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Congress of the United States
House of Representatives
Washington, DC 20515

October 18, 1989

Ms. Margaret A. Willis
FAR Secretariat
Federal Acquisition Regulatory Council
Room 4041 GSA Building
Washington, D.C. 20405

Dear Ms. Willis:

I understand that the Federal Acquisition Regulatory Council is considering the final rule implementing the statutory clarification of the definition of architect-engineer (A/E) services which was enacted as Section 742 of the Business Opportunity Development Reform Act of 1988 (P.L. 100-656) as well as identical language enacted as Section 8 of the Office of Federal Procurement Policy Act Amendments of 1988 (P.L. 100-679). As the author of this language during House consideration as well as the sponsor of the "Brooks A/E Act", P.L. 92-582, I am writing to offer my views on the Congressional intent underlying this provision.

The 1988 amendment was intended to clarify for contracting officers those professional services of an architectural or engineering nature to which the original Act applies. The new definition, with three distinct parts, was written specifically to eliminate misinterpretations which have developed over applicability of P.L. 92-582. With the new definition, Congress intended that the only determination the contracting officer should make is the type of services that are needed for a particular contract. Once that determination is made, then the contracting officer should look to the definition to see if those services are included, and therefore subject to the Brooks A/E Act procedures.

I would hope that, in formulating its rule, the FAR Council will not misconstrue the intent of Congress in light of a July 14, 1989, General Accounting Office decision (B-233987). In suggesting that the statute provides discretionary authority for contracting officers to determine what services are A/E services, GAO may have misread the legislative history in this regard. The GAO decision states that the conference report on this provision (H. Rept. 100-1070) "clearly recognizes that the new definition of A-E services does not impair an agency's discretion to decide (on a case-by-case basis) what type of services should be performed by an A-E firm as opposed to a construction contractor." [Emphasis supplied.] This is not what the conference report says: Section 742 of the conference report states, "the Conferees agree that the definition does not impair an agency's discretion to decide whether construction manager services should be performed by an architect-engineer firm or a construction contract." [Emphasis supplied.] The conference report goes on to indicate that, within the context of construction manager services, the agency has the discretion to determine

whether or not the work to a substantial or dominant extent involves A/E services or services that "should be performed by a construction contractor . . .", and to use appropriate procurement procedures. To suggest the conference report's reference to agency discretion applies beyond the narrow scope of construction manager services, as the GAO decision apparently does, would run counter to Congressional intent.

I am also concerned about the implication in the GAO decision that the Brooks Act procedures should be applied to procurement of surveying and mapping services only in the narrow context of contracting for those services when related to construction or design. This is not what Congress intended. As the GAO decision correctly notes, the purpose of the 1988 provision was to clarify the definition of A/E services in response to GAO decisions "which have had the effect of narrowing the application of the law, particularly in the field of surveying and mapping." See 134 Cong. Rec. H10058 (daily ed., October 12, 1988) (statement of Mr. Myers). There is ample legislative history to indicate that Congress intended to apply the Brooks Act to surveying and mapping services irrespective of whether those services are related to a specific architectural or engineering project or a specific construction project. The only discussion of any limitation to this principle arose in a colloquy on the same definition in another bill; that limitation, however, was restricted to Defense Mapping Agency (DMA) procurements, and only for certain mapping services of DMA specified in the colloquy.

I believe that the FAR Council should also take into account the subsequent decision of the GAO on September 21, 1989 (White Shield, B-235522). The latter decision, in referring to the 1988 amendments to P.L. 92-582, stated:

> ". . . the contracting agency's exercise of discretion must be consistent with the statutory and regulatory requirements. In this regard, the Brooks Act amendment specifically lists surveying and mapping as examples of services which members of the architectural and engineering professions may logically or justifiably perform. In our view, surveying and mapping services traditionally performed by members of the architectural and engineering professions (and individuals in their employ) are clearly subject to the Brooks Act procedures."

I would hope that the FAR Council will issue a final rule that does not leave the implication that contracting officers have discretionary authority to decide whether or not to use the procedures of P.L. 92-582. I also hope that the final rule will extend the policy statement in the interim rule in regard to surveying and mapping services, irrespective of their relationship to a specific architectural or engineering project.

With every good wish, I am

Sincerely,