

The General Services Administration Must Discontinue Sales of Architectural and Engineering Services to Federal Agencies through the Federal Supply Schedule. Such Sales Violate the Brooks Architect-Engineers Act of 1972

I. Introduction

The Brooks Architect-Engineers Act (“the Act”), 40 U.S.C. §§ 1101-1104, requires the federal government to select firms to provide architectural and engineering (“A/E”) services based on the qualification of the contractor, with a subsequent negotiation of a fee determined by the government to be fair and reasonable. In contrast, the Federal Supply Schedule (“FSS”) program requires government agencies to select contractors largely on the basis of price. While the General Services Administration (“GSA”), the agency responsible for the FSS program, takes the position that federal agencies ought not to buy A/E services through the FSS program, these purchases occur routinely, in large part because GSA allows the practice by maintaining A/E services on several schedules in clear violation of the Act. The GSA must remove all A/E services from the FSS and cease the sale of all A/E services through the FSS program.

II. The Brooks Act Establishes the Governing Legal Framework for Federal Procurement of Architectural and Engineering Services

A. The Brooks Act

Congress passed the Brooks Architect-Engineers Act in 1972 to legislate the federal government’s long-established practice of procuring A/E services based on competence and qualifications, not on price competition. *See* Pub. L. 92-582, Oct. 27, 1972, 86 Stat. 1279 (codified at 40 U.S.C. §§ 1101-1104). The Act, as amended, establishes the federal government’s procurement policy for A/E services as:

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

40 U.S.C. § 1101.

The Act currently defines “architectural and engineering services” as:

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

(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning,

development, design, construction, alteration, or repair of real property;
and

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

Id. § 1102(2).¹ It also defines the term “firm” to mean “an individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture or engineering.” *Id.* § 1102(3).

The Act sets forth a specific process to be used in selecting A/E services that differs markedly from the government’s customary procurement processes. As a threshold matter, the government’s requirement for A/E services must be “publicly announced,” *id.* § 1101, and the government must “encourage firms to submit annually a statement of qualifications and performance data,” *id.* § 1103(b). Then, when a government agency has need to procure A/E services, it is required to evaluate the annual statements of qualifications and performance data submitted by firms as well as statements submitted by firms specific to the proposed project,² conduct discussions with at least three firms for purposes of considering anticipated concepts and comparing alternative methods for furnishing services, and then select, in order of preference, at least three firms the agency considers most highly qualified to provide the services required. *Id.* §1103(c), (d). Next, the agency is directed to negotiate a contract for compensation that the agency determines to be fair and reasonable with the firm selected as the most highly qualified firm. *Id.* § 1104. If the agency is unable to negotiate a satisfactory contract with the most highly qualified firm, the agency is directed to initiate contract negotiations with the second-most highly qualified firm, and so on, until an agreement is reached. *Id.* This selection process is known as Qualifications Based Selection (“QBS”). While the Act provides for the procurement of A/E services “at fair and reasonable prices,” such prices are to be achieved through negotiation with the most highly qualified firm, which is, itself, determined based on technical competency and qualifications and not on price factors, and does not allow for the selection of an A/E firm based

¹ The Act initially defined “architectural and engineering services” as “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.” Pub. L. 92-582, §901(3) (1972).

² See Standard Form 330, available on the GSA website at: [http://contacts.gsa.gov/webforms.nsf/0/21DBF5BF7E860FC185256E13005C6AA6/\\$file/SF%20330.pdf](http://contacts.gsa.gov/webforms.nsf/0/21DBF5BF7E860FC185256E13005C6AA6/$file/SF%20330.pdf).

solely on price, or even on a combination of technical and price factors. *See, e.g., Management Association for Private Photogrammetric Surveyors v. United States*, 492 F. Supp. 2d 540, 542-43 (E.D. Va. 2007).

The legislative history of the Act underscores Congress' concern about ensuring that the government procures A/E services from qualified firms and preventing a procurement scheme where an emphasis on price would compromise the quality of the services obtained by the government. For example, the Senate report for the original 1972 legislation stated:

The Committee on Government Operations is always concerned with the element of cost in all Federal endeavors. In this instance, the committee feels that the Government's interest, which is the public interest, is best served by placing the emphasis on obtaining the highest qualified architectural and engineering services available. The bill makes ample provision for keeping costs under control by requiring negotiation for a fee that is fair and reasonable to the Government . . . Failure for any reason to provide the highest quality plans and specifications may well result in higher construction costs, a functionally inferior structure, or troublesome maintenance problems.

S. Rep. No. 92-1219, *reprinted in* 1972 U.S.C.C.A.N. 4767, 1972 WL 12552 at *4772. Similar concerns were articulated by members of Congress during debate of the legislation. For example, Rep. Brooks stated:

If routine contract negotiation procedures were used and the amount of the fee to be paid the AE firm discussed incident to the determination of qualifications, less responsible firms could quote a lower fee and have an advantage in obtaining the contract, and then make up for the reduction in fee by delivering lower quality plans and specifications to the Government.

118 CONG. REC. 25487 (1972).³

The legislative history also highlights Congress' intent regarding the breadth of application of the Brooks Act. For example, when asked if the legislation would cover services offered by landscape architects, Rep. Brooks stated that the legislation was intended to cover "the various types of architects insofar as the term implies that the individual is professionally trained and qualifies under appropriate State law to practice the profession." 118 CONG. REC. 25493 (1972). Specific to landscape architects, he said that the legislation applied "when the controlling jurisdiction, under appropriate registration laws, requires that persons acquire and

³ Rep. Buchanan similarly stated: ". . . if procurement of such [A/E] services are limited strictly to price competition, a tolerable building or structure might be constructed but it could well prove to be far less durable in the long run and maintenance costs might be doubly large." 118 CONG. REC. at 25488 (1972).

maintain a proper level of professional excellence.” *Id.*; *see also* 118 CONG. REC. 36181 (1972) (statement by Senator McClellan that the legislation was “intended to apply to all the various classifications and types of architects, if the individual providing the services is professionally trained and qualifies under appropriate State law to practice the profession.”).

B. Regulatory Implementation of the Brooks Act

Subpart 36.6 of the Federal Acquisition Regulation implements the Brooks Act and establishes the regulatory framework for the federal acquisition of A/E services. As a threshold matter, the FAR requires the government to publicly announce all requirements for A/E services. FAR 36.601-1. The FAR then makes clear that contracts for A/E services shall be selected in accordance with the procedures of Subpart 36.6 and not the government’s standard source selection procedures found in FAR Parts 13, 14, and 15. FAR § 36.601-3(b). When the government’s statement of work includes both A/E services and other services, the government must follow the selection procedures in Subpart 36.6, instead of those in Parts 13, 14, and 15, if the statement of work “substantially or to a dominant extent, specifies performance or approval by a registered or licensed architect or engineer.” *Id.* § 36.601-3(c).

To select a contractor to perform A/E services, the government must utilize an “evaluation board” composed of members with experience in architecture, engineering, construction, and government acquisition matters. *Id.* § 36.602-2. This board evaluates firms in accordance with specific criteria, including (1) professional qualifications necessary for satisfactory performance of required services; (2) specialized experience and technical competence in the type of work required; (3) capacity to accomplish the work in the required time; (4) past performance on government and commercial projects; (5) location in the general geographical area of the project and knowledge of the locality of the project; and (6) acceptability under other appropriate evaluation criteria. *Id.* §§ 36.602-1(a), 36.602-3. The evaluation board prepares a selection report for the agency procurement official, and that official makes the final selection in the form of “a listing, in order of preference, of the firms considered most highly qualified to perform the work.” *Id.* §§ 36.602-3, 36.602-4(b). The agency procurement official then must initiate negotiations with the firm considered to be the most highly qualified (i.e., at the top of the final selection list); if a mutually satisfactory contract cannot be negotiated, the procurement official must notify the firm that negotiations are terminated and initiate negotiations with the next firm on the final selection list. *Id.* § 36.606.

The FAR contains essentially the same definition of A/E services in the general “Definitions” section as is set forth in the Brooks Act. *See* FAR § 2.101. However, Subpart 36.6 adds a section to the definition that addresses surveying and mapping. Specifically, FAR 36.301-34 directs contracting officers to consider the following services to be “architect-engineer services” subject to Subpart 36.6 procurement procedures:

- (1) Professional services of an architectural or engineering nature, as defined by applicable State law, which the State law requires to be performed or approved by a registered architect or engineer.

(2) Professional services of an architectural or engineering nature associated with design or construction of real property.

(3) Other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering drawing reviews, preparation of operating and maintenance manuals and other related services) that logically or justifiably require performance by registered architects or engineers or their employees.

(4) Professional surveying and mapping services 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 and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and is to be procured pursuant to §36.601. However, mapping services 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.

Id. § 36.601-4.

C. Interpretive Case Law of the Brooks Act

The application of the Brooks Act has been litigated in a number of bid protests, where offerors have argued either that the QBS process should have been used by the procuring agency or that traditional procurement procedures should have been used.⁴ Through a series of early decisions, the General Accounting Office (now Government Accountability Office or “GAO”) has addressed the scope and applicability of the Brooks Act to federal procurement. In a 1982 decision, GAO ruled that the Brooks Act is not limited to construction-related projects or services, but instead applied to A/E services generally. *Association of Soil and Found. Eng’rs – Recon.*, B-199548.2, 82-2 CPD ¶ 128, Aug. 13, 1982. Later, GAO developed a two-prong test for determining when Brooks Act procedures apply. The first prong, interpreting the phrase “professional services of an architectural or engineering nature” that is now found in the first two sections of the definition of A/E services (*see* Section II.A above), provided that the QBS process should be applied “where the controlling jurisdiction requires an A-E firm to meet a

⁴ Note that the Brooks Act QBS procedures are considered to be competitive procurement procedures pursuant to the Competition in Contracting Act. *See* 41 U.S.C. 259(b)(1); 10 U.S.C. 2302(2)(A).

particular degree of professional capability in order to perform the desired services.” *See, e.g., Forest Service, Dep’t of Agric. – Request for Advance Decision*, B-233987 et al., 89-2 CPD ¶ 47 (July 14, 1989) at 1. GAO explained that the phrase “professional services of an architectural or engineering nature” referred to “services which uniquely, or to a substantial or dominant extent logically require performance by a professionally licensed and qualified architect-engineer.” *Id.* at 2 (internal quotations omitted).

GAO revised the second prong of its test after Congress amended the definition of A/E services in 1988 to make clear that at least certain types of other professional services, such as mapping and surveying, were covered by the Brooks Act. *See* third section of the current definition set forth in Section II.A above. In light of the 1988 legislative amendments to the Brooks Act, GAO held that the second prong of its test should be “whether the service is the type which is incidental to professional services of an architectural or engineering nature, and if so, whether the service is one which members of the architectural and engineering professional may logically or justifiably perform.” *Id.* at 3. Consequently, in two other decisions issued in 1989, GAO held that surveying and mapping services traditionally performed by members of the A/E professions are “clearly subject to” the Brooks Act QBS procedures. *See, White Shield, Inc.*, B-235522, 89-2 CPD ¶ 257 (Sept. 21, 1989) (holding that the Forest Service improperly used competitive procedures for the procurement of cadastral mapping survey services and was required to use Brooks Act procedures); *Fodrea Land Surveys*, B-236413, 89-2 CPD ¶ 364 (Oct. 19, 1989) (affirmation of Forest Service’s use of Brooks Act procedures to procure cadastral land surveying services).

III. Procurement of A/E Services Occurs under the General Services Administration’s Federal Supply Schedule Program in Violation of the Brooks Act

The Federal Supply Schedule program is directed and managed by the General Services Administration (“GSA”) and provides federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying.⁵ GSA is responsible for negotiating Schedule contracts, and the primary focus of these negotiations is establishing the pricing of the products or services for government purchase.⁶ GSA requires prospective contractors to submit “accurate, current, and complete” data on their

⁵ “With GSA Schedules, customers have a partner in meeting their procurement needs. *GSA has worked hard to award contracts to vendors who provide ‘fair and reasonable’ pricing.*” GSA, For Federal Agency Customers—Ordering from Schedules, <http://www.gsa.gov/portal/content/197513> (last visited Mar. 14, 2011) (emphasis added).

⁶ Throughout the life of a Schedule contract, the contractor is required to ensure that the pricing negotiated with GSA for government use is maintained in relationship to the contractor’s pricing for a selected category of its commercial customers (known as the Basis of Award customer). *See* 48 CFR § 552.238-75. If the contractor’s pricing for its Basis of Award customer improves during the term of the GSA Schedule contract, then the contractor must improve the pricing for the government by the same percentage. *Id.*

commercial sales pricing and practices and, using the data, GSA negotiates the best price possible for the government. *See* GSA CSP-1 Form.

Once awarded a contract, Schedule contractors are required to publish an “Authorized Federal Supply Schedule Pricelist” which contains all supplies and services offered by the contractor and the associated pricing. *Id.* § 8.402(b). Schedule contractors must make their pricelists available to ordering agencies upon request and otherwise federal agencies can access the pricelists directly from GSA, including through GSA’s web site. *Id.* § 8.402(b), (c). To procure a product and/or service through the FSS program, agencies issue task or delivery orders using certain procedures set forth in FAR Subpart 8.4, and these ordering procedures necessarily result in procurement decisions based largely, if not exclusively, on price. For example, the FAR states that through use of the Subpart 8.4 ordering procedures, the ordering agency “has concluded that the order represents the best value . . . and results in the lowest overall cost alternative . . . to meet the Government’s needs.” *Id.* § 8.404(d). The procedures for ordering products or services that do not require a statement of work direct agencies to “place orders with the schedule contractor that can provide the supply or service that represents the best value.” *Id.* § 8.405-1(c) (1). Agencies are required to gather pricing information from at least **three Schedule contractors** by reviewing the catalogs or pricelists. *Id.* To determine “best value,” the ordering agency must consider price and “may” consider other factors such as past performance, warranty considerations, maintenance availability, and delivery terms. *Id.* § 8.405-1(c) (3). Further, for orders over a certain threshold, agencies are directed to seek an additional “price reduction” from the published prices. *Id.* § 8.405(d).

Similarly, when ordering services that do require a statement of work, the procedures set forth in FAR Subpart 8.4 result in price being a primary selection factor. For these orders, agencies are required to issue a statement of work to at least three contractors as well as a Request for Quotation requesting the submission of firm-fixed prices. The ordering agency then evaluates the responses, determines that the proposed price is reasonable, and places the order with the contractor representing the best value. *Id.* § 8.405-2; *see, e.g., US Information Tech. Corp.*, B-404357, B-404357.2, 2011 WL 1349211 (Feb. 2, 2011) (sustaining protest of FSS procurement where GSA failed to sufficiently evaluate proposed prices). Again, for orders over a certain dollar threshold, ordering agencies are directed to seek additional “price reductions.” *Id.* § 8.405-2(c) (3).

A wide variety of products and services are offered through the FSS program, and while the program started as a contract vehicle largely for the sale of products, it is now dominated by the sale of services. Among the 40 Schedules offered through the FSS program are the Professional Engineering Services (“PES”) Schedule (Schedule 871), the Environmental Services Schedule (Schedule 899), the Temporary Administrative and Professional Staffing Schedule (Schedule 736), the General Purpose Commercial Information Technology Equipment, Software, and Services Schedule (Schedule 70), and the Mission Oriented Business Integrated Services (“MOBIS”) (Schedule 874). Remarkably, each of these has involved the sale of A/E services. For example, since the inception of the PES Schedule in the fall of 1999, A/E services, including surveying and civil engineering, have been offered for purchase by government

agencies. Also, a number of agencies have issued task orders for geographic information services (“GIS”)⁷ and mapping services. The GSA competitively selects GIS vendors through the Federal Systems Integration and Management Center (FEDSIM), a program of the Federal Technology Service (FTS). These Schedule contracts are often used to produce maps for federal agencies. Given that agencies making FSS acquisitions are directed to follow the ordering procedures in FAR Subpart 8.4, which require orders to be issued based on review of pricing from at least three vendors to the “best value” contractor, the Brooks Act QBS process is not invoked in FSS procurements.

Since the proposal to add the PES Schedule to the FSS program, professional associations representing A/E firms have attempted to convince GSA to remove A/E services from FSS offerings. For example, the Council on Federal Procurement of Architectural and Engineering Services (“COFPAES”) has worked with GSA to remove A/E services from the Schedule program for over 13 years. As a result of numerous letters, emails, and meetings, GSA has, over time, agreed to some modifications to the FSS program, including adding language to the PES and other solicitations and the GSA web site to state that the FSS program does not cover A/E services, and adding guidance to the GSA FAQ web page to advise that ordering agencies are not to use the FSS program to acquire services subject to FAR Subpart 36.6 and the Brooks Act.⁸ GSA has refused, however, to eliminate civil engineering, surveying and other A/E services from the Schedule offerings and has not instituted any mechanism to ensure that agencies are not procuring A/E services through the FSS program.

In 2003, Congress made clear that A/E services were not permitted to be purchased through the FSS program unless such services were performed under the direct supervision of a professional architect or engineer and were awarded pursuant to the Brooks Act QBS procedure. Specifically, in the 2004 Defense Authorization Act, Congress provided:

Architectural and engineering services . . . shall not be offered under multiple-award schedule contracts entered into by the Administrator of General Services or under Governmentwide task and delivery order contracts . . . unless such services (1) are performed under the direct supervision of a professional architect or engineer licensed, registered, or

⁷ Geographic information services (GIS) are information systems that involve locational data, such as maps or other geospatial information resources. 44 USC 3501 note, (§ 216 of PL 107–347); http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ347.107.pdf.

⁸ The FAQ page provides the following warning: “Question: May I use GSA Schedule contracts to acquire Architect-Engineer (A/E) services? Answer: No. The GSA Schedules Program may not be used to acquire services that are subject to the procedures of FAR 36.6, Architect-Engineer Services.” <http://www.gsa.gov/portal/content/203021#9> (last visited Mar. 15, 2011) (emphasis in original). This warning is not prominently located on GSA’s website and is the only notification federal customers seeking A/E services receive; no engineering services contracts on the FSS directly reference the Brooks Architect-Engineers Act.

certified in the State, territory . . . , possession, or Federal District in which the services are to be performed; and (2) are awarded in accordance with the selection procedures set forth in [the Brooks Act].

Pub. L. 108-136, § 1427(b). Subsequently, FAR Subpart 8.4 was amended to specifically provide that “for requirements that substantially or to a dominant extent specify performance of architect-engineer services . . . , agencies (1) shall use the procedures at Subpart 36.6; and (2) shall not place orders for such requirements under a Federal Supply Schedule.” FAR § 8.403(c).

However, despite this clear prohibition on procuring A/E services through the FSS program, GSA has not taken definitive action to ensure A/E services are not sold under the FSS program, and A/E services continue to be offered for sale and purchased by the government through the FSS program. For example, civil engineering services and surveying services are still offered for sale through the PES Schedule. *See*

<http://www.gsaelibrary.gsa.gov/ElibMain/scheduleSummary.do;jsessionid=A7EC393B8BB4A885C139289762D1F34F.node2?scheduleNumber=871>. Under the Environmental Services Schedule, the offered services include mapping and GIS services. *See*

<http://www.gsaelibrary.gsa.gov/ElibMain/scheduleSummary.do;jsessionid=A7EC393B8BB4A885C139289762D1F34F.node2?scheduleNumber=899>. The staffing Schedule (Schedule 736) offers architectural services. *See*

<http://www.gsaelibrary.gsa.gov/ElibMain/scheduleSummary.do;jsessionid=A7EC393B8BB4A885C139289762D1F34F.node2?scheduleNumber=899>. Further, A/E firms offer their services under the MOBIS Schedule. *See*

<http://www.gsaelibrary.gsa.gov/ElibMain/sinDetails.do?executeQuery=YES&scheduleNumber=874&flag=&filter=&specialItemNumber=874+1>.

A recent example of a procurement conducted through the FSS program for services covered by the Brooks Act is the April 11, 2011 issuance of a Request for Quotation to Environmental Services Schedule (Schedule 899) contractors by the Department of Interior for mapping services and data collection for GIS within Mount Rushmore National Monument (located in South Dakota). *See* Exh. 1. South Dakota defines surveying to include GIS, and requires survey work to be conducted by a licensed professional. S.D. Codified Laws § 36-18A-4 (definition of “Practice of land surveying”); § 36-18A-8 (license required to practice surveying). As discussed in more detail below, because the state requires licensure of surveying work, federal procurement of surveying work is subject to the QBS procedures in the Brooks Act.

IV. The Federal Supply Schedule Must Comply with the Brooks Act

Currently, A/E services are available for sale and are purchased by the federal government through the FSS program. These sales directly violate the Brooks Act. Rather than selecting a contractor to perform A/E services using the QBS process, whereby GSA or the ordering agency utilize an evaluation board with members experienced in architecture and engineering evaluate the professional qualifications, specialized experience, and technical competence (among other factors) of the contractors, and then negotiate a price with the most highly qualified contractor, GSA allows – in fact, requires – ordering agencies to consider at least three contractors based on their pricelists and select the contractor offering the “best value”

which must be determined by considering price (and other factors may be considered). It cannot be disputed that the FSS program's procurement process, as dictated by FAR Subpart 8.4, conflicts with the Brooks Act and implementing procurement regulations at FAR Subpart 36.6. Accordingly, A/E services covered by the Brooks Act should not be sold or made available for sale through GSA's FSS program.

Despite this fundamental conflict between the Brooks Act and FSS program procurement processes and Congress' clear intention that A/E services not be purchased through the FSS program (without substantial modification to the FSS program procurement process), *see* Pub. L. 108-136, § 1427(b), it is entirely unclear why A/E services covered by the Brooks Act continue to be sold through the FSS program. Brooks Act applicability is invoked when an architectural or engineering service is required to be registered, licensed, or certified by state law. *See* 40 U.S.C. § 1102(A) and 1102(3) (defining "architectural and engineering services" as "professional services of an architectural or engineering nature, as defined by state law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide the services described in this paragraph" and defining "firm," as used throughout the Brooks Act when setting forth the procedures for procuring services from A/E firms, as "an individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the profession of architecture or engineering"); FAR 36.601-4(1) (defining "architect-engineer services" as "professional services of an architectural or engineering nature, as defined by applicable State law, which the State law requires to be performed or approved by a registered architect or engineer"); *Forest Service, Dep't of Agric. – Request for Advance Decision*, B-233987 et al., 89-2 CPD ¶ 47 (July 14, 1989).⁹

Every U.S. state has licensing laws for architecture, engineering, and surveying work, and many of these laws also apply specifically to mapping and GIS services. Each state regulates the performance of professional engineering services and requires individuals to be licensed as a professional engineer in order to perform "engineering services" as defined under the relevant state's engineering licensure law. "Professional licensure protects the public by enforcing standards that restrict practice to qualified individuals who have met specific qualifications in education, work experience, and exams.

Likewise, each state regulates the performance of architecture services and all states currently require individuals to be licensed as a professional architect in order to perform architectural services. *See, e.g.*, California, West's Ann.Cal.Bus. & Prof.Code § 5500; Florida, West's F.S.A. T. XXXII, Ch. 481; Illinois, 225 ILCS 305/1; Michigan, M.C.L.A. 339.2002; New York, McKinney's Education Law § 7302.

Licensure for the surveying professions is regulated by state law as well. *See, e.g.*, Arizona, Ariz. Rev. Stat. Ann. § 32-121; California, West's Ann.Cal.Bus. & Prof.Code § 6730; Florida, West's F.S.A. § 471.001; Maine, 32 M.R.S.A. Ch. 19; Oklahoma, 59 Okl.St. Ann. §

⁹ The Brooks Act's legislative history supports this interpretation: the Brooks Act applies "when the controlling jurisdiction, under appropriate registration laws, requires that persons acquire and maintain a proper level of professional excellence." 118 CONG. REC. 25493 (1972).

475.1; Texas, V.T.C.A., Occupations Code § 1001.004; Washington state, West's RCWA 18.43.010. A number of states define mapping and GIS as the practice of surveying. See National Council of Examiners for Engineering and Surveying, <http://www.ncees.org/Licensure.php> (e.g., VA, NC, SC, FL, CA, NM, SD).

In 48 states, government agencies are required to use qualifications based selection for hiring architects and engineers. See, e.g., Cal. Gov't Code §§ 4526 – 4529; Ga. Code Ann. §§ 50-22-1 – 50-22-9; Mo Rev. Stat. §§ 8.285 - 8.291; N.C. Gen. Stat. §§ 143-64.31 – 143.64.34. The ABA Model Procurement Code for State and Local Government recommend QBS for procurement of architecture, engineering, surveying, and mapping services. See http://meetings.abanet.org/webupload/commupload/PC500500/relatedresources/2Updates_Incorporated_into_2000_Model_Procurement_Code.pdf.

In addition, several states have adopted ethics codes for various professions that prohibit engineers, architects, mappers and surveyors from competing for professional services contracts on the basis of price, e.g., Alabama, Chap. 330-X-14 Professional Conduct; Georgia, Conduct 180-6-.06(1); Mississippi, Board of Licensure for Professional Engineers and Surveyors, Rules and Regulations of Procedure, Solicitation of Work, Rule 17.05.7; Texas, Professional Services Procurement Act, Texas Government Code Sec. 2254.003(a).

Using the terms “Engineering” or “Professional Engineering” are themselves terms of art defined in state law and upheld by the courts. See, e.g., *Tackett v. State Board of Registration for Prof'l Eng'rs*, 466 S.W.2d 332 (Tex. Civ. App. 1971) (owner and operator of television sales and service business who had never been licensed by the state as an engineer violated the Texas Engineering Practice Act by using “engineering” in the trade name under which he conducted his business); *Department of Registration and Educ. v. Hund*, 385 N.E.2d 836 (Ill. App. Ct. 1979) (use of the term “engineer” in a landscaping business name implied that the landscapers were registered professional engineers and, because they lacked the required registration, violated the state’s Professional Engineers Act); *McWhorter v. Board of Registration for Prof'l Eng'rs and Land Surveyors*, 359 So.2d 769 (Ala. 1978) (use of the term “engineering” in a business trade name by an individual who was not registered with the state as an engineer was a violation of the state law requiring registration of engineers). Only individuals licensed as “professional engineers” may practice “professional engineering” and offer “professional engineering services” to the public (including the government).

Similarly, the term “Architect” is also a term of art defined in state law and upheld by courts. See *State Bd. of Architecture v. Kirkham, Michael & Assoc's, Inc.*, 179 N.W.2d 409 (N.D. 1970) (enjoining a corporation from advertising itself as a firm of architects as a corporation may not be engaged in the practice of architecture); *State ex rel. Meyer v. Knutson*, 133 N.W.2d 577 (Neb. 1965) (suit by state to enjoin unlicensed architect from practice of professional architecture until his compliance with statute requiring registration); *State ex rel. McLeod v. Montgomery*, 136 S.E.2d 778 (S.C. 1964) (finding that a person classifying himself as an “architectural designer” was engaged in practice prohibited by state architecture licensing statute although he did not claim to be a licensed architect); *Hughes v. Bd. of Architectural Examiners*, 80 Cal. Rptr. 2d 317 (Cal. Ct. App. 1998) (upholding Board of Architectural Examiners revocation of current license of defendant who had previously taken measures to conceal his lack of a license and held himself out as an architect); *Merrill v. Bd. of Architect*

Examiners, 693 P.2d 1317 (Or. Ct. App. 1985) *aff'd*, 300 Or. 34, 706 P.2d 556 (1985) (finding a “building designer” engaged in the unlicensed practice of architecture by preparing plans and specifications in construction of a school).

Accordingly, all professional engineering services available on the PES Schedule are covered by the Brooks Act and should be removed from the FSS program. Architecture services available on the Staffing Schedule and through the MOBIS Schedule are covered by the Brooks Act and should be removed. Surveying and mapping services available on the PES, Environmental, and Information Technology Schedules should be removed. Even the use of the term “Professional Engineering Services” for the title of the PES Schedule should be changed to ensure it is clear to both ordering agencies and Schedule contractors that engineering services covered by the Brooks Act are not available for sale through the PES Schedule.

Ensuring that the FSS program does not conflict with the Brooks Act and removing A/E services from the FSS program is important for a number of reasons. Despite the disclaimers placed on various GSA documents and web pages that A/E services should not be procured through the FSS program and despite GSA’s proclaimed commitment to ensuring that A/E services are not sold through the FSS program, GSA conducts no monitoring of orders placed by agencies, nor has it appeared to have taken any enforcement action against agencies that have procured A/E services through the FSS program. For example, although the Information Technology Schedule contains a disclaimer regarding inappropriate use of the Schedule,¹⁰ COFPAES routinely receives reports from its members about this Schedule being used for GIS, cartography and other services covered by the Brooks Act. Thus, disclaimers without enforcement or monitoring are ineffective and moot. Also, using disclaimers without educating the ordering agencies about what A/E services are covered by the Brooks Act is ineffective because it is the ordering agency that must decide whether a particular service is covered by the Brooks Act so should not be procured through the FSS program.

More fundamentally, GSA does not require that its Schedule contractors have the required state licenses, registrations, or certifications before offering A/E services to the government. GSA allows firms to advertise to the government as “professional engineers,” even if they are not licensed by the relevant state jurisdiction. Thus, when a government agency purchases engineering services from a PES contractor, there is no guarantee that the government is procuring services from a qualified firm or individual. Similarly, when a government agency purchases architecture services from the Staffing Schedule or surveying or mapping services through the PES, Environmental, or Information Technology Schedules, there is no guarantee that the government is purchasing services from a qualified firm or individual.

¹⁰ “Offerors and Agencies are advised that the Group 70 Information Technology Schedule is not to be used as a means to procure services which properly fall under the Brooks Act. . . .” See Solicitation FCIS-JB-980001-B at 12, <https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=00a375133749bb8b955cc59867519f42&tab=documents&tabmode=list>.

Further, allowing government agencies to purchase A/E and related services through the FSS program directly undermines the states' licensing system for engineering, architecture, and related services. By allowing firms and individuals to violate their state laws by advertising A/E services to the federal government through the FSS program without having obtained the required license/registration/certification from the relevant state contravenes sound public policy. It also encourages firms and individuals from the states that view competition based on price as unethical to violate their ethical obligations or, alternatively, unfairly discriminates against them by preventing them from appropriately competing (based on qualifications) for the opportunity to perform A/E services for the federal government.

In addition, removing A/E services from the FSS program will allow the congressional intent of the Brooks Act to ensure the quality of A/E services procured by the government to be fully realized. Congress recognized that “[f]ailure for any reason to provide the highest quality plans and specifications may well result in higher construction costs, a functionally inferior structure, or troublesome maintenance problems.” S. Rep. No. 92-1219, *reprinted in* 1972 U.S.C.C.A.N. 4767, 1972 WL 12552 at *4772. Simply put, procuring A/E services through the FSS program, which is driven by selecting contractors based on price, 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. Ceasing the sale of A/E services through the FSS program will ensure the public's protection and higher quality results for the government.

V. Conclusion

The General Services Administration persists in offering architectural and engineering and other related professional services contracts through the Federal Supply Schedule in clear violation of the Brooks Architect-Engineers Act of 1972. GSA must end the FSS program's continuing violation of the Brooks Act. In order to ensure GSA's full compliance with the law, GSA should:

- Change the name of the PES Schedule to remove reference to “Professional Engineering” and remove references in the PES and other Schedules to “professional engineering.”
- Remove all civil engineering from the PES Schedule; remove architecture services from the Staffing Schedule; and remove, as appropriate, surveying, mapping and GSA services from the PES, Environmental, and Information Technology Schedules.
- Implement a process by which GSA monitors orders placed by government agencies to ensure agencies are not purchasing A/E services through the FSS program.
- Implement a process by which Schedule contractors and members of the public can report to GSA attempted or completed purchases of A/E services through the FSS program and implement an investigation procedure that GSA will follow when such reports are received to determine if a Brooks Act violation has occurred.

- Implement penalties for agencies that purchase or attempt to purchase A/E and related services through the FSS program.
- Provide agencies with thorough and regular training and briefing materials concerning the Brooks Act and the obligation to not procure A/E and related services through the FSS program.