A registered design professional (either in-house or retained) should represent the government throughout the entire project. The design professional, if retained from the private sector, should be selected based on his or her qualifications and experience according to the requirements of the QBS law as amended.

The design professional should prepare the project scope, description, function, standards, design criteria, analyses, reports and cost estimates for the proposed project. A sufficient level of detail should be produced to provide an adequate description of the project scope and level of quality expected by the government agency.

The design-build team must include registered design professionals who are selected based on their qualifications and expertise.

The selection of a design-build team should include two steps. Step one, evaluation of the teams, would be based on the qualifications and experience of the competing teams. Step two would

include a detailed evaluation of the proposals from the short-listed teams. The selection of the top design-build team would be based on pre-determined criteria established for the specific project, such as technical expertise, past performance, management capabilities, design quality, approach, schedule and cost.

Federal agencies should fully develop and disclose their overall procurement process and project decision making process, including any special contractual provisions, all totally integrated to allow participants to fully evaluate the costs, benefits, and risk aspects of their participation on individual projects. Those participants selected to submit a detailed proposal should receive a reasonable stipend for their submission. In addition, the selection process should be consistent throughout and applicable to all Federal agencies and departments.

Given that it has been more than 10 years since D-B was authorized, it would be timely and appropriate for Congress to review the government's experience with the process to determine if it has lived up to its expectations and whether it is causing feared or unforeseen problems. Among the questions for inquiry –

Has the changing roles and relationships between project designer and construction contractor impacted the independence of the designer with regard to construction inspection and testing functions?

In D-B projects, has there been the requisite shift of allegiance from the owner to the contractor created a shift in design professional's business and ethical models that causes conflicts or compromises?

Has the emphasis on awarding the contract for both the design and construction phases of project development actually expedited the timeframe for committing available construction funds? Are the projects actually being delivered more rapidly? Has any evaluation of life-cycle costs (repairs, operation and maintenance (O&M) costs of D-B projects been conducted, in comparison to traditional design-bid-build projects?

Has D-B provided greater opportunity or a competitive advantage for larger construction and engineering firms to compete for projects, thereby reducing project opportunities for smaller construction or architecture or engineering firms?

Has there been any negative impact on small, specialty subcontractors, such as geotechnical engineers, land surveyors, topographic mapping firms, by being sub-tier contractors in D-B?

Has D-B undermined the inherent checks and balances between design and construction teams in the traditional delivery systems, with the design team no longer independent of the construction contractor?

Has D-B threatened the foundation of the traditional quality assurance/quality control role performed by design professionals (architects and engineers) through the marriage/combination of engineering and construction in the D-B process?

Have there been increases in project costs due to the elimination of the low bid contractor selection criteria?

Are small to mid-sized A/E firms disadvantaged by being required to perform uncompensated preliminary design services for construction contractors as part of unsuccessful D-B offers?

Is D-B being used solely for complex and significant projects, or is D-B becoming an ordinary and regular way of doing business?

Has any agency conducted audits or investigations to determine if D-B has resulted in hidden costs, such as increased change orders and delays, a higher incidence of design errors or poor construction workmanship due to meeting D-B bids and timetables, or if the amount of competition among design and construction teams on D-B projects has declined when compared to ordinary design-bid build?

Retainage on A/E Contracts

On February 28, the Small Business Administration (SBA) announced its 2008 Top 10 Rules for Review and Reform. The SBA's Regulatory Review and Reform Initiative is designed to identify and address existing federal rules creating barriers to small business that should be reviewed and may need reforming. In choosing the top 10, the SBA reviewed more than 80 constructive suggestions received from small businesses and associations.

Included in their final top 10 is the Federal Acquisition Regulation rule for fixed-price architectural-engineering services, 48 CFR 52.232-10, which allows agencies to impose a 10 percent withholding fee on A/E contracts. Originally intended to protect the government's interest, the provision seems counter to the Brooks Act, which allows A/E firms and the procuring agency to meet to discuss the design and scope of services before bidding on the work, thus guaranteeing the government's interest is met. The 10% withholding for design services is also out of line with other federal contract payment regulations which typically have no withholding fee or a maximum of a 5% withholding.

The withholding restricts the cash flow of small businesses, with little benefit to government, and in some instances is in addition to any bonding requirements.

The issue of a this withholding of payment for design services in federal contracts was brought to the attention of the AIA by a member who's firm, a small business of 12 employees, in working on their very first federal work had the withholding included in his firm's contract. This was also the first time they had faced a withholding in all their years of doing business. No payment timeframe was guaranteed. The small business was told by the contracting officer that if they wanted to receive full payment before the end of construction of the facility (well after the completion of the design phase) they would have to file a written request to release funds. Upon receipt of the request, disbursement of any funds would be at the discretion of the contracting officer. After 15 months, and having to borrow money to keep their business running, the small business finally received full payment for their services.

In some instances, A/E firms are seeing 10% withholdings for each phase of project. Therefore, for example, in a three phase design project a firm could actually see withheld 30% of their fee.

For small design firms with very small profit margins and tight cash flows, having 10 percent (or greater) of their fee held back for what could be years is a very troubling and unnecessary burden and a strong deterrent for small A/E firms to seek federal government contracts.

Small Business Competitiveness Demonstration Program

COFPAES strongly supports the Small Business Competitiveness Demonstration Program. We are concerned that Congress has attempted to terminate this important program, without any hearings being held. Latest is Section 11127 of the Senate Farm Bill. We would welcome hearings by the Committee to show them how well the program is working for our industries and professions and the related and NAICS codes.

COFPAES recognizes that some degree of preference for small firms may be necessary. COFPAES has worked closely with Congress to achieve an acceptable level of preference which will not be unfair to any firm and still permit the agencies to have the benefit of the services of the best qualified design firms. COFPAES has made a concentrated effort to create a system of opportunities for "small" firms in tune with the mandate of Congress in that regard, but without imposing undue and unwise procedures which penalize qualified A/E design firms by disallowing their consideration under QBS procedures. To deal with this problem in the area of military agency procurement, COFPAES supported enactment of provisions in the military agency procurement laws which require that smaller design contracts be limited to small firms, and that contracts with a higher amount be available to all firms, including small firms. This procedure has worked well and fairly for all concerned. COFPAES supports the Small Business Competitiveness Demonstration Program whereby each agency shall set-aside for small firms A/E design professional contracts only to the extent that agency awards to small business fail to exceed the designated threshold. The dollar definition of "small" has been confusing and remains uncertain. COFPAES has worked, and will continue to work, in cooperation with the Small Business Administration toward achieving a dollar definition which will best serve the objectives outlined above.

A related issue is counting specialty subcontracts in our profession. We duly collect the data and send it in via the SF 294 and 295, and it disappears. We strongly support a program by which small business subcontractor participation is tabulated and that such participation be used to truly and accurately reflect the full extent of small business involvement in Federal procurement.

Federal A/E Acquisition Workforce

The FY04 Defense Authorization bill for fiscal year 2004, enacted as section 1414 Public Law 108-136 on November 24, 2003, included provisions originally introduced in separate legislation known as the Services Acquisition Reform Act (SARA). Incorporated was a provision on improving the Federal government's workforce for the acquisition of architectural and engineering (A/E) services.

The provision reads as follows:

SEC. 1414. ARCHITECTURAL AND ENGINEERING ACQUISITION WORKFORCE.

The Administrator for Federal Procurement Policy, in consultation with the Secretary of Defense, the Administrator of General Services, and the Director of the Office of Personnel Management, shall develop and implement a plan to ensure that the Federal Government maintains the necessary capability with respect to the acquisition of architectural and engineering services to -- 1) ensure that Federal Government employees have the expertise to determine agency

requirements for such services; (2) establish priorities and programs (including acquisition plans); (3) establish professional standards; (4) develop scopes of work; and (5) award and administer contracts for such services.

Unlike many products, for which the government awards contracts to the lowest bidder, or other services, which are awarded based on the “best value,” A/E services have long been recognized as having a significant impact on public health, welfare and safety. Moreover, A/E services amount to 1/10th of 1 percent of the life cycle cost of a project or program, but the quality of the A/E services determines the price and efficiency of the other 99.9 percent. As a result, Congress has long recognized the efficiency and economy of selecting firms for A/E services “on the basis of demonstrated competence and qualification for the type of professional services required”, and negotiating a fee with the most qualified firm only after the firm’s credentials have been established.

Over the past decade or more, the Federal Government’s in-house A/E capability has been reduced. Retirements, attrition, recruitment and shifting priorities have all contributed to changes in the Federal personnel structure that has resulted in fewer Federal employees trained, qualified and actually engaged in evaluating, awarding and managing Federal A/E contracts. Notwithstanding this workforce reduction, the Federal government’s demand and expenditures for A/E services has remained steady or in some cases increased.

The loss of an A/E acquisition workforce has caused a number of undesirable trends in A/E procurement. Federal contracts for A/E services have become larger in dollar value, longer in duration, bundled with other services, and less competitive. The advantages of QBS are being diminished. Moreover, given that the private A/E market is overwhelmingly comprised of small businesses, the trend has resulted in the creation of a virtual oligopoly. There are now fewer A/E contracts. They are now for longer time periods, with some potentially lasting 15 years when options are exercised. The use of design-build procedures, once reserved for rare and unique projects, has become more common. And the advent of GSA Federal Supply Schedules for services has resulted in rampant abuse of such schedule contracts in violation of the QBS law. None of these trends favor the government, and the taxpayer, and they certainly put small business A/E firms at a disadvantage.

The reason for this trend is simple - supply and demand - within the Federal government. Fewer government A/E professionals experienced in acquisition are responsible for awarding more work. The decline in the Federal A/E acquisition workforce led Congress to enact section 1414 of Public Law 108-136.

To reverse this trend, COFPAES recommends the following elements of a plan to rebuild the A/E acquisition workforce. We were deeply disappointed these recommendations were not adopted by OFPP, and that in fact little has been done to implement the recommendation OFPP did come up with in its section 1414 study.

1. To the maximum extent practicable, utilize the private sector for commercially available A/E services

Historically, A/E services have been considered commercial activities. A/E has long been listed as an illustrative example of commercial activities in Office of Management and Budget Circular A-76. However, since OMB Circular A-76 has required public-private cost competitions to make outsourcing or contracting-out decisions, and the QBS law is based on competition on

competence and qualifications, a conflict has long existed. Consequently, A-76 has not been an effective tool for determining when private sector performance of A/E services should be employed. This conflict has been noted in the May 29, 2003 revision to the Circular through recognition of FAR part 36, which had not been included in previous versions of A-76. The Circular advises (See ¶ D.3.a.(2) of Attachment B) that “agencies that have identified A&E services in their competition plans to consult with OFPP as they prepare to undertake competitions and request deviations as appropriate.”

Due to the historical conflict between the law (40 U.S.C. 541 et. seq.) and the Circular, A/E services have not been subject to A-76. No process to conduct QBS-compliant public – private competitions on A/E services has been developed since the release of the A-76 revision on May 29, 2003.

In order to redirect the Federal government’s in-house A/E workforce from the commercial activity of performing A/E services to the inherently governmental function of managing and administering contracts for A/E services, OFPP should limit the amount of A/E services to that which is necessary for government personnel to maintain professional and technical competency to effectively scope, negotiate and administer A/E contracts.

2. Training in A/E contracting should be a requirement for all Federal A/E personnel.

The U.S. Army Corps of Engineers is the Federal government’s most experienced procurer of A/E services. The Corps has established a robust training program, Proponent Sponsored Engineer Corps Training (PROSPECT). <http://pdsc.usace.army.mil/AboutUsProspect.asp> This includes a through 5-day course on A/E Contracting. http://pdsc.usace.army.mil/CourseListDetails1.asp?Cntrl_Num=4.

OFPP should make completion of the A/E Contracting course a requirement for all Federal A/E personnel.

Although the Corps of Engineers makes this course available to personnel from other agencies, the Corps is prohibited from keeping any reimbursement funds it receives for such training. This results in a disincentive for the Corps to offer this course to personnel from other Federal agencies. Legislation to permit the Corps to retain these funds has been enacted in the Water Resources Development Act of 2007. OFPP should implement ways for this course to be available to Federal A/E personnel, including through the Federal Acquisition Institute.

3. Federal architects, engineers, surveyors, certified photogrammetrists and other design professionals and technical specialists should be fully engaged in the entire A/E contracting process.

Not all Federal agencies utilize their in-house A/E personnel in their acquisition process. A self-imposed “firewall” often separates agency A/E personnel from acquisition personnel. Given the nature of A/E services and the need for the Federal user to be an integral part of the acquisition process, OFPP should establish a process by which Federal architects, engineers, surveyors, certified photogrammetrists and other design professionals and technical specialists should be fully engaged in the entire A/E contracting process.

4. Require professional registration for key positions.

All 50 states license individuals in architecture, engineering and surveying. Licensure is an assurance that the individual has passed at least a minimum level of professional competence. In the private sector, only a licensed A/E may prepare, sign and seal, and submit plans and drawings to a public authority for approval, or seal work for public and private clients. A licensed surveyor's seal is required on surveys for quantity, construction, title transfer, subdivision, parcel consolidation and other transactions. The model licensing law promulgated by the National Council of Examiners for Engineers and Surveyors (NCEES), the body of the licensing boards of all 50 states and the possessions, now includes photogrammetric mapping and geographic information systems (GIS), and has been adopted by several state legislatures. Licensure is a legal requirement for those who are in responsible charge of A/E work. With the growing complexity and the increasing diversity of modern design, construction, resource and program management, the Federal A/E workforce must be current with processes and techniques, and be able to communicate and exchange ideas and views with other licensed design professionals. The scope of professional A/E practice is constantly changing, and activities that may be exempt today may eventually shift into a practice area that one day requires a license (for example, research and development may find practical application in the facilities design/construction process, requiring the practitioner to be licensed). A/E's must adapt to a rapidly changing workplace-restructuring, downsizing, outsourcing, privatization, and re-engineering. Only by becoming licensed can an A/E perform the broad scope of services within an area of competence as defined under state law.

The Federal government has had difficulty recruiting and retaining its A/E employees because its salary classification system is not competitive with the private sector. To rectify this situation, the federal government established a special wage rate system for certain professional or technical occupations, including engineering. "Specialty pay," as the system is known, is intended to close the gap in salary levels between federal government and private sector professionals. Doing so assists the federal government in overcoming barriers to the recruitment or retention of qualified professional personnel.

The Office of Personnel Management (OPM) classifies engineers *without regard* to the fact of whether they are licensed or not. Engineers, as technical specialists, in fact, can only be promoted up to a GS-12 level. In order to advance further they must be assigned to a management position, while doctors and lawyers may be promoted up to a GS-15 level as specialists.

OPM *does not* recognize the achievement of a Professional Engineering license as an appropriate event and additional credential of value to the government to merit additional compensation. In fact, many federal agencies do not distinguish between licensed and non-licensed engineers.

OFPP should work with OPM to overhaul its hiring and promotion system for A/Es, and remove barriers for promotion and job advancement for A/Es, while encouraging licensure.

The Defense Authorization Act for FY 2002, codified in 5 U.S.C. 5757, allows agencies to use appropriated funds or funds otherwise available to the agency to pay for expenses for employees to obtain professional credentials, including expenses for professional accreditation. The provision applies government-wide, not solely to the Department of Defense, and establishes statutory authority for agency payment of licensing fees through appropriated funds. This is a valuable recruitment and retention tool for engineers in the federal government and encourages the Federal A/E to seek and obtain his or her license. No regulations implementing this provision of law have been implemented. OFPP should work with OPM to more forcefully implement this provision with regard to licensure of Federal A/Es.

5. Share A/E contracting “best practices” among all Federal A/E personnel and acquisition centers.

Pursuant to Section 1431(b) of the Service Acquisition Reform Act (SARA), OFPP is establishing an Acquisition Center of Excellence (ACE) for Service Contracting. The purpose is to provide a central clearinghouse of service contracting best practices for both the public and private sectors. OFPP should establish as a top priority the development of a robust A/E section of the ACE. The Corps of Engineers has established very thorough procedures for A/E contracting in EP 715-1-7 and the EFARS. These, and other agency A/E best practices, should be in the ACE and implemented in the other training and workforce development recommendations suggested in this document.

The Corps of Engineers has developed engineering and design publications, available on TechInfo (www.hnd.usace.army.mil/techinfo/), and other agencies have similar collections. OFPP should inventory these resources and integrate them into the A/E workforce training plan, as well as in the SARA ACE.

6. Establish Government-wide Centers of Expertise in A/E Acquisition.

The declining Federal A/E acquisition workforce has made it imperative that the Federal government more efficiently manage, maintain, deploy and utilize the resources it has. That workforce resource cannot reasonably be maintained in every agency. Many agencies have only intermittent needs for A/E services, while others have more long-term and robust programs. OFPP should establish a system of technical expertise that includes centers of expertise and regional technical specialists to act as A/E acquisition service bureaus to manage A/E acquisitions for those agencies that cannot maintain adequate in-house capabilities of their own. Such centers could operate in a manner somewhat similar to the GSA Federal Supply Service or the National Business Center (www.nbc.gov) in the Interior Department, and other, similar “franchise fund” operations.

Conclusion

Madam Chairman, without Congress acting, we have seen an erosion of the time-tested qualifications based selection process. New procurement methods are being implemented that are not beneficial to small business, or the A/E profession in general. Nor are they beneficial to the taxpaying public, or their health, welfare and safety. We urge Congress to work to re-establish the time-tested and proven QBS process in Federal procurement of A/E services.

TITLE 40-- SELECTION OF ARCHITECTS AND ENGINEERS

Sec. 1101. Definitions As used in this subchapter—

- (1) The term "firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.
- (2) The term "agency head" means the Secretary, Administrator, or head of a department, agency, or bureau of the Federal Government.
- (3) The term "architectural and engineering services" means—
 - (A) professional services of an architectural or engineering nature, as defined by State law, if applicable, 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.

Sec. 1102. Congressional declaration of policy. The Congress hereby declares it to be the policy of the Federal Government 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.

Sec. 1103. Requests for data on architectural and engineering services In the procurement of architectural and engineering services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. The agency head, for each proposed project, shall evaluate current statements of qualifications and performance data on file with the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with no less than three firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, in order of preference, based upon criteria established and published by him, no less than three of the firms deemed to be the most highly qualified to provide the services required.

Sec. 1104. Negotiation of contracts for architectural and engineering services

- (a) Negotiation with highest qualified firm The agency head shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the agency head determines is fair and reasonable to the Government. In making such determination, the agency head shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.
- (b) Negotiation with second and third, etc., most qualified firms Should the agency head be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price he determines to be fair and reasonable to the Government, negotiations with that firm should be formally terminated. The agency head should then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the agency head should terminate negotiations. The agency head should then undertake negotiations with the third most qualified firm.
- (c) Selection of additional firms in event of failure of negotiation with selected firms Should the agency head be unable to negotiate a satisfactory contract with any of the selected firms, he shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.

JOHN M. PALATIELLO

John M. Palatiello is Administrator of the Council on Federal Procurement of Architectural-Engineering Services (COFPAES, www.cofpaes.org), a coalition of the nation's leading design professional societies. He is also president of the firm of John M. Palatiello & Associates, Inc., (www.jmpa.us) a public affairs consulting firm located in Reston, Virginia, providing government affairs, association management, strategic planning, public relations and marketing consulting services to firms and organizations, with a specialization in services to the architect/engineer, remote sensing, mapping and GIS communities. He is also Executive Director of MAPPS (www.mapps.org), the national association of private geospatial firms, having been affiliated with the association since its founding in 1982 and has served as Executive Director since 1987.

A Connecticut native, John earned a Bachelor of Arts degree in political science from The American University in Washington, DC. He served for eight years as a Congressional staff assistant, including service as an aide to former Congressman John Myers of Indiana, then chief deputy whip, who later served as Chairman of the House Appropriations Subcommittee on Energy and Water. John was also Chief Legislative Assistant to Congressman Bill Hendon of North Carolina.

John left Capitol Hill to become the first Government Affairs Director of the American Congress on Surveying and Mapping and the American Society for Photogrammetry and Remote Sensing and was Assistant Executive Director for Public Affairs of ACSM. He started John M. Palatiello & Associates in 1987.

John is a frequent author of articles on legislative, marketing and public policy issues, particularly Federal procurement and geographic information systems, and has testified before several Congressional committees.

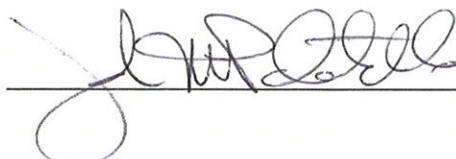
Earlier this year, John was named by Interior Secretary Dirk Kempthorne to the National Geospatial Advisory Committee.

Mr. Palatiello has also served as an editorial advisor to several trade magazines, writing on small business and public policy issues. John has been Chairman of the Procurement and Privatization Council of the United States Chamber of Commerce, and currently serves on the Chamber's Small Business Council. He was active in the 2000 White House Conference on Small Business, serving as a delegate to the Virginia conference. He has also served on the Government Relations Section Council of the American Society of Association Executives, Chairman of the Government Affairs Committee of the Greater Reston Chamber of Commerce, and as Chairman of the Business Coalition for Fair Competition. John is a former 9-year member of the Fairfax County (VA) Planning Commission and has held leadership positions in numerous community and civic organizations in Virginia. He has served on the Fairfax County Major League Baseball Stadium Site Selection Committee, the Transportation Advisory Committee and Airports Advisory Committee. He was appointed by the Virginia General Assembly to the Virginia Geographic Information Network (VGIN) study committee's technical advisory committee and a study committee to the Virginia Department of Professional and Occupational Regulation (DPOR) on licensing of photogrammetrists.



HOUSE COMMITTEE ON SMALL BUSINESS
Witness Disclosure Statement
Required by House Rule XI, Clause 2(g)

Your Name: John M. Palatiello		
1. Are you testifying on behalf of a Federal, State, or Local Government entity?	YES	NO X
2. Are you testifying on behalf of an entity other than a Government entity?	YES X	NO
3. Other than yourself, please list what entity or entities you are representing: Council on Federal Procurement of Architectural & Engineering Services (COFPAES)		
4. Please list any offices or elected positions held or briefly describe your representational capacity with the entities disclosed in question 3. COFPAES Administrator		
<i>(For those testifying on behalf of a Government entity, ignore these questions below)</i>		
5. a) Please list any Federal grants or contracts (including subgrants or subcontracts), including the amount and source (agency) which <u>you</u> have received and/or been approved for since October 1, 2006: None		
b) If you are testifying on behalf of a non-governmental entity, please list any federal grants or contracts (including subgrants or subcontracts) and the amount and source (agency) received by the <u>entities listed under question 3</u> since October 1, 2006, which exceeded 10% of the entities' revenues in the year received: None		
6. If you are testifying on behalf of a non-governmental entity, does it have a parent organization or an affiliate who you specifically do not represent? If so, list below:	YES	NO X

Signature: 

Date: 03/03/08