HB

211

STATE OF ALASKA

WALT FURNACE, CHAIRMAN
RICK UEHLING, VICE CHAIRMAN
JOHN COWDERY
NIILO E. KOPONEN
HUGH MALONE
JOHN RINGSTAD
RON WENDTE

POUCH V
JUNEAU, ALASKA 99811
(907) 465-3892

HOUSE LABOR AND COMMERCE COMMITTEE

MEETING SCHEDULE

FOR THE WEEK OF APRIL 11 - APRIL 15

<u>LABOR & COMMERCE</u>

Meets: Behrends Rm 209
M - F 8:45 - 10 am

Monday, April 11

HB 211 An Act relating to contracts for architectural, engineering, and land surveying services; and providing for an effective date.

Tuesday, April 12

** HB 14 An Act relating to processing of permits by state agencies, and to administration of the Alaska coastal management program.

Wednesday, April 13

HB 14 An Act relating to processing of permits by state agencies, and to administration of the Alaska coastal management program.

HB 197 An Act relating to hazardous and toxic substances; and providing for an effective date.

Thursday, April 14

HB 241 An Act relating to the creation of the Alaska Athletic Commission and the regulation of combative sports.
(STATEWIDE TELECONFERENCE FROM 4:00 pm to 6:00 pm)

Friday, April 15

** SSHB 7 An Act relating to motor vehicles; and providing for an effective date.

** Indicates first public hearing of a new bill.

FAIRBANKS SOCIETY OF
PROFESSIONAL LAND SURVEYORS

SR 10113
~~P.O. Box 2593~~
Fairbanks, Alaska 99701

March 24, 1983

Rep. Niilo Koponen
Pouch V
Juneau, AK 99811

MAR 24 1983

Dear Rep. Koponen:

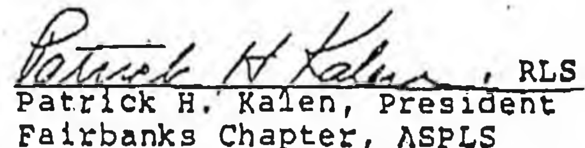
The Fairbanks Chapter of the Alaska Society of Professional Land Surveyors wants to express strong support for HB 211 in its original form. We also wish to express our strong objection and dismay at the Committee Substitute for HB 211 which eliminates Land Surveyors from this bill.

As a profession, we are classified under AS 48 in the same category as Architects and Enginners. We are registered by the same Board of Occupational Licensing and licenced by State of Alaska. Our Professional Certificates are signed by the "Board of Architects, Engineers, and Land Surveyors." Each Professional Land Surveyor receives a Professional License which must renewed annually by the the State of Alaska.

When a Registered Land Surveyor (RLS) signes and places his professional seal on a survey plat, his reputation and that of the entire profession are being offered as surety that the plat is correct and the land survey legal and complete. When a member of the profession is found guilty of unprofessional work, his license and professional status can be stripped by the State Board of Architects, Engineers, and Land Surveyors.

This attempt by the Committee Substitute to remove Professional Land Surveyors from the bill has the effect of removing one-third of the category which the bill addresses. We strongly urge you and others of the Fairbanks delegation, and members of the appropriate legislative committees, to re-instate Land Surveyors as a part of HB 211. It is a good bill, but the Committee Substitute must be rescinded.

Sincerely yours,



Patrick H. Kalen, RLS
Patrick H. Kalen, President
Fairbanks Chapter, ASPLS

Copy:
Rep. Bob Bettisworth
Rep. John Ringstad
Rep. Mike Davis
Rep. Mike Miller
Rep. Hugh Malone, RLS
Rep. Furnace, Chair, Labor & Commerce
Speaker Joe Hayes, PE, RLS
Sen. Bettye Fahrenkamp
Sen. Don Bennett

Labor: Commerce

STUTZMANN ENGINEERING ASSOC., INC.

P. O. BOX 1429

FAIRBANKS, ALASKA 99707

907 452-4094

March 23, 1983

MAR 24 1983

John Ringstad
House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Sir:

It has just come to my attention that committee revisions to H.B. 211 have the effect of deleting the profession of land surveying from the context of this bill.

As both a professional engineer and a professional land surveyor, I have supported this bill in its original form as introduced February 17, 1983 and strongly urge your support in passing it as such.

The deletion of land surveying and other amendments proposed in committee do a tremendous disservice to the land surveyor's profession, some two thousand strong in this State; also, its exclusion would have a deleterious effect on the quality of land surveys in the future by aiding in the degradation of this highly skilled profession into sub-professional status.

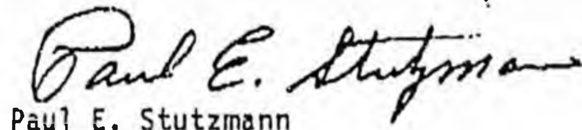
Sub-standard land survey work has already been a major problem in land title work in our State, one of the newest in the Union, and any regulation of land surveying out of professional status can only contribute to more disastrous results.

H.B. 211, as introduced, is a fine and much needed piece of legislation which brings State government procurement practices in line with professional standards in use in other States and by the Federal government.

Again, I urge you to support this bill in original form and resist any modifications thereto.

Very truly yours,

STUTZMANN ENGINEERING ASSOC., INC.



Paul E. Stutzmann

BRO-HB

A

*Section 1. AS 36.98 is amended by adding a new section to read:

Sec. 36.98.041 ARCHITECTS AND ENGINEERS.

(a) It is the policy of the state to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services only on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices notwithstanding the provisions of AS 36.98.040.

(b) This section chapter applies to contracts for architectural and engineering services provided to a state agency unless

(1) the total amount of the ~~contract~~ FEE does not exceed $25,000;
PROHIBITS ALL FEES

[[[(2) the contract is an employment contract for services to be performed under direct supervision regardless of the existence of an employer-employee relationship and a written justification signed by the person responsible for awarding the contract is filed with the commissioner.]]]

(c) When a state agency proposes to enter into a contract for architectural and engineering services, the agency shall give public

notice soliciting a request for qualifications for the professional services contract by publication at least three times in one or more newspapers in general circulation in the state and, when appropriate, in a newspaper in local circulation where the work is to be performed. The first notice shall be published not less than 30 days before the date on which the agency expects to enter into the contract and each subsequent notice shall be published at intervals of no more than three days thereafter. The notice shall include

(1) a general description of the proposed project for which the agency is seeking professional services; and

(2) the procedure by which a person or firm interested in the professional services contract may submit its response to the agency for consideration for the contract.

(d) In addition to complying with the publication requirements of (c) of this section, when a state agency proposes to enter into a contract for architectural and engineering services it shall

(1) review the register of professional services contractors maintained by the commissioner under AS 36.98.020; and

(2) provide a notice of a request for qualifications for the proposed professional services contract to each prospective contractor who, after review of the register of professional services contractors under (1) of this subsection, the agency finds is qualified for consideration for the contract.

(e) Requests for qualification from at least six persons or firms with the required expertise shall be solicited for contracts equal to or greater than $100,000. Requests for qualification from at least three persons or firms with the required expertise shall be solicited for contracts of less than $100,000 if the expertise required is available. If the expertise required is not available to enable an agency to solicit the number of requests for qualification otherwise required under this subsection, the agency shall solicit requests for qualification

(1) from each person or firm listed on the professional services contractors register maintained under AS 36.98.020 who appears to possess the required expertise;

(2) from each person or firm responding to the public notice given under (a) of this section who appears to possess the required expertise.

(f) The provisions of this section do not apply if

(1) the contracting agency demonstrates that there is a single source of the expertise or knowledge required or that one person or firm can clearly perform the required tasks more satisfactorily because of the person's or firm's prior work; however, this exemption applies only if the head of the state agency has submitted a written request to the commissioner that details the reasons for the exemption and the commissioner or deputy commissioner has authorized in writing the state agency to enter contract negotiations with the single source;

(2) the commissioner makes a written determination that public necessity will not permit delay incident to the procedures otherwise required by this chapter; or

(3) the service is to be provided by another state agency, a federal agency, or a political subdivision of the state.

(g) The agency must provide a description of the work to be performed under the contract and the agency shall conduct discussions regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services. The state agency must provide a description of the factors that will be considered when it evaluates the request for qualifications received.

(h) After the responses are submitted, the state agency shall publically evaluate them. The evaluation shall consist of assigning point values to factors considered by the agency in evaluating each proposal. Points shall be awarded for being a qualified Alaska firm..

(i) The state shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the state determines is fair and reasonable to the state. In making such determination, the state shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature of the services. Should the state be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, the state shall undertake negotiations with

the second most qualified firm. Failing accord with the second most qualified firm, the state shall enter negotiations with other contractors, in order of ranking until an agreement is reached. The state may reject all or part of a proposal.

(j) This section does not apply to contracts awarded in an emergency if the person responsible for execution of the contract on behalf of the state certifies in writing that an emergency exists.

(k) In this section "state" includes political subdivisions of the state and agencies of the state and its political subdivisions.

(l) In this section "architectural and engineering services" includes 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.

CONSULTING ENGINEERS
COUNCIL OF ALASKA

2550 Denali Street, 8th Floor
Anchorage, Alaska 99503
907/278-2551

March 16, 1983

Mr. Walt Furnace
Chairman
Labor & Commerce Committee
House of Representatives
State of Alaska
Pouch V
Juneau, AK 99811

Subject: House Bill 211

Mr. Chairman:

I am addressing my comments to you on HB 211 as president of the Consulting Engineers Council of Alaska, representing 32 member firms and approximately 500 employees statewide. Our group is the principal sponsoring body for House Bill 211, referred to by many as the Mini Brooks Bill, along with the support of the state American Institute of Architects, and other professionals. House Bill 211, as introduced, is an act relating to a method of selecting and awarding contracts for Architectural, Engineering and Land Surveying services (i.e., land surveying services related to the design process). The bill was structured utilizing the general procedures outlined in the A.B.A. (American Bar Association) Model Procurement Code.

At this time twenty-one states have adopted laws calling for the selection of Architect/Engineers based on qualifications, and another twenty either prohibit or exempt architect engineers from general bidding requirements. The remaining states, with the exception of Maryland, leave the selection procedure up to methods developed by the various agencies within the state, the predominance of which make selection by qualifications. One state, Maryland, has adopted bidding, which makes price a basis for selection. That procedure has not proved to be overwhelmingly satisfactory. (See article written by R. Charles Avara, Maryland House of Delegates). In Maryland the process actually has proven to result in higher project costs by as much as 30%, with consistent project delays being notable.

Architectual and engineering services should only be obtained through a selection process that ascertains the qualifications and capabilities of interested A/E's to design public works

projects. Fair and reasonable fees should be established by negotiation after selection and discussion of scope of work. It is not in the best interest of the public and in some cases public safety, to obtain these services by price proposals or competitive bidding.

The procurement of professional services providied by members of the learned professions has traditionally been considered apart from technicians and other trades people who are often loosely grouped for other purposes. A learned profession is one requiring specialized knowledge and long academic preparation prior to employment in the particular professional field. To practice as an individual, one must be licensed through written examination reviewed by peers (Board of Registration) and must have a minimum background of experience under the direction of qualified practitioners. Consequently, members of these professions exercise judgements and make decisions only after thorough assessment, analysis, calculation, research and investigation of the problem. Architects and Engineers are learned professionals whose role is that of the problem solver for public works projects.

The public is the loser when price competition becomes the determinant in the selection process. The quality and quantity of services required to satisfy functional needs of a project or agency cannot be precisely defined. A contracting authority, purchasing agent, or even an individual owner cannot, without prior discussions of the intended scope of work with an experienced architect or engineer, establish in detail the effort that the professional must expend to achieve the required results. Competitive bidding for professional services does not provide consumer safeguards. Rather it encourages poor use of public funds, since the importance of "value received" is subjugated to "money spent". For your reference, attached (to the documents from which I am speaking that have been placed in your hands), are copies of the ABA Model Procurement Code, the Federal selection law known as the Brooks Act, and a copy of an article written for American City & County Magazine by R. Charles Avara who represented Baltimore City in the Maryland General Assembly, and other material.

I would like to share with you a few points made by Mr. Avara in his article as they represent a parallel view of the problems of professional selection and highlight the many considerations of why selection of architects and engineers by qualifications is the only rational method to appropriately serve the public interest.

> "What the public agency client is buying are the design ideas of the engineer and architect - and each design team will give the client a different facility. The difference is measureable against the experience and innovation of the individual competitors; in short, their qualifications."

> "Inherant in A/E services and not generally for other types of services, is the extent to which quality can affect the ultimate efficiency, effectiveness and economy of the facility or structure. Consider the cost of the design portion of a project compared to the overall project cost; a report by the U.S. General Accounting Office states that 'design costs represent a very small proportion, probably less than 1% of the costs that will be incurred over the life of a building. Decisions made during the expenditure of this, less-than-one-percent, determine and freeze nearly all costs that follow.'... A/E services are unique and we cannot expect them to conform to bidding specifications which serve so well for the procurement of other goods and most services."

The A/E is expected to be a member of the agency's team, to assess alternatives, to design a facility or structure to satisfy the agency's need at the lowest project cost, oversee the construction in many cases and assist the agency in prosecuting claims that may arise out of the construction project. The relationship is different from the ordinary buyer/seller relationship. In many respects, the A/E acts as the agency agent and in many cases he has a great value in the ability to protect the agency's interests.

In order to fairly assess a competitive bid, public agency officials must be certain that all design professional firms are pricing the same project. In the case of A/E services,

this is difficult, if not impossible to assure. The work scope simply cannot be accurately defined to that extent prior to engagement of an engineering firm.

To quote further from Mr. Avara,

> "It is incumbent upon us (and here he uses the term Public Officials, as that is what he is) to understand and recognize the nature of the services we are seeking in design professionals. Engineering is a learned profession. Whether it is practiced by an individual or a team of individuals, creative talents are applied to solving a problem."

In combination with the agency staff, the A/E group assigned to a project analyzes a myriad of alternatives and addresses the problems of safety, permanence, beauty, maintenance, life-cycle costs, energy-saving features and other factors.

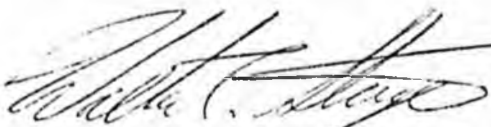
Price is most definitely a factor in the competitive negotiation process. By the time the number one ranked firm reaches the negotiation table with the representative agency, that process has now allowed both the agency and the selected firm an opportunity to collectively define (and refine) the scope of the project requirements being requested by the agency. At the end of this process, the selected firm has examined all these requirements and has been able to identify the effort and the compensation necessary to meet those needs. If, however, the fee suggested by the firm is not in line with the agency's budget, the next step is to evaluate the cause and the significance of the differences. Often the A/E firm will suggest alternatives and approaches which will effectively accomodate the agency's budget estimate. By the same token, it gives the A/E firm an opportunity to discuss with the agency and point out why the agency's best interest is <u>not</u> to reduce the design effort. If however, the agency cannot reach satisfaction with the first-ranked firm, then it has the opportunity to discontinue negotiations with the highest-ranked firm if they believe that the fee proposal is not fair and reasonable. Negotiation can then be undertaken with the second-ranked firm, and then of course the third-ranked firm if that is necessary. These methods provide steps that ultimately will provide a fee that is fair and reasonable for the defined services.

Many of the benefits of A/E services must be measured against final construction, maintenance and operating costs of the facility or structure. Costs that are not clearly determined until after the A/E services have been completed. Injecting price in an initial selection may lower the A/E fee and time spent, but it will also most likely lower the quality of the final product, since price competition can inhibit the ability of the A/E to provide full cost saving services due to inadequate compensation for innovative and thorough work. It may even cause more talented A/E firms not to offer their services, thus lowering the overall quality of the services available to the agency. Thus, stated again, the public is not well served.

We believe the process of competitive selection for Architect/ Engineer firms in the State of Alaska makes even more sense than the same considerations in any of the other 49 states. As you are all aware, our state has more unique and diverse needs than any of the other 49. Alaska has many varied climatological zones and sensitive environmental factors that must be considered during the design of any project. The environmental problems are further complicated by the problems of code and regulation compliance, budget constraints, committee hearings, committee review, agency reviews, maintenance considerations, operational costs, maintenance complexities, and in many of the bush areas--a lack of qualified maintenance personnel. In order for these problems to be met effectively, the only rational method from which to make a selection of an A/E firm is by addressing the qualifications of the responding firms and selecting the highest ranked firm on the basis of those qualifications. Only then, based on the quality and experience of the selected A/E firm, can the project design objective be effectively met and the public resources most effectively protected.

We believe House Bill 211 provides for those measures and protection, insuring that the public need, through the use of competitive selection, will be most successfully met. I urge your positive consideration of House Bill 211.

Respectfully Submitted,



Walter E. Steige, P.E.
C.E.C.A. President

WES/rw

State of Washington
47th Legislature
1981 Regular Session

by Committee on State Government (originally sponsored by Representatives Nelson (G), King (R), McGinnis, Greengo, Ehlers, Erickson, Walk, Addison, Hine)

Read first time March 10, 1981, and passed to Rules for second reading.
April 16, 1981: Passed as amended by the Senate.

1 AN ACT Relating to public contracts; adding a new chapter to
2 Title 39 RCW; and providing an effective date.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. Section 1. The legislature hereby
5 establishes a state policy, to the extent provided in this
6 chapter, that governmental agencies publicly announce
7 requirements for architectural and engineering services, and
8 negotiate contracts for architectural and engineering services
9 on the basis of demonstrated competence and qualification for
10 the type of professional services required and at fair and
11 reasonable prices.

12 NEW SECTION. Sec. 2. Unless the context clearly
13 requires otherwise, the definitions in this section shall apply
14 throughout this chapter.
15 (1) "State agency" means any department, agency,
16 commission, bureau, office, or any other entity or authority of
17 the state government.
18 (2) "Local agency" means any city and any town, county,
19 special district, municipal corporation, agency, port district
20 or authority, or political subdivision of any type, or any other
21 entity or authority of local government in corporate form or
22 otherwise.
23 (3) "Special district" means a local unit of government,
24 other than a city, town, or county, authorized by law to perform
25 a single function or a limited number of functions, and
26 including but not limited to, water districts, irrigation
27 districts, fire districts, school districts, community college
28 districts, hospital districts, sewer districts, transportation

IN THE LEGISLATURE of the STATE OF WASHINGTON

CERTIFICATION OF ENROLLED ENACTMENT

SUBSTITUTE HOUSE BILL NO. 176

CHAPTER NO. ....

Passed the House March 24, 1981
Yeas 95 Nays 0

Passed the Senate April 14, 1981
as amended
Yeas 31 Nays 18

4-16-81

The House concurred in the Senate amendment and passed the bill as amended by the Senate.

Yeas 83 Nays 13

CERTIFICATION

I, Vito T. Chiechi, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is enrolled Substitute House Bill No. 176 as passed by the House of Representatives and the Senate on the dates hereon set forth.

Vito T. Chiechi, Chief Clerk

of qualifications and performance data on file [illegible] the agency, together with those that may be submitted by other firms regarding the proposed project, and shall conduct discussions with one or more firms regarding anticipated concepts and the relative utility of alternative methods of approach for furnishing the required services and then shall select therefrom, based upon criteria established by the agency, the firm deemed to be the most highly qualified to provide the services required for the proposed project. Such agency procedures and guidelines shall include a plan to insure that minority and women-owned firms are afforded the maximum practicable opportunity to compete for and obtain public contracts for services. The level of participation by minority and women-owned firms shall be consistent with their general availability within the professional communities involved.

<u>NEW SECTION.</u> Sec. 5. (1) The agency shall negotiate a contract with the most qualified firm for architectural and engineering services at a price which the agency determines is fair and reasonable to the agency. In making its determination, the agency shall take into account the estimated value of the services to be rendered as well as the scope, complexity, and professional nature thereof.

(2) If the agency is unable to negotiate a satisfactory contract with the firm selected at a price the agency determines to be fair and reasonable, negotiations with that firm shall be formally terminated and the agency shall select other firms in accordance with section 4 of this act and continue in accordance with this section until an agreement is reached or the process is terminated.

<u>NEW SECTION.</u> Sec. 6. (1) This chapter need not be complied with by any agency when the contracting authority makes a finding in accordance with this or any other applicable law that an emergency requires the immediate execution of the work involved.

(2) Nothing in this chapter shall relieve the

cts, and metropolitan municipal corporations organized chapter 35.58 RCW.

(4) "Agency" means both state and local agencies and il districts as defined in subsection (1), (2), and (3) of ection.

(5) "Architectural and engineering services" or ssional services" means professional services rendered by rson, other than as an employee of the agency, contracting form activities within the scope of the general definition fessional practice in chapters 18.08, 18.43, or 18.96 RCW.

(6) "Person" means any individual, organization, group, ation, partnership, firm, joint venture, corporation, or mbination thereof.

(7) "Consultant" means any person providing professional es who is not an employee of the agency for which the es are provided.

(8) "Application" means a completed statement of fications together with a request to be considered for the of one or more contracts for professional services.

<u>NEW SECTION.</u> Sec. 3. Each agency shall publish in e that agency's requirement for professional services. nnouncement shall state concisely the general scope and of the project or work for which the services are ed and the address of a representative of the agency who provide further details. An agency may comply with this n by: (1) Publishing an announcement on each occasion professional services provided by a consultant are required he agency; or (2) announcing generally to the public its cted requirements for any category or type of professional ces.

<u>NEW SECTION.</u> Sec. 4. In the procurement of tectural and engineering services, the agency shall rage firms engaged in the lawful practice of their ssion to submit annually a statement of qualifications and rmance data. The agency shall evaluate current statements

1 contracting authority from complying with applicable law
2 limiting emergency expenditures.

3 NEW SECTION. Sec. 7. Nothing in this chapter shall
4 affect the validity or effect of any contract in existence on
5 the effective date of this 1981 act.

6 NEW SECTION. Sec. 8. If any provision of this act or
7 its application to any person or circumstance is held invalid,
8 the remainder of the act or the application of the provision to
9 other persons or circumstances is not affected.

10 NEW SECTION. Sec. 9. This act shall take effect on
11 January 1, 1982.

12 NEW SECTION. Sec. 10. Sections 1 through 8 of this act
13 shall constitute a new chapter in Title 39 RCW.

Passed the House April 16, 1981.

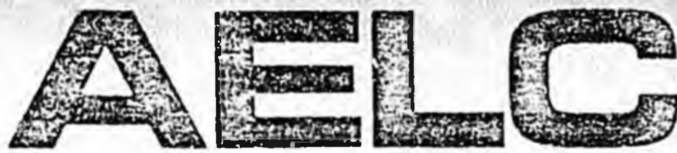
William M. Polk

Speaker of the House.

Passed the Senate April 14, 1981.

John A. Cherberg

President of the Senate.



ARCHITECTS & ENGINEERS
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SB 2303 and HB 1214: ARCHITECTS & ENGINEERS PROFESSIONAL SERVICES PROCUREMENT

> Architectural and Engineering Services should only be obtained through a selection process that ascertains the qualification and capability to design public works projects. Fair and reasonable fees should be established by negotiation after selection and discussion of scope of work. It is not in the best interest of the public to obtain these services by priced proposals or competitive bidding.

THE PROCUREMENT OF PROFESSIONAL SERVICES provided by members of the learned professions has traditionally been considered apart from technicians and tradespeople who are often loosely grouped under professions to define a vocation for the purpose of business taxes or licenses.

A LEARNED PROFESSION is one requiring specialized knowledge and long and intensive academic preparation prior to employment in the particular professional field. To practice as an individual one must be licensed through written examination, reviewed by peers and must have a minimum background of experience under the direction of qualified practitioners. Consequently, members of these professions exercise judgments and make decisions only after thorough assessment, analysis, calculation, research and investigation of the problem. Architects and engineers are learned professionals whose role is that of the problem-solver for public works projects.

THE SELECTION OF PROFESSIONALS HISTORICALLY has been conducted through a process based upon qualifications whether they be Doctors, Lawyers, Architects or Engineers; however, an insidious ingredient entered the procurement of A & E's--kick backs, payoffs, finder's fees and so on. This reached the ultimate when exposure of such activities in the State of Maryland implicated Vice President Agnew. The practice was recognized as widespread along the eastern seaboard, into the large metropolitan areas of the midwest and even surfaced in the City of Seattle with eventual indictment and conviction of its City Engineer in 1978. In a sense it was the "buying-a-job technique." Who cannot but remember, oft-quoted remarks not too many years ago, that any problem with the Government could be resolved by paying the Judge. Several well-meaning public entities, particularly the State of Maryland, have attempted to resolve the problem through competitive bidding. This practice has proved ill-advised because it eliminated

CECW — Consulting Engineers Council of Washington, SEAW — Structural Engineers Association of Washington, ASCE — American Society of Civil Engineers, WSPE — Washington Society of Professional Engineers, WCCELS — Washington Council of Civil Engineers and Land Surveyors, IEEE — Institute of Electrical and Electronics Engineers, ASME — American Society of Mechanical Engineers, WC/AIA — Washington Council of the American Institute of Architects, ASHRAE — American Society of Heating, Refrigeration and Air-Conditioning Engineers

an adequate determination of qualifications and has resulted in project delays of several years. Total project costs increased 25 to 30% or nearly four times the total professional fee. Yes, they did save on the professional fee--but who was the loser?

THE PUBLIC IS THE LOSER WHEN PRICE COMPETITION IS THE DETERMINANT IN A SELECTION PROCESS. For one thing, the quality and quantity of services requred to satisfy functional needs of the project or agency cannot be precisely defined. A contracting authority, a corporation purchasing agent or an individual owner cannot, without prior discussions of the scope of work with an experienced architect or engineer, establish in detail the number of man-months of effort that the professional must expend to achieve the required results. A price submitted prior to having such discussions cannot be an adequate measure of value.

COMPETITIVE BIDDING FOR PROFESSIONAL SERVICES DOES NOT PROVIDE CONSUMER SAFEGUARDS; rather it encourages poor use of public funds since the importance of "value received" is subjugated to "money spent." There is still the problem of specifying the quality and intent of services to be rendered.

Many of the principal U.S. Federal Agencies, the World Bank, various Washington State Departments, major Washington Cities and Counties and other agencies have learned to use the professional negotiation approach. In this method, three or more architectural or engineering firms are ranked on the basis of qualifications that have been reviewed in written form and by oral interviews. Negotiations are commenced with the firm receiving the highest ranking and is consummated when complete understanding of the scope of services is achieved and an equitable fee is agreed upon. Should it become impossible to consummate satisfactory negotiations with the first choice, negotiations would commence with the second choice in the same manner and if that proves unsuccessful, the same process is conducted with #3 and so on. This method was enacted into law for all Federal civilian agency projects under the sponsorship of Rep. Brooks of Texas and is known nationally as the "Brooks Act" for the selection of architects and engineers. Considerable credit for passage through the Senate is accorded to both Senators Magnuson and Jackson. The Department of Defense had adopted and used these same procedures prior to the Brooks Act and continue to do so.

THE LEGISLATION INTRODUCED IN THIS SESSION of our State Legislature as SB 2303 and HB 1214 is patterned to a large extent upon the "Brooks Act" except that more latitude is provided to assist smaller political entities. Announcements of design service needs may be made on an annual basis or for each project, the selection method can vary with each agency as long as:

(1) Selection is based upon qualifications to provide the services, and

(2) Fair and reasonable fees are established through negotiation.

It is through this approach that the opportunity for collusion and misuse of public funds is reduced. The legislation presented contains punitive measures for consultants and public officials, should discovery occur, regarding bribery or contingent fees as a means to obtain the commission.

GREATER OPPORTUNITY FOR SELECTION IS PROVIDED TO THE SMALLER PROFESSIONAL FIRMS AND MINORITY FIRMS since all capital expenditure programs and rules for selection will be published. Qualifications and capability to perform the services will be the only basis of selection.

THE PUBLIC DESERVES THE BEST THAT THE PROFESSIONS HAVE TO OFFER AT FAIR AND REASONABLE FEES. SB 2303 and HB 1214 AFFORDS THE GREATEST ASSURANCE FOR THIS POTENTIAL.

ATTACHMENT 1

[illegible]
AMERICAN INSTITUTE OF ARCHITECTS
McCleary Mansion, Suite 6
111 - 21st Avenue S.W.
Olympia, WA [illegible]

The Model Procurement Code for State and Local Governments

Note: Excepts related to A & E consulting services only.

FEBRUARY 1979

The suggested statutory provisions and Code Commentary contained in this draft were approved by the American Bar Association on February 13, 1979. This material should not be considered as legislative history of any statute or regulation which may become law in any jurisdiction.

Part E—Architect-Engineer Services

§5-501 Architect-Engineer Services.

(1) *Applicability.* Architect-engineer services shall be procured as provided in this Section except as authorized by Section 3-204 (Small Purchases), Section 3-205 (Sole Source Procurement), and Section 3-206 (Emergency Procurements).

(2) *Policy.* It is the policy of this [State] 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 services required, and at fair and reasonable prices.

(3) *Architect-Engineer Selection Committee.* In the procurement of architectural and engineering services, the Chief Procurement Officer or the head of a Purchasing Agency shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data. [The Chief Procurement Officer or the head of a Purchasing Agency, the Procurement Officer, and [the State Architect]] shall comprise the Architect-Engineer Selection Committee for each architect-engineer services contract over [$_____]. The Selection Committee for architect-engineer services contracts under this amount shall be established in accordance with regulations promulgated by the Policy Office. The Selection Committee shall evaluate current statements of qualifications and performance data on file with the [State], together with those that may be submitted by other firms regarding the proposed contract. The Selection Committee shall conduct discussions with no less than three firms regarding the contract 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 the Selection Committee, no less than three of the firms deemed to be the most highly qualified to provide the services required.

(4) *Negotiation.* The Procurement Officer shall negotiate a contract with the highest qualified firm for architectural and engineering services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State]. In making this decision, the Procurement Officer shall take into account the estimated value, the scope, the complexity, and the professional nature of the services to be rendered. Should the Procurement Officer be unable to negotiate a satisfactory contract with the firm considered to be the most qualified, at a price the Procurement Officer determines to be fair and reasonable to the [State], negotiations with that firm shall be formally terminated. The Procurement Officer shall then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the Procurement Officer shall formally terminate negotiations. The Procurement Officer shall then undertake negotiations with the third most qualified firm. Should the Procurement Officer be unable to negotiate a contract at a fair and reasonable price with any of the selected firms, the Procurement Officer shall select additional firms in order of their competence and qualifications, and the Procurement Officer shall continue negotiations in accordance with this Section until an agreement is reached.

COMMENTARY:

(1) This Section applies to procurement of all services within the scope of architecture, professional engineering, or registered land surveying as defined by the laws of the State whether or not construction is involved.

(2) The principal reasons supporting this selection procedure for architect-engineer services are the lack of a definitive scope of work for such services at the time the selection is made and the importance of selecting the best qualified firm. In general, the architect-engineer is engaged to represent the [State's] interests and is, therefore, in a different relationship with the [State] from that normally existing in a buyer-seller situation. For these reasons, the qualifications, competence, and availability of the three most qualified architect-engineer firms is considered initially, and price negotiated later.

(3) It is considered more desirable to make the qualification selection first and then to discuss the price because both parties need to review in detail what is involved in the work (for example, estimates of man-hours, personnel costs, and alternatives that the architect-engineer should consider in depth). Once parameters have been fully discussed and understood and the architect-engineer proposes a fee for the work, the recommended procedure requires the [State] to make its own evaluation and judgment as to the reasonableness of the fee.

(4) If the fee is fair and reasonable, award is made without consideration of proposals and fees of other competing firms. If the fee cannot be negotiated to the satisfaction of the [State], negotiations with other qualified firms are initiated. Thus price clearly is an important factor in the award of the architect-engineer contract under this procedure. The principal difference between the recommended procedure for architect-engineer selection and the procedures used in most other competitive source selections is the point at which price is considered.

(5) If an enacting jurisdiction desires to use a different selection process, then it may consider the following language:

> **"The Procurement Officer shall negotiate with the highest qualified firms for a contract for architectural and engineering services at compensation which the Procurement Officer determines in writing to be fair and reasonable to the [State]. In making such determination, the Procurement Officer shall take into account, in the following order of importance, the professional competence of offerors, the technical merits of offers, and the price for which the services are to be rendered."**

FEDERAL SELECTION LAW
(Brooks Act)

PUBLIC LAW 92-582; 92ND CONGRESS, H. R. 12807; OCTOBER 27, 1972

AN ACT

To amend the Federal Property and Administrative Services Act of 1949 in order to establish Federal policy concerning the selection of firms and individuals to perform architectural, engineering, and related services for the Federal Government.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.) is amended by adding at the end thereof the following new title [1]

"TITLE IX—SELECTION OF ARCHITECTS AND ENGINEERS

"*Definitions*

"Sec. 901 As used in this title—

"(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' includes 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 [2]

"*Policy*

"Sec. 902. 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.

Announcement

"*Requests for data on architectural and engineering services*

"Sec. 903. 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.

Evaluation

"*Negotiation of contracts for architectural and engineering services*

"Sec 904. (a) 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.

Negotiation

"(b) 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) 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."[3]

Approved October 27, 1972.

Award

[1] Architects and engineers. Federal selection policy, establishment 63 Stat 377; 82 Stat 1104

[2] 86 Stat 1278

[3] 86 Stat 1279

LEGISLATIVE HISTORY

HOUSE REPORT No 92-1188 (Comm on Government Operations).
SENATE REPORT No 92-1219 (Comm on Government Operations).
CONGRESSIONAL RECORD, Vol 118 (1972), July 26, considered and passed House Oct 11 considered and passed Senate.

Note: States may appear in more than one category. Prohibition of or exemption from competitive bidding requirements for procurement in general may be provided in general statutes for A/E services. A specific procedure for selection of A/E services may be spelled out in another law.

States which prohibit competitive bidding for A/E services in Law:

Tennessee
Texas

States which exempt A/E services from general bidding requirements:

California
District of Columbia
Hawaii
Illinois
Kentucky
Mississippi-by attorney general's ruling
New Jersey
New York-by state comptroller's opinion
Ohio
Oklahoma
Pennsylvania
Wyoming

States calling for selection based on qualification: (with procedure requiring ranking of firms, negotiation on scope of project and fee with the top firm. If no contract can be reached, negotiations are terminated and taken up with the second ranked firm. Same procedure required for third ranked firm (and lower ranked firms if required by law) if no agreement can be reached with the second.

State	Year
California	(1973)
Connecticut	(1979)
Colorado	(1979)
Delaware	(1976)
Florida	(1973)
Kansas As and Es	(1977)
Kentucky	(1978)
Louisiana	(1975)
Maine	(1979)
Massachusetts	(1975)
Minnesota	(1975)
Nebraska	(1978)
New Hampshire	(1973)
New York State	(1980)
Oklahoma	(1974)
Pennsylvania-building construction offices	(1975)
South Carolina	(1981)
Texas	(1971)
Utah	(1980)
Virginia	(1980)
Washington	(1981)

States prohibiting competitive bidding under registration law rules, regulations, standards of conduct: (Source: NCARB study revised June 13, 1975. Whether rules are promulgated for architectural board alone, joint board or occupational board is noted).

Arkansas - A
Connecticut - A
Florida - A
Hawaii - A/PE/S
Idaho - Occup. Licensing
Kentucky - A
Louisiana - Occup. Standards
Montana - A
North Carolina - A
North Dakota - A
Oklahoma - A
South Carolina - A
South Dakota - A/E
Tennessee - A/E
Vermont - A
Wisconsin - A/E
Pennsylvania - A/E/LS

HOUSE OF DELEGATES

ANNAPOLIS, MARYLAND 21401

R. CHARLES AVARA
37TH DISTRICT
BALTIMORE CITY
COMMITTEES:
VICE-CHAIRMAN, APPROPRIATIONS
CHAIRMAN, JOINT SUB-COMMITTEE
CAPITAL PROJECTS

841-3407

HOME ADDRESS:
3508 COOLIDGE AVENUE
BALTIMORE, MARYLAND 21229
644-3057
OFFICE ADDRESS:
1314 LIGHT STREET
BALTIMORE, MARYLAND 21230
752-0711

August 19, 1982

Mr. John P. O'Connor
Engineering Editor
American City & County Magazine

Dear Mr. O'Connor:

As discussed with a representative of the American Consulting Engineers Council, I am enclosing another view of the Maryland Professional Procurement System. This was prompted by the latest Zemansky article of May 1982, entitled Separate Myth from Fact.

By way of background, I represent Baltimore City in the Maryland General Assembly, assigned to the Capital Projects Committee for sixteen (16) years, twelve (12) years as chairman. I have served for the past six (6) years in dual capacity as Vice Chairman Appropriations Committee.

Sincerely,

R.C. A—

R. Charles Avara

HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

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AMERICAN CITY & COUNTY MAGAZINE
Article on A/E Procurement Procedures

As a public elected official I must be concerned with the wise expenditure of taxpayer money, best use of government personnel, and assurance that we develop the best and most cost effective capital works projects. All of these objectives are realized in the procurement of engineering and architectural services, when that procurement process is one which ensures that firms are selected first on the basis of their qualifications..

Yet, the debate continues over the best means of procuring A/E services. Maryland, which I serve as an elected State representative, is the only state in the country which requires A/Es competing for public jobs to submit priced proposals. Because of that requirement I have been long involved in discussions with public procurement officials, private sector engineers and architects and other legislators on this issue. We have made some progress toward educating other officials and the public that what appears to be the simplest solution may not always be the best.

The State of Maryland adopted a bidding requirement subsequent to the procurement scandals that ultimately resulted in the resignation of Spiro T. Agnew as Vice President of the United States. While reforms were clearly needed

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in the State selection process, many legislators still do not believe that bidding is a defense against corruption. The widespread announcement of public project and openness now associated with the Maryland system could just as easily be a vital part of a negotiated procedure.

Competitive negotiations were adopted by all federal agencies, including the military, with the passage of the P.L. 92-582 in 1972. Twenty-nine states also have statutes which recognize the value of A/E selection based on competence with competitive negotiation for a fair and reasonable fee. Of these, twenty have enacted a law detailing a qualifications selection procedure similar to the federal system and nineteen have exempted or prohibited A/Es from bidding. (Ten states have enacted both.) Maryland stands alone with a bidding procedure.

Competitive negotiation requires that firms first submit their qualifications to perform work on a project, after which three or more are ranked and negotiations take place with the number one ranked firm. At that negotiation stage a fair and reasonable price is established. If the agency and the firm cannot agree on the price, negotiations are ended with the first and undertaken with the second firm. If a design contract price cannot be agreed to by the client and the second ranked design professional, negotiations are ended and undertaken with the third ranked firm.

What the public agency client is buying is the design ideas of the engineer and architect -- and each design team will give the client a <u>different</u> facility. The difference is measurable against the experience and innovation of the individual competitors -- in short, their qualifications.

Maryland's bidding requirement has not served the best interests of the

State. In fact, a recent survey among consulting engineering firms showed that 90 percent of Maryland's engineering firms do not seek work from the State and that more than 80 percent who sought State work before no longer do so.

The slim chances of success do not justify the costly ($2,300 to $15,000) preparation of proposals and two out of three projects result in no profit, or more usually a financial loss according to the study. While this may be of little personal concern to the public, or even to the public agency client, it is of crucial importance to those small private sector firms whose staff is paid and whose doors stay open -- or close -- according to a reasonable income.

Disturbing also were comments by firms responding to the survey, who said they believe that competitive price bidding encourages them to submit proposals that are void of innovation and to cut corners by meeting minimal standards in an effort to keep fees low. The creativity of our small design firms is an important resource to be fostered in an encouraging competitive climate -- not a marketplace which fosters perfunctory and shop worn design approaches.

These findings recently were corroborated in two extensive independent studies of A/E services procurement. The American Bar Association's Public contract Law Section for the Office of Federal Procurement Policy reaffirmed the findings of the three-year study that resulted in the ABA Model Procurement Code for State and local governments.

The National Academy of Sciences Committee on Procurement Policy concluded after a year of study, which included the Maryland system, that "in the Committee's opinion no problems of major importance were found and certainly no problems that would justify a significant modification of the (competitive negotiation) law".

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Inherent in A/E services, and not generally for other types of services, is the extent to which quality can affect the ultimate efficiency, effectiveness and economy of a facility or structure.

Consider the cost of the design portion of a project, compared to the overall project cost. A report by the U.S. General Accounting Office states that "design costs represent a very small proportion, probably less than one percent, of the costs that will be incurred over the life of a building. Decisions made during the expenditure of this less-than-one-percent determine and freeze nearly all costs that follow".

A/E services are unique and we cannot expect them to conform to bidding specifications which serve so well for the procurement of other goods and most services. The A/E is expected to be a member of the State's team, to assess alternatives, design a facility or structure to satisfy the State's need at the lowest project cost, oversee the construction and assist the State in prosecuting claims that may arise out of the construction project. The relationship is different from the ordinary buyer/seller relationship. In many respects the A/E acts as the State or city's agent, and they have great value in their ability to protect the State's interest.

In order to fairly assess a competitive bid, public agency officials must be certain that all design professional firms are pricing the same project. In the case of engineering services this is difficult, if not impossible to assure. The work scope simply cannot be accurately defined to that extent prior to engagement of an engineering firm.

The Maryland experience proves this point graphically. Studies have shown

huge variations, some over 400%, between the high and low bidder on the <u>same</u> project. For example, price proposals on 125 A/E projects by the Department of General Services over the past five years resulted in 0-25% variations between the high and low bidder on 15 projects; 26-50% variations on 29 projects; 50-100% variations on 47 projects; 101-200% variations on 30 projects; and 201-400% variations on 4 projects.

It is incumbent upon us as public officials to understand and recognize the nature of the services we are seeking in design professionals. Engineering is a learned profession. Whether it is practiced by an individual or a team of individuals, creative talents are applied to solving a problem. How can we expect bids on the execution of an idea that is still being conceived, such as bridging a river to handle 25,000 cars per day? Should there be a culvert, timber pilings, concrete pilings, no pilings? Should there be two lanes or four lanes, a sidewalk to allow fishing or a bike travelway or both? Public works staffs, working in consultation with various public groups and in concert with private practice engineers, are able to analyze a myraid of alternatives and suggest approaches that address the problems of safety, permanence, beauty, maintenance and a host of other factors.

The traditional selection process permits this essential professional relationship between the client and the engineer or architect. The largest single misconception I hear from colleagues is that price is not a factor when the competitive negotiation process is utilized. It most definitely is. By the time procurement officials or selection boards arrive at the negotiating table with the number one ranked firm both have a grasp of the project scope and the budget which the city, county or state, has determined to be within reason. At the same time, the firm has examined

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its approach to meeting the requirements of the job and the compensation necessary to do so effectively. If the fee suggested by the firm is not in line with the agency's budget, the next step is to evaluate the cause and significance of the disparity.

Often the firms will suggest alternatives in approaches which will more effectively accommodate the agency budget estimate. But if the firm feels it is not in the agency's best interest to reduce the design effort, it will explain its rationale leaving the consideration of the alternative up to the public works staff or selection board.

Further, since the procedure also calls for selecting at least three qualified competitors, the firm with whom the agency first negotiates knows the agency can walk away if the fee proposal is not fair and reasonable. Additionally the agency can and should require the selected A/E to submit a cost breakdown of its proposed fee, and audit the fee proposal against the agency's established cost principals. These steps provide a means for negotiating a fee that is fair and reasonable for the defined services. In contracting for A/E services this should be the primary objective -- not the lowest price.

One of the many people who have encouraged a change in the Maryland system of procurement of A/E services is O. S. Hiestand, a Maryland attorney and former general counsel to the federal government commission on federal procurement as well as a member of the American Bar Association Coordinating Committee to develop a Model Procurement Code. That ABA Code did recommend selection procedure based on a qualifications method for design professional services. Mr. Hiestand has made many persuasive arguments in favor of reforming the Maryland system, and one

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in particular is important to note.

He says, "A public procurement policy is most effective -- both in quality and cost -- when it utilizes the competitive forces of an existing marketplace. This enables the State to achieve the maximum competition and provides a yardstick to measure its costs. Adopting artificial market conditions reduces competition and the ability to make an objective assessment of reasonable costs. Public procurement of A/E services is probably less than 5 percent of the total A/E services market. If 95 percent of A/E procurement does not utilize price in the initial selection, requiring priced proposals in public A/E procurement is clearly out of step with the normal marketplace for A/E services."

Most of the benefits of A/E services have to be measured against final construction, maintenance, and operating costs of a facility or structure. Costs that are not clearly determined until after the A/E services have been completed. Injecting price in an initial selection may lower the A/E fee sometimes, but it will also most likely lower the quality of the final product. Such price competition can inhibit the ability of the A/E to provide full cost saving services due to inadequate compensation for innovative and thorough work. It may even cause more talented A/E firms not to offer their services -- thus lowering the overall quality of A/E services available to the State or other public sectors.

Price competition has its place in public procurement, and when acquiring goods and commercial services is a fair method for assuring that the state buys what it wants at the lowest costs. However, price competition should not be injected, or relied upon, when it can adversely affect selection in situations where quality should be the controlling consideration initially. In the initial selection of an

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A/E project, quality should be the primary consideration for the taxpaying public. When that criterion is met, the state's interests are best served by utilizing the best qualified firm (for the type and complexity of the services needed) if the amount of compensation is fair and reasonable. This is sound public policy and one which I am working to see implemented in Maryland.

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Sec. 36.98.010. APPLICATION OF CHAPTER.
This chapter applies to contracts for professional services provided to a state agency unless

(1) the total amount of the contract does not exceed $25,000;

(2) the contract is an employment contract for services to be performed under direct supervision regardless of the existence of an employer-employee relationship and a written justification signed by the person responsible for awarding the contract is filed with the commissioner;

(3) the contract is awarded based on competitive bids obtained under the procedure provided in AS 37.05.230. HISTORY (Sec. 5 ch 144 SLA 1982)

Sec. 36.98.020. PROFESSIONAL SERVICES CONTRACTORS REGISTER.

(a) The commissioner shall establish and maintain a professional services contractors register.

(b) A person or firm that desires to provide professional services to a state agency may submit to the commissioner a statement of qualifications and performance data, and any other information that the commissioner, by regulation, may require.

(c) The commissioner may at any time require the person or firm to revise the statement of qualifications and performance data or any other information submitted by the person or firm if the commissioner believes that the credentials or record of experience of the person have materially changed since the last filing by the person or firm.
HISTORY (Sec. 5 ch 144 SLA 1982)

Sec. 36.98.030. SOLICITATION OF PROPOSALS.

(a) When a state agency proposes to enter into a contract for professional services, the agency shall give public notice soliciting proposals for the professional services contract by publication at least three times in one or more newspapers in general circulation in the state and, when appropriate, in a newspaper in local circulation where the work is to be performed. The first notice shall be published not less than 30 days before the date on which the agency expects to enter into the contract and each subsequent notice shall be published at intervals of no more than three days thereafter. The notice shall include

(1) a general description of the proposed project for which the agency is seeking professional services; and

(2) the procedure by which a person or firm interested in the professional services contract may make its proposal to the agency for consideration for the contract.

(b) In addition to complying with the publication requirements of (a) of this section, when a state agency proposes to enter into a contract for professional services it shall

(1) review the register of professional services contractors maintained by the commissioner under AS 36.98.020; and

(2) provide a request for proposals for the proposed professional services contract to each prospective contractor who, after review of the register of professional services contractors under (1) of this subsection, the agency finds is qualified for consideration for the contract.

(c) A request for proposals must be extended to a sufficient number of prospective providers of the required services to assure that public interest in competition is adequately served. Proposals from at least six persons or firms with the required expertise shall be solicited for contracts equal to or greater than $100,000. Proposals from at least three persons or firms with the required expertise shall be solicited for contracts of less than $100,000 if the expertise required is available. If the expertise required is not available to enable an agency to solicit the number of proposals otherwise required under this subsection, the agency shall solicit proposals

(1) from each person or firm listed on the professional services contractors register maintained under AS 36.98.020 who appears to possess the required expertise;

(2) from each person or firm responding to the public notice given under (a) of this section who appears to possess the required expertise.

(d) The provisions of this section do not apply if

(1) the contracting agency demonstrates that there is a single source of the expertise or knowledge required or that one person or firm can clearly perform the required tasks more satisfactorily because of the person's or firm's prior work; however, this exemption applies only if the head of the state agency has submitted a written request to the commissioner that details the reasons for the exemption and the commissioner or deputy commissioner has authorized in writing the state agency to enter contract negotiations with the single source;

(2) the commissioner makes a written determination that public necessity will not permit delay incident to the procedures otherwise required by this chapter; or

(3) the service is to be provided by another state agency, a federal agency, or a political subdivision of the state.

(e) A request for proposals must contain a description of the work to be performed under the contract and the terms under which the work is to be performed. A request for proposals must contain that information necessary for a prospective contractor to submit a response or contain references to any information that cannot reasonably be included with the request. The request for proposals must provide a description of the factors that will be considered by the state agency when it evaluates the proposals received.

(f) Nothing in this section limits the authority of an agency to use additional means that it may consider appropriate to notify prospective contractors that it proposes to enter into a contract for professional services.

HISTORY (Sec. 5 ch 144 SLA 1982)

Sec. 36.98.035. STANDARD OVERHEAD RATE.

(a) If a state agency has established a standard overhead rate applicable to contracts for services from the state agency, the standard overhead rate shall be included in a proposal for a contract submitted under AS 36.98.030(a).

(b) As used in this section, "standard overhead rate" means a charge established for services from a state agency that is designed to compensate the state agency for administration and support services incidentally provided with the professional services. (AS 36.98.030(g), (h); sec. 5 ch 144 SLA 1982)

Sec. 36.98.040. EVALUATION OF PROPOSALS AND AWARD OF CONTRACT.

(a) After the responses are submitted, the state agency shall evaluate them. The evaluation shall consist of assigning point values to factors considered by the agency in evaluating each proposal. Each proposal received must be evaluated using the same factors as those set out in the request for proposal.

(b) The contract shall be executed by the contractor and the project director for the contracting agency and be approved by the head of the contracting agency or the designee of the head of the contracting agency. If a contract is made by a board or commission, execution of the contract on behalf of the board or commission shall be authorized by the board or commission.

(c) a contract subject to this chapter shall be submitted to the commissioner for review and approval and, if approved, is effective from the date of the approval. A state agency must clearly provide in the request for proposal that the state is not obligated to perform under the contract until the approval required by this subsection is granted.

(d) A contract award under this chapter shall contain:

(1) the amount of the contract stated on its first page;

(2) the date for the work to begin;

(3) the date by which the work must be completed;

(4) a description of the services to be performed under the contract; and

(5) a certificate by the project director for the contracting agency, the head of the contracting agency, or his designee that sufficient funds are available in an appropriation to be encumbered for the amount of the contract.

HISTORY (Sec. 5 ch 144 SLA 1982)

Sec. 36.98.045. REVIEW AND APPROVAL BY DEPARTMENT OF LAW.

If a contract contains terms that are not provided in a state standard form contract or if the standard terms are deleted or modified by other terms that are not standard, the contract must be reviewed by the Department of Law and approved as to form. The review and approval required by this section must be completed before approval of the award of the contract by the commissioner under AS 36.98.040(c).

HISTORY (AS 36.98.040(e); sec. 5 ch 144 SLA 1982)

Sec. 36.98.050. CONTRACT ADMINISTRATION.

(a) When a state agency has entered into a professional services contract, that agency is responsible for the diligent administration and monitoring of the performance of the provisions of the contract.

(b) When a professional services contract is completed, the contracting state agency shall evaluate the performance of the contractor under the contract and shall report on and evaluate the use of the final product of the contract. A copy of the report and evaluation prepared under this subsection shall be transmitted to the commissioner and shall be retained by the commissioner for as long as the commissioner is required to maintain copies of completed contracts.

HISTORY (Sec. [illegible] ch 144 SLA 1982)

Sec. 36.98.060. FILING OF PROPOSAL AND CONTRACT.

A copy of each contract and the response to the request for proposal upon which the contract was awarded must be filed with both the

commissioner and the contracting state agency and is open for public inspection. The request for proposal and the name and address of each person who submitted a response to it must also accompany the filed copies.
HISTORY (Sec. 5 ch 144 SLA 1982)

Sec. 36.98.070. REGULATIONS GOVERNING CONTRACT PROCEDURES.
The commissioner shall, by regulation adopted in accordance with the Administrative Procedure Act (AS 44.62), establish the manner and form by which state professional services contracts shall be prepared and processed, including, but not limited to, a review process for persons aggrieved under this chapter.
HISTORY (Sec. 5 ch 144 SLA 1982)

Sec. 36.98.080. DEFINITIONS.
In this chapter
(1) "commissioner" means the commissioner of administration; except that for contracts entered into by the Department of Transportation and Public Facilities, "commissioner" means the commissioner of transportation and public facilities;
(2) "professional services" means professional, technical, or consultant's services that are predominantly intellectual in character and that
(A) include analysis, evaluation, prediction, planning, or recommendation; and
(B) result in the production of a report or the completion of a task;
(3) "public necessity" means an urgent public need that could not have been anticipated or foreseen; the term also includes emergency situations when work is necessary to protect life or property;
(4) "request for proposals" means a written solicitation for contract proposals by prospective contractors that sets out the nature of the services to be performed or product to be secured with sufficient information for a qualified prospective contractor to prepare a contract proposal for consideration and evaluation by the state agency;
(5) "state agency" means a department, institution, board, commission, division, authority, or other administrative unit of the executive branch of state government, and the University of Alaska.
HISTORY (Sec. 5 ch 144 SLA 1982)

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Alan K. Palmer
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Washington, D.C. 20036
(202) 887-1500

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Attorney General
By: Mark E. Ashburn
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Counsel for Defendant
Alaska Board of Registration
for Architects, Engineers,
and Land Surveyors

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, PROFESSIONAL ENGINEERS, AND LAND SURVEYORS, Defendant.	Civil No. A82-423 CIV Filed: 10/12/82 MOTION TO STAY PROCEEDINGS

The defendant Alaska Board of Registration for Architects, Professional Engineers, and Land Surveyors ("the Board") hereby moves that all proceedings in this case be stayed temporarily in order to permit a legislative resolution of the controversy involved herein, making litigation of this case unnecessary. To this end, the Board moves that proceedings be stayed until May 31, 1983, or

until such earlier time as the current session of the Alaska legislature enacts or rejects legislation that would insulate the conduct challenged herein from antitrust attack.

The grounds upon which this Motion is based, as set out in more detail in the attached Memorandum of Points and Authorities, are as follows:

The new Attorney General of the State of Alaska has determined that the most efficient way to resolve this dispute is through enactment of state legislation that would definitively establish a "state action" defense to the complaint herein, pursuant to the principles of Parker v. Brown, 317 U.S. 341 (1943), and subsequent cases. Accordingly, such legislation will be introduced in the state legislature, on behalf of the Board, in the very near future.

Should legislation conclusively establishing a state-action defense be enacted, litigation of this matter will be unnecessary. Thus, the order requested by the Board would avoid potentially unnecessary expenditure of resources by the parties and the Court. Nor would proceedings be unreasonably delayed in the event that the legislature does not enact the proposed legislation, since (a) the stay is for a limited period of time, and (b) the Board is prepared

1 to litigate the case on an expedited basis should the
2 proposed legislation not be enacted.

3 Respectfully submitted,

4

5 DATED: January 28, 1983

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6 Alan K. Palmer
MORRISON & FOERSTER
7 1920 N Street, N.W.
Washington, D.C. 20036
8 (202) 887-1500

9

10 Norman C. Gorsuch
Attorney General

11

12 By: ______________________
Mark E. Ashburn
13 Assistant Attorney General
State of Alaska
14 1031 West Fourth Avenue
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15 Anchorage, Alaska 99501
(907) 276-3550

16 Counsel for Defendant
17 Alaska Board of Registration
for Architects, Engineers,
18 and Land Surveyors

Of Counsel:
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Wilson L. Condon
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Counsel for Defendant
10 Alaska Board of Registration
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11 and Land Surveyors

12 UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

13

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND [illegible] SURVEYORS, Defendant.	Civil No. A82-423 CIV Filed: 10/12/82 ANSWER OF DEFENDANT ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS

14 15 16 17 1[illegible] 19

20 For answer to the complaint filed by the United
21 States, defendant Alaska Board of Registration for
22 Architects, Engineers, and Land Surveyors ("the Board")
23 responds as follows:
24
25 I. <u>JURISDICTION AND VENUE</u>
26
27 1. Answering paragraph 1 of the complaint, the Board
28 admits that the complaint is filed under 15 U.S.C. § 4.

Except as expressly admitted, the Board denies each and every allegation of that paragraph.

2. Answering paragraph 2 of the complaint, the Board admits the allegations of that paragraph.

II. DEFENDANT

3. Answering paragraph 3 of the complaint, the Board admits the allegations of that paragraph.

III. CO-CONSPIRATORS

4. Answering paragraph 4 of the complaint, the Board denies the allegations of that paragraph.

IV. TRADE AND COMMERCE

5. Answering paragraph 5 of the complaint, the Board admits the allegations of the first three sentences of that paragraph, except that it denies that there are approximately 2100 architects, professional engineers, and land surveyors licensed to practice in Alaska. The Board is informed and believes that there are approximately 3200 architects, professional engineers, and land surveyors licensed to practice in Alaska. The Board lacks knowledge or information sufficient to form a belief as to the

allegations of the last sentence of paragraph 5 of the complaint, and on that basis denies those allegations.

6. Answering paragraph 6 of the complaint, the Board admits the allegations of that paragraph.

7. Answering paragraph 7 of the complaint, the Board admits the allegations of that paragraph.

8. Answering paragraph 8 of the complaint, the Board admits the allegations of that paragraph.

9. Answering paragraph 9 of the complaint, the Board admits the allegations of the first two sentences and denies the remainder of that paragraph.

10. Answering paragraph 10 of the complaint, the Board admits the allegations of that paragraph.

11. Answering paragraph 11 of the complaint, the Board admits the allegations of that paragraph.

12. Answering paragraph 12 of the complaint, the Board admits the allegations of that paragraph.

13. Answering paragraph 13 of the complaint, the Board admits the allegations of that paragraph.

14. Answering paragraph 14 of the complaint, the Board admits the allegations of that paragraph.

15. Answering paragraph 15 of the complaint, the Board admits that the activities of the Board's certificate of registration holders are within the flow of interstate commerce and have a substantial effect on interstate commerce and that the activities of the Board have a substantial effect on interstate commerce. Except as expressly admitted, the Board denies the allegations of that paragraph.

V. VIOLATION ALLEGED

16. Answering paragraph 16 of the complaint, the Board denies the allegations of that paragraph.

17. Answering paragraph 17 of the complaint, the Board denies the allegations of that paragraph.

18. Answering paragraph 18 of the complaint, the Board denies the allegations of that paragraph.

VI. EFFECTS

19. Answering paragraph 19 of the complaint, the Board denies the allegations of that paragraph.

FIRST DEFENSE

The complaint fails to state a claim against the Board upon which relief can be granted.

SECOND DEFENSE

The complaint is barred by the "state action" doctrine of Parker v. Brown, 317 U.S. 341 (1943), and subsequent cases.

THIRD DEFENSE

The complaint is barred because the Board, as a governmental agency of the State of Alaska, may not be sued under the Sherman Act.

FOURTH DEFENSE

The complaint is barred by the Tenth Amendment to the United States Constitution and by the doctrine of National League of Cities v. Usery, 426 U.S. 833 (1976).

DISPOSITION

WHEREFORE, the Board prays for judgment as follows:

1. That the complaint be dismissed;

2. That the relief sought by the complaint be denied; and

3. That the Court grant the Board such relief as the Court shall deem just and proper.

Respectfully submitted,

Dated: November 22, 1982

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Attorney General

By:

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Of Counsel:
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Counsel for Defendant
Alaska Board of Registration
for Architects, Engineers,
and Land Surveyors

MINUTES OF THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS & LAND SURVEYORS

THE HONORABLE JAMES A. VON DER HEYDT CASE NO. A82-423 Civ

Deputy Clerk

___ Jim Meyers
xx Colleen Cannon
___ Ida Romack

Reporter

___ Dolores Runner
___ Janis Roller

APPEARANCES: PLAINTIFF:

DEFENDANT:

PROCEEDINGS: MINUTE ORDER FROM CHAMBERS:

Oral argument on defendant's motion to stay proceedings is denied in order to expedite the business of the court. See Local Rule 5(c)(1). Defendant's motion to stay proceedings (Docket #10) is granted. All proceedings in this case are stayed until May 31, 1983, or until such earlier time as the current session of the Alaska Legislature enacts or rejects legislation that would insulate the conduct challenged from anti-trust attack.

Plaintiff's motions to compel discovery (Docket #12) and for status conference (Docket #13) are denied without prejudice.

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cc: U. S. Attorney

Mark E. Ashburn &
Louise E. Ma

MAR 0 3 1983
AM PM
7,8,9,10,11,12,1,2,3,4,5,6

DATED February 24, 1983 INITIALS: [signature]
Deputy Clerk

NORMAN C. GORSUCH
ATTORNEY GENERAL

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Assistant Attorney General
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Department of Law
Pouch K - State Capitol
Juneau, Alaska 99811
Attorney for Defendants

Telephone: 907-465-3600

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
) Civil No. A82-423 CIV.
v.)
)
ALASKA BOARD OF REGISTRATION)
FOR ARCHITECTS, ENGINEERS) SUBSTITUTION OF COUNSEL
AND LAND SURVEYORS,)
)
Defendants.)

PLEASE TAKE NOTICE that under General Rule 3(F)(3) of the Rules of the U.S. District Court for the District of Alaska, Peter B. Froehlich, Assistant Attorney General, Department of Law, Pouch K, Capitol Building, Juneau, Alaska, 99811, phone: (907) 465-3600, hereby enters his substitution for Alan K. Palmer and Robert H. Loeffler of Morrison & Foerster as counsel of record in the above-captioned matter on behalf of defendant, Alaska Board of Registration for Architects, Engineers and Land

////

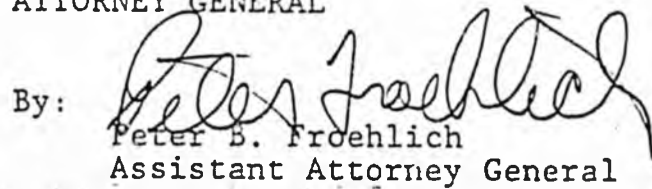
ATTORNEY GENERAL, STATE OF ALASKA
STATE CAPITOL
POUCH K, JUNEAU, ALASKA 99811
PHONE 465-3600

Surveyors.

Copies of all notices, motions and pleadings should be sent to the address referenced.

DATED: February 18, 1983 at Juneau, Alaska.

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: 
Peter B. Froehlich
Assistant Attorney General

ORDER

It is so ordered.

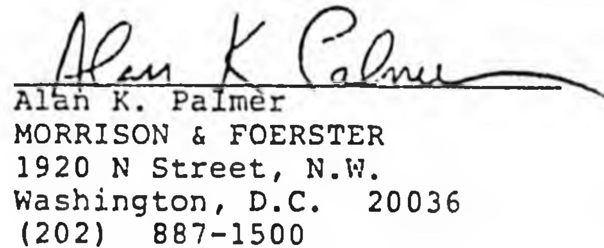
DATED: ______________________.

James A. von der Heydt
Chief U.S. District Judge

ATTORNEY GENERAL, STATE OF ALASKA
STATE CAPITOL
POUCH K, JUNEAU, ALASKA 99811
PHONE 465-3600

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January 1983, copies of (1) the Motion to Stay Proceedings of defendant Alaska Board of Registration for Architects, Professional Engineers, and Land Surveyors, (2) defendant's Memorandum of Points and Authorities in support thereof, and (3) defendant's proposed order were mailed, postage prepaid, to counsel of record listed on the attached service list.



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Counsel for Defendant
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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, PROFESSIONAL ENGINEERS, AND LAND SURVEYORS, Defendant.	)	Civil No. A 82-423 CIV. ORDER DENYING DEFENDANT'S MOTION TO STAY PROCEEDINGS

Upon consideration of Defendant's Motion to Stay Proceedings and Plaintiff's Memorandum In Opposition thereto, it is ORDERED:

That Defendant's Motion is DENIED.

Dated this __________ day of _____________, 1983.

James A. von der Heydt
Chief United States District Judge

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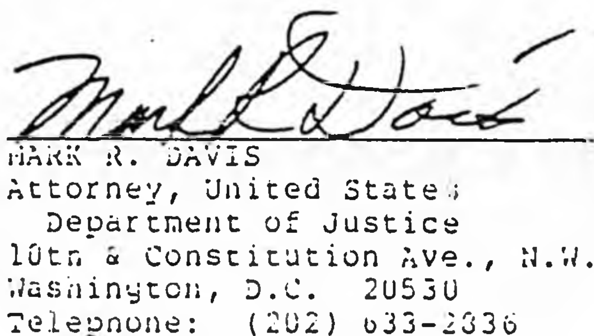
CERTIFICATE OF SERVICE

I, Mark R. Davis, attorney for Plaintiff United States of America, hereby certify that a copy of the attached Plaintiff's Memorandum In Opposition To Defendant's Motion To Stay Proceedings has been served this 14th day of February, 1983 by hand upon Robert H. Loeffler, Esquire, attorney for Defendant, 1920 N Street, N.W. Washington, D.C. 20036.



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Form OBD-183
12-8-76 DOJ

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Attorneys for Plaintiff

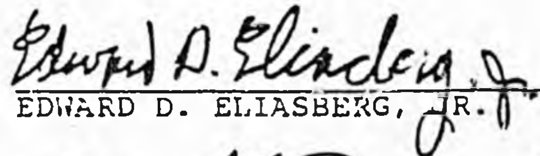
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	Civil No. A82-423 CIV PLAINTIFF'S MOTION FOR ORAL ARGUMENT ON DEFENDANT'S MOTION TO STAY PROCEEDINGS AND PLAINTIFF'S MOTION FOR A STATUS CONFERENCE

Pursuant to Local Rule 5(C)(1) of the District of Alaska, Plaintiff United States of America moves for oral argument on Defendant's Motion to Stay Proceedings. Plaintiff United States further moves for a status conference pursuant to Local Rule 9(b) of the District of Alaska. Plaintiff would suggest that, in order to minimize travel expense for out-of-state counsel, this conference be

1 held the day before or on the date oral argument is considered on
2 Defendant's Motion to Stay Proceedings and Plaintiff's Motion For
3 Order Compelling Discovery.
4
5 Respectfully submitted,

6 Dated: February 14, 1983



7 EDWARD D. ELIASBERG, JR.
8

9
10 MARK R. DAVIS
11

12 CAROLYN L. DAVIS
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Attorneys, United States
14 Department of Justice
10th & Pennsylvania Ave, NW
15 Washington, D.C. 20530
Telephone: (202) 633-2582
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CERTIFICATE OF SERVICE

I, Carolyn L. Davis, attorney for Plaintiff United States of America, hereby certify that a copy of the attached Plaintiff's Motion For Oral Argument on Defendant's Motion to Stay Proceedings and Plaintiff's Motion for a Status Conference has been served this 14th day of February, 1983, by hand upon Robert H. Loeffler, Esquire, attorney for Defendant, 1920 N Street, NW, Washington, D.C. 20036.

Carolyn L. Davis

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Telephone: (202) 633-2582
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	Civil No. A82-423 CIV. PLAINTIFF'S MOTION FOR ORDER COMPELLING DISCOVERY

Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, Plaintiff United States of America moves for an order compelling Defendant to answer Plaintiff's Interrogatories and to respond to Plaintiff's Document Request

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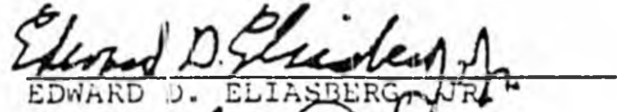
within 15 days of the date of the Court's order.

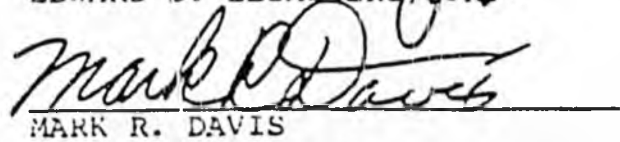
The grounds upon which this motion is based are set forth in the attached Memorandum In Support.

Respectfully submitted,

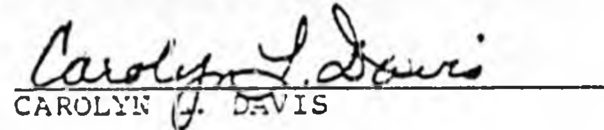
Dated: February 14, 1983



EDWARD D. ELIASBERG, JR.



MARK R. DAVIS



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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	Civil No. A82-423 CIV MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER COMPELLING DISCOVERY UNDER RULE 37(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendant, in spite of the fact that it has been given two extentions of time do so, has defaulted on its agreement to respond to the plaintiff's discovery. Consequently, the plaintiff, United States of America, brings this motion.

STATEMENT OF FACTS

Plaintiff United States of America filed its complaint in this matter on October 12, 1982, after extensive discussions with Defendant aimed at resolving the dispute without litigation. The Complaint alleges a *per se* violation of

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1 Section 1 of the Sherman Act based on the Defendant's adoption
2 of a complete ban against its members or licensees offering
3 competitive bids. The United States alleges that this
4 prohibition on price competition restrains trade.

5 After service of the Complaint, the United States was
6 contacted by representatives of then Alaska Attorney General
7 William Condon. The Government was informed that the Alaska
8 Attorney General had decided not to defend defendant Alaska
9 Board of Registration for Architects, Engineers, and Land
10 Surveyors (hereinafter cited as "Board"), but would authorize
11 the Board to retain outside counsel. To accommodate this
12 change in representation, the United States consented to a
13 twenty day extension of time to answer the Complaint.

14 Defendant's Answer was filed on November 22, 1982 after
15 new counsel was retained. On November 24, 1982 counsel for
16 Plaintiff and Defendant met to discuss whether the case could
17 be handled on a stipulated record or an expedited basis and
18 advised the Court they would seek to exchange stipulations for
19 the purpose of limiting the facts in dispute. Each promised to
20 exchange initial proposed stipulations of fact by December 17,
21 1982. The United States further informed Defendant that it
22 intended to file discovery requests under Rules 33 and 34 of
23 the Federal Rules of Civil Procedure.

24 The Government served a Document Request and sixteen
25 Interrogatories on Defendant on December 13, 1982. As agreed
26 upon between counsel, the United States filed its proposed
27 Stipulations of Fact on December 17, 1982.
28

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In response, Defendant did not file any proposed stipulations of fact on Plaintiff, nor did the Board offer any comment on the Government's proposed stipulations. On January 6, 1983, however, the Defendant contacted Plaintiff to request an extension of time to answer discovery which was due January 13. The United States agreed to extend the time to answer discovery to January 31, 1983 because of a change in administration in the State of Alaska government.

Despite this extension and several conversations with counsel aimed at securing a response to discovery as required under Local Rule 5 of the District of Alaska, Defendant has failed completely to answer or respond to the government's limited discovery requests. Defendant's position is that its reasons for refusing to answer discovery are set forth in its Memorandum of Points and Authorities In Support of Defendant's Motion To Stay Proceedings (hereinafter cited as "Defendant's Memorandum In Support"). See Attachment A, Affidavit of Mark R. Davis.

ARGUMENT

The United States of America, plaintiff in this action, brings this motion to compel the defendant to respond to plaintiff's interrogatories and request for documents. Plaintiff's discovery was served on December 13, 1982. Defendant was given an extension of time to respond and is now in default on its obligation to respond on January 30, 1983.

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Permitting for the delay in making such response would be inequitable and will seriously impair trial preparation in this case. The discovery plaintiff has sought for two months is relevant to the issues in this lawsuit. Plaintiff seeks access to the minutes of the Board and to documents in its possession relating to the Board's competitive bidding ban, its enforcement and its impact. Plaintiff's interrogatories seek Defendant's basic contentions with respect to its competitive bidding ban.

Defendant does not even claim that it would be burdensome for it to respond to these requests which it has had for two months. See Defendant's Memorandum In Support at 5-7. And on the other hand, it will greatly slow trial preparation if plaintiff is denied them. Access to these documents will enable Plaintiff to narrow the issues between the parties and prepare for prompt disposition of the case.

It would, we submit, be particularly inequitable not to force Defendant to respond to discovery where, as here, Plaintiff has made substantial efforts to move the case forward, has already granted Defendant two extensions of time and where Defendant has already failed to meet two commitments - to furnish proposed stipulations on December 17, 1982 and to respond to discovery on January 30, 1983.

Rule 37(a) of the Federal Rules Of Civil Procedure is designed to permit courts to compel answers to discovery when one party has failed to respond, filed incomplete answers, or

1 been evasive. See Rickles, Inc. v. Frances Denney Corp., 508
2 F. Supp. 4 (D. Mass. 1980). Use of a Rule 37 motion is
3 particularly appropriate where, as defendant claims is the case
4 in this matter (Defendant's Memorandum In Support at 5), the
5 "litigation is not especially complex as a factual matter."
6 See Bates v. Firestone Tire & Rubber Co., 83 F.R.D. 535 (D.S.C.
7 1979).

8 Rule 37, therefore, provides a court with a flexible tool
9 for compelling discovery in order to avoid unjustifiable
10 delays. The Rule becomes applicable once one party has failed
11 to respond to discovery. See Bates supra at 539 citing to 9
12 C. Wright & A. Miller, Federal Practice and Procedure § 2284
13 (1971) ("Any failure to disclose, regardless of the reasons for
14 it, brings the sanctions of Rule 37 into play. . . ."). If a
15 defendant simply refuses to answer discovery, a plaintiff is
16 forced to bring a motion to compel discovery. See Marquis v.
17 Chrysler Corp., 577 F.2d 624, 641 (9th Cir. 1978) ("[T]he
18 defendants' conduct regarding discovery in this case has
19 required the plaintiff to bring motions to compel discovery
20 that would otherwise have been unnecessary.") Under Rule 37 an
21 unexplained or unjustified failure to respond to discovery can
22 also be grounds for the imposition of sanctions, even absent a
23 motion to compel. See Barker v. Bledsoe, 85 F.R.D. 545, 548
24 (W.D. Okla. 1979) ("All sanctions defined in Rule 37(b) are
25 available for total failure to answer interrogatories, even
26
27
28

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absent a motion to compel."); and Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981)"("Dismissal is a proper sanction under Rule 37(d) for a serious or total failure to respond to discovery even without a prior order.")

In this case, the Defendant has totally failed to respond to the Plaintiff's limited discovery requests, despite two extensions of time designed to accomodate Defendant. There are no indications in the record or information known to the United States which would indicate Defendant was was unable to answer discovery within the allotted time. While a defendant's reasons for not complying with discovery can be relevant, see Bates, supra, no explanation has been given which would excuse this Defendant's lack of regard for discovery. Indeed, Defendant has indicated by implication in its Memorandum that it has sought, without permission of this Court or the Government, to delay discovery until its Motion To Stay is considered. The Defendant quite simply does not have this option. Its Motion To Stay Proceedings is independent of and has no bearing on its obligation to respond to discovery.

Defendant has also not made a persuasive case that answering discovery would be burdensome. In Defendant's own words "this litigation is not especially complex as a factual matter." See Defendant's Memorandum In Support at 5. Defendant has indicated that it can answer discovery on 15 days notice. Id. at 6, n.3. Furthermore, the Government has indicated its willingness to relieve some of the burden of

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12-8-76 DOJ

1 discovery by proposing stipulations designed to narrow issues
2 of factual dispute. Defendant, despite its agreement to do so,
3 (See Letter to Court of January 31, 1983) has failed to respond
4 or to propose its own. If the facts can be simply stated,
5 answering limited discovery should not be a substantial burden
6 and is certainly not the type of debilitating burden that would
7 permit a party to avoid the clear dictates of Rule 37.

8 The Defendant in its Memorandum in Support pleads that it
9 is in a difficult position since it does not wish to be "in
10 violation of its obligations under the Federal Rules. . . ."
11 See Defendant's Memorandum In Support at 6. The fallacy in
12 Defendant's position is that its filing a Motion to Stay did
13 not relieve of its duty to respond to discovery requests. As
14 discussed in our opposition to Defendant's Motion to Stay,
15 Defendant has not raised any basis to allow it to continue its
16 illegal conduct by further delaying this litigation. In any
17 event, Defendant, having not even requested from the Court an
18 extension of time to respond and having demonstrated no
19 hardship or burden in the government's discovery request it is
20 entirely appropriate to grant the Government's motion to compel.

21 Nor is this a situation where the Government is not
22 affected by Defendant's failure to answer. Both the Plaintiff
23 and Defendant agree that the case should not be factually
24 complex. If and when Defendant answers the Plaintiff's
25 discovery requests, the United States believes it will be able
26 to promptly file a motion for summary judgment and at the
27
28

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conference in November 1982 Defendant's counsel indicated that they contemplated making a similar motion. Thus, if the Defendant actually wanted to expedite this matter, it could have answered discovery and then both sides could have filed cross motions for summary judgment. This possibility was discussed between counsel for both sides on November 24, 1982. The Government in this case has attempted to negotiate a stipulated record; the Defendant has failed to keep its commitments. Hence under Rule 37, the Government believes it should be granted a Motion To Compel Discovery since Defendant has offered no cognizable excuse for its total failure to respond.

No change in counsel for Defendant justifies its failure to respond to discovery despite adequate time to do so. Indeed, the Government has been continually sensitive to Defendant's desire at one time to change counsel in this matter by granting two extensions of time. Yet after two delays, Defendant's primary counsel remains the same and that counsel without any basis or consent for its actions decided unilaterally not to

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respond to Rule 33 and Rule 34 discovery requests. As a result, the Government respectfully requests this Court enter a Motion To Compel Discovery under Rule 37.

Respectfully submitted,

Dated: February 14, 1983

EDWARD D. ELIASBERG, JR.

MARK R. DAVIS

CAROLYN L. DAVIS

Attorneys, United States
Department of Justice
10th & Pennsylvania Ave., N. W.
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Attorneys for the Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
) Civil No. A82-423 CIV.
v.)
)
ALASKA BOARD OF REGISTRATION)
FOR ARCHITECTS, ENGINEERS,)
AND LAND SURVEYORS,)
)
Defendants.)

AFFIDAVIT OF MARK R. DAVIS

District of Columbia)
) ss.
City of Washington)

MARK R. DAVIS, being duly sworn, deposes and says:

1. I am an attorney for the Government in the above-captioned action and have been assigned to this matter since the Complaint was filed October 12, 1982. I make this

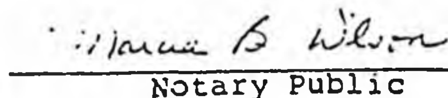
affidavit in support of Plaintiff's Motion for an Order Compelling Discovery Under Rule 37(a) of the Federal Rules of Civil Procedure.

2. On February 8, 1983, pursuant to Local Rule 5 of the District of Alaska, I called by telephone Alan K. Palmer, Esquire, attorney for the Defendant in the above-captioned matter, to ascertain Defendant's position with regard to answering discovery before preparing the Government's Motion Compelling Discovery Under Rule 37(a) of the Federal Rules of Civil Procedure.

3. Mr. Palmer informed me that the Defendant's position with regard to answering Plaintiff's discovery was set out in Defendant's Memorandum of Points and Authorities In Support of Defendant's Motion to Stay Proceedings.

MARK R. DAVIS

Sworn to before me this 14th day of February, 1983.



Notary Public

My commission expires July 31, 1984.

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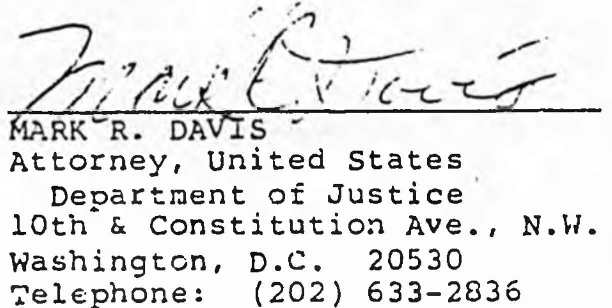
12-8-76 DOJ

<u>CERTIFICATE OF SERVICE</u>

I, Mark R. Davis, attorney for Plaintiff United States of America, hereby certify that a copy of the attached Plaintiff's Motion For Order Compelling Discovery has been served this 14th day of February, 1983 by hand upon Robert [illegible]. Loeffler, Esquire, attorney for Defendant, 1920 N Street, N.W. Washington, D.C. 20036



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	Civil No. A 82-423-CIV STIPULATION OF FACTS

Come now, the United States of America and the Alaska Board of Registration for Architects, Engineers, and Land Surveyors ("Board"), and for the purpose of this action only and without admitting the relevancy, admissibility, or materiality of any matter contained herein, agree and stipulate, by and through their respective undersigned counsel of record, to the accuracy of the following facts:

A. Jurisdiction and Venue

1. The complaint in this case was filed and these proceedings were instituted under Section 4 of the Sherman Act, as amended (15 U.S.C. § 4), in order to prevent and restrain an alleged continuing violation by the Board of Section 1 of said Act (15 U.S.C. § 1).

2. The Board maintains its principal office in Juneau, Alaska and transacts business and is found within the District of Alaska.

3. The Court has jurisdiction over this action pursuant to 15 U.S.C. § 4.

4. The Court has jurisdiction over the parties to this action and venue is proper.

B. Authenticity of Documents

5. Attached to this Stipulation as Exhibit 1, and by this reference incorporated herein, is a true and authentic copy of a pamphlet issued by the Board which contain the Alaska statutes on architects, engineers, and land surveyors (AS § 08.48.011 *et seq.*), centralized licensing (AS § 08.01.010 *et seq.*), and the termination, contunation and reestablishment of regulatory boards (AS § 08.03.010 *et seq.*). This pamphlet also contains the Professional and Vocational Regulations of the Board (12 AAC 36.010 *et seq.*), including the Board's Rules of Professional Conduct (12 AAC 36.200 *et seq.*).

6. Attached to this Stipulation as Exhibit 2, and by this reference incorporated herein, is a true and authentic copy of

the Directory of Architects, Engineers and Land Surveyors of the Board valid for the period ending December 31, 1977.

C. Creation, Composition and Functions of the Board

7. The Board was created and organized and exists under the laws of the State of Alaska AS § 08.48.011 et seq. That statute, AS § 08.48. 011 et seq., is the only act of the Legislature of the State of Alaska which establishes the powers or duties of the Board or from which the Board derives its authority. The Board is the sole professional engineering, architecture, and land surveying licensing authority in the State of Alaska.

8. The Board consists entirely of practitioners. As required by Alaska Statute § 08.48.011(b), five members are practicing professional engineers, three members are architects and one is a land surveyor. Each member of the Board must have been a resident of Alaska for three consecutive years preceeding his or her appointment and must be registered and have a minimum of five years of professional practice in his or here respective field (Alaska Statute § 08.98.031). All Board members may, and do, maintain their private practices while serving on the Board.

9. One function of the Board is the administration of written examinations and supervision of the qualification, certification and registration of professional engineers, architects, and land surveyors located in Alaska and other states of practice within the State of Alaska. Upon payment

of a fee, the Board annually issues certificates of registration to all properly certified or registered professioal engineers, architects and land surveyors. Revenues from this fee may be used only to cover the expenses of the Board. Currently, there are approximately 3200 professional engineers, architects, and land surveyors holding Board certificates of registration to practic professional engineering, architects, and land surveyors holding Board certificates of registration to practice professional engineering, architecture, or land surveying in Alaska. More then one-half of these certificate of registration holders are residents of states other than Alaska.

10. It is unlawful in Alaska for individuals to represent that they are profesional engineers, architects, or land surveyors unless they have been properly certified by and registered with the Board, and hold a Board certificate of registration to practice professional engineering, architecture, or land surveying. The Board will not grant a temporary registration under any circumstances. Nor will the Board recognize or grant professional registration by eminence.

11. Another function of the Board is to regulate certain aspects of the practice of professional engineering, architecture, and land surveying in the State of Alaska relating to, among other things, misconduct by its registrants. In

promulgating in adopting the regulations challenged by the plaintiff herein the Board acted pursuant to its understanding of its duties as set forth in AS § 08.48.101 and 08.48.111.

12. Board rules are distributed to all certificate of registration holders. Board rules are binding on every certificate of registration holder.

D. Trade and Commerce

13. Most Board certificate of registration holders are engaged in the practice of professional engineering architecture or land surveying and render such services to individuals, corporations, governmental entities and other business entities located in Alaska and other states for a fee or salary. The professional engineering, architectural, and land surveying services provided by Board certificate or registration holders involve and affect individuals, corporations, governmental entities and other business entities located in Alaska and other states. Board certificate of registration holders design and supervise the construction of buildings, roads, bridges, dams, industrial plants and other structures located throughtout the United States. Many Board certificate of registration holders located outside the State of Alaska perform professional engineering and architectural services within Alaska.

14. In the course of rendering professional engineering, architectural, and land surveying services, Board certificate of registration holders often travel from the state of their principal place of business to other states and make

substantial use of interstate mail and wire services in the transport of contracts, plans, reports, plats, drawings and other communications throughout the United States.

15. The activities of Board and Board certificate of registration holders affect and are within the flow of interstate commerce.

E. Rule 36.230(b)

16. The Board has adopted and promulgated Rule 36.230(b) of Title 12 of the Alaska Administrative Code ("Rule 36.230(b)").

17. Rule 36.230(b) provides:

> Each architect, engineer or land surveyor shall seek professional employment on the basis of qualifications and competence for proper accomplishement of the work. He may not knowingly solicit or submit proposals for professional services on the basis of competitive bidding.

F. Legislative Authority For Rule 36.230(b)

18. The Board adopted and promulgated Rule 36.230(b) pursuant to Alaska Statutes §§ 08.48.101 and 08.48.111.

19. Alaska Statute § 08.48.101(a)(5), the pertinent portion of the first of these statutes, provides:

> The board may adopt regulations to carry out the purpose of this chapter, including but not limited to publishing a code of ethics or professional conduct for those persons regulated by this chapter, including corporations under sec 241 of this Chapter.

20. Alaska Statute § 08.48.111, the second of these statutes, provides:

> The board may suspend, refuse to renew, or revoke the certificate of or reprimand a registrant or corporation who is found guilty of (1) fraud or deceit in obtaining a certificate; (2) gross negligence, incompetence, or misconduct in the practice of architecture, engineering, or land surveying; or (3) a violation of this chapter, a regulation adopted under it, or the code of ethics or professional conduct as adopted by the board. The code of ethics or professional conduct shall be made known in writing to every registrant and applicant for registration under this chapter, and shall be published with the roster provided for in AS 08.48.081. This publication constitutes due notice to all registrants. The board may revise and amend its code and, upon doing so, shall immediately notify each registrant in writing of the revisions or amendments. The board may, upon petition of the registrant or corporation, reissue a certificate if a majority of the members of the board vote in favor of the reissuance.

21. Alaska Statutes §§ 08.48.101 (a)(5) and 08.48.111 are the sole authority upon which the Board relies to have adopted or promulgated Rule 36.230(b) or a code of ethics or professional conduct.

22. Except for Rule 36.230(b), it would not be a violation of any State of Alaska law, statute, order, legislative or executive resolution, or legislature, executive or administrative rule, regulation or policy for a purchaser of architectural, engineering or land surveying services to seek competitive bid or for an architect, professional engineer or land surveyor to provide such bids.

G. History of the Rule

23. In either 1968 or 1969, the Board first adopted the ban on competitive bidding. At that time, the Board decided to adopt a code of ethics which was derived by combining the then existing codes of ethics of the American Society of Civil Engineers ("ASCE") and the American Institute of Architects ("AIA"), both of which contained competitive bidding bans. This competitive bidding ban, current Rule 36.230(b), was repromulgated without change by the Board on May 23, 1974 and September 30, 1978. Both the ASCE and the AIA eliminated their competitive bidding bans in 1972 pursuant to consent decrees settling antitrust civil actions brought against them by the United States.

24. There was no mention made of or consideration given to the competitive bidding ban at public hearings held in 1978 about the Board's regulations, including the Board's code of ethics.

25. There was no mention made of or consideration given to the competitive bidding ban during the Alaska state legislature sunset review of the Board held in 1980.

26. In 1980, the Office of the Alaska Attorney General recommended to the Board that they repeal Rule 36.230(b). The Board at its December 1980 meeting rejected this recommendation by a 4-3 vote.

27. In May 1982, the Office of the Alaska Attorney General recommended to the Board that they repeal Rule 36.230(b) on an emergency basis. The members of the Board unanimously rejected this recommendation at their May 1-7, 1982 meeting. A true and accurate copy of the May 13, 1982 letter of Assistant Alaska Attorney General Peter B. Froehlich recounting these events is attached as Exhibit 3 and bv this reference incorporated herein.

28. The Board conducted a public hearing on June 10, 1982, concerning the repeal of Rule 36.230(b). A true and accurate transcript of that hearing is attached to this Stipulation as Exhibit 4 and by this reference incorporated herein.

29. At the June 10, 1982 hearing, the consensus of the providers was that Rule 36.230 (b) should be retained. The following Board certificate of registration holders spoke against and urged the rejection of the proposed repeal of the competitive bidding ban: (1) Jan Hansen, P.E., (2) Don Dent, P.E., (3) Ron Mitchell, P.L.S., (5) Charles Torkko, P.E., representing the Consulting Engineer Council of Alaska, (7) Roy Peratrovich, P.E., (7) Richard Treoger, R.L.S., (8) Ken Cannon, architect, representing the Alaska Chapter of the American Institute of Architects, (9) Daniel Dougherty, P.E., (10) Herman Kaiser, R.L.S., (11) Gary Bock, P.E., (12) Nelson Franklin, P.E., representing the Anchorage Chapter of the

Alaska Society of Professional Engineers, (14) George Schwadetier, P.E. and P.L.S., (15) Mr. Partch, architect, and (16) Dale Nelson, representing the Anchorage Branch of the American Society of Civil Engineers.

30. On August 5, 1982 the Board held another hearing concerning the repeal of this competitive bidding ban. A true and accurate copy of the transcript of this hearing and written comments received in response to the July 2, 1982 public notice of this hearing is attached to this Stipulation as Exhibit 5 and by this reference incorporated herein.

31. At the August 5, 1982 hearing, the consensus of providers was again that Rule 36.230(b) should be retained. The following Board certificate of registration holders spoke against and urged the rejection of the proposed repeal of the competitive bidding ban: (1) Don Dent, P.E., (2) Charles Torkko, P.E., representing the Consulting Engineers Council of Alaska, (3) Vernon Ackin, P.E., (4) John Burdick, P.E., (5) Rupert Tart, representing the American Society of Civil Engineers, (6) Nelson M. Franklin, representing the Anchorage Chapter of the Alaska Society of Professional Engineers, (7) Doug Ackley, Architect, (8) Robert Minch, Architect, (9) William P. Hamm, representing the Alaska Chapter of Professional Engineers in Private Practice, and (10) Harley Hightower, representing the Alaska Chapter of the American Institute of Architects.

32. On September 9-10, 1982, the Board, contrary to the advice of the Office of the Alaska Attorney General, voted unanimously to retain Rule 36.230(b).

33. In retaining and enforcing this rule, the Board has the support of the various engineering associations and societies in Alaska.

H. Impact and Enforcement of the Rule

34. No person can practice architecture, engineering or land surveying in Alaska unless registered or certified by the Board (Alaska Statute § 08.48.281).

35. The Board can revoke, suspend or refuse to renew the registration of an architect, professional engineer or land surveyor if that person is found guilty of violating the Board's code of ethics, including the competitive bidding ban. (Alaska Statute § 08.48.111)

36. The Board has caused its Rules of Professional Conduct to be made known in writing to every registrant and applicant for registration and has caused them to be published with the roster of registrants, which the Board publishes annually, mails to registrants and state, borough, and city officials, and distributes or sells to the public.

37. The Boards' position is that failure to comply with the terms of the Code of Ethics, including Rule 36.230(b), might subject the professional engineer, architect, or land surveyor to disciplinary action.

38. The Board has continually and actively enforced Rule 36.230(b) and plans to continue enforcement of the Rule.

39. Board certificate of registration holders compete with each other in the offering of architectural, engineering and land surveying services. Present and past Board members

are competitors among themselves in the providing of architectural, professional engineering and land surveying services, and they compete with the other Board certicate of registration holders in providing those services.

40. Most Board certificate of registration holders have abided by Rule 36.230(b)..

41. In February or March, 1982, the City of Sitka put out a request for bids for professional services on an addition to the city library which would be built with state money.

42. About a week and a half after the requests were sent out, the Board, at the behest of several practitioners, contacted Sitka by conference telephone call and informed the City Administrator, Fermin "Rocky" Guitierrez, that Sitka would be making architects and engineers "outlaws" by asking them to bid on the project. Board members participating in the conference call also told Guitierrez that they would notify certificate of registration holders that participation in the library addition project or any other Sitka projects would be in violation of the Board's rule.

43. About the same time as the Board conference telephone call, Charles E. Torkko, president of the Consulting Engineers Council of Alaska ("CECA"), on behalf of that organization wrote Mr. Guitierrez on February 8, 1982 requesting reconsideration of pricing procedures used by Sitka for the procurement of professional engineering services for a water resource study. A true and accurate copy of Mr. Torkko's February 8, 1982 letter is attached as Exhibit 6 and by this reference incorporated herein.

44. On February 18, 1982, Mr. Guitierrez wrote a reply to Mr. Torkko's February 8, 1982 letter. In his reply, Mr. Guitierrez assured Mr. Torkko that "fee alone is not the determining factor in our procurement of engineering services." A true and accurate copy of Mr. Guitierrez's February 18, 1982 letter is attached as Exhibit 7 and by this reference incorporated herein.

45. In October, 1982, Board member Wallace Wellenstein phoned the Anchorage Public School Board and informed them that a proposal that Board certificate of registration holders submit price bids on designated design projects would violate the Engineering Board's ban on competitive bidding.

46. Shortly thereafter, Harley Hightower, president of the Alaska Chapter of the American Institute of Architects ("AIA"), made an appearance before the School Board on behalf of the AIA and indicated that the proposed regulation of the Board violated the Engineering Board ban on competitive bidding. A copy of the transcript of the appearance and a submission made at that time are attached are Exhibits 8 and 9 respectively and by this reference incorporated herein.

47. Practitioners have on occasion used the existence of Rule 36.230(b) to discourage the solicitation of competitive bids for projects.

48. Certificate of registration holders, practitioners, and architectural, professional engineering and land surveying societies have encouraged and supported the adoption and retention of Rule 36.230(b).

49. Absent an order of Court, the Board will not repeal Rule 36.230(b).

I. Consequences of the Rule

50. There would be a substantial increase in the amount of competitive bidding taking place in Alaska if Rule 36.230(b) were eliminated.

51. This substantial increase in the amount of competitive bidding taking place in Alaska would allow customers to utilize and compare prices, price bids and proposed designs much more readily and effectively when selecting engineering services than is presently the case under Rule 36.230(b).

52. Rule 36.230(b) increases the cost to purchasers of gathering price, quality and design information and dampens price, quality and design competition.

53. Most states no longer have bans on competitive bidding. There is no data indicating that these states have experienced increases in fraud and harm to the public health and safety.

J. Other Activities of the Board

54. The Board has adopted licensing requirements, in part, to insure the professional competence of all licensees.

55. The Board has adopted licensing requirements and examination standards to insure that all licensees have adequate knowledge of what construction, design and other architectual and professional engineering problems can arise from Alaska's cold climate.

56. The Board has adopted ethical and licensing requirements other than Rule 36.230(b) to prevent fraud in the offering of professional services.

57. The Board holds public hearings and solicits input of certificate of registration holders before changing or adopting any rule.

58. The Board continuously monitors and keeps informed of the impact and effectiveness of its rules.

59. Architects, professional engineers and land surveyors regularly contact the Board about conditions in the profession and about the effect of or need for Board rules.

Dated:

Respectfully submitted,

FOR THE PLAINTIFF:

____
EDWARD D. ELIASBERG, JR.

____
MARK R. DAVIS

____
CAROLYN L. DAVIS

FOR THE DEFENDANT:

____
ROBERT H. LOEFFLER

____
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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, PROFESSIONAL, ENGINEERS, AND LAND SURVEYORS, Defendant.	Civil No. A82-423 CIV Filed: 10/12/82 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO STAY PROCEEDINGS

I. INTRODUCTION AND SUMMARY

As the Court has previously been informed by letter, shortly after taking office the new Attorney General of the State of Alaska undertook a review of the status of the present case.[1/] As a result of that review, the

1/ Letter to the Court from Robert H. Loeffler and Alan K. Palmer, January 11, 1983.

Attorney General and the defendant Alaska Board of Registration for Architects, Professional Engineers, and Land Surveyors have determined to seek a legislative resolution of the issues raised by the complaint.

Legislation is being prepared which, on behalf of the defendant Board, will be introduced in the very near future for enactment during the current session of the state legislature. The legislation will be designed specifically to approve and implement the provisions of the "competitive bidding" rule challenged in the complaint herein. Enactment of such legislation would conclusively immunize the Board's actions from antitrust liability by virtue of the "state action" doctrine and the principles established pursuant to that doctrine by _California Retail Liquor Dealers Association_ v. _Mid-Cal Aluminum, Inc._, 445 U.S. 97 (1980), and would thus resolve the controversy between the parties and make continuation of this case pointless.

Accordingly, in order to conserve the resources of the parties and the Court, the Board asked the Department of Justice to join in a request that the Court stay proceedings so as to permit the current session of the legislature to act upon the proposed legislation. The Department refused this request, however, so that the Board now has filed the present Motion.

The limited stay of proceedings that the Board seeks would not unduly prejudice the interests of the Department and would provide an opportunity to resolve the current dispute without the burdens attending discovery and trial. If the current session of the legislature does not enact the proposed legislation, the Board would be prepared to have the case tried on an expedited basis.

II. BACKGROUND: THE STATE-ACTION DEFENSE

The complaint filed by the Department of Justice in this case challenges as unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, a rule enacted by the defendant Board -- Rule 36.230(b) -- which prohibits competitive bidding by architects, engineers, and surveyors. One of the key issues in the case is whether the regulation is immune from antitrust attack by virtue of the "state action" doctrine established by *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent cases.

In the *Mid-Cal Aluminum* decision, *supra*, the Supreme Court set out the basic requirements for a state-action defense to be successfully invoked:

> "[There are] two standards for antitrust immunity under *Parker* v. *Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy': second, the policy must be 'actively supervised' by the State itself."

445 U.S. at 105, quoting from *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Justice Brennan).

1 The Board's position is that inasmuch as it has
2 authoritatively acted for the State in the fashion specified
3 by the Court in Mid-Cal, the standards quoted above have
4 been satisfied and Rule 36.230(b) is exempt from antitrust
5 scrutiny.[2/] The Department of Justice, by contrast,
6 believes action by the Board is insufficient to satisfy the
7 standards of Mid-Cal; according to the Department, those
8 standards can be met only if the state legislature speci-
9 fically authorizes or establishes a noncompetitive regime.
10
11 III. THE STATE ATTORNEY GENERAL'S PROPOSAL

12 In reviewing this matter, the new Attorney General
13 of the State of Alaska has concluded that the most straight-
14 forward and efficient way of resolving the controversy
15 between the Board and the Department would be for the state
16 legislature to enact legislation specifically meeting the
17 Mid-Cal requirements. Although the Board continues to
18 believe that such legislation is by no means necessary to
19 satisfy Mid-Cal, it agrees that such legislation would
20 conclusively resolve the controversy, since even under the
21 Department's view of Parker and Mid-Cal it would defin-
22 itively establish a valid state-action defense and thus
23 would eliminate any conceivable basis for the current suit.
24 Accordingly, in the interests of expediting resolution of
25 the controversy and eliminating the need for prolonged
26
27 2/ The Board also asserts several other defenses to the complaint.
28

litigation, legislation of the sort described above will be introduced on behalf of the Board in the very near future.

IV. BASIS FOR THE BOARD'S MOTION TO SUSPEND PROCEEDINGS

Compared to most antitrust cases, this litigation is not especially complex as a factual matter. Stipulations of fact could be utilized to provide at least most of the record upon which the legal issues involved would be decided.

Nonetheless, substantial time and effort by both parties, and by the Court, would be required to litigate the matter. Agreeing on a complete set of stipulations of fact would not be a simple matter, and some discovery inevitably would be sought. The Department of Justice has in fact already served on the Board a set of interrogatories and a request for production of documents, pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure; responses to those discovery requests are currently due on January 31, 1983.

In an effort to avoid potentially unnecessary discovery and other pre-trial preparation that similarly may prove unnecessary, the Board asked the Department of Justice to join in requesting that the Court order proceedings stayed pending the outcome of the legislative effort described above. The Board informed the Department that the outcome

of that effort almost certainly would be known by May or June, since sessions of the state legislature historically have ended no later than that time of year. The Department replied, however, that it would not agree to such a stay and that it intended to move for an order requiring compliance with its currently outstanding discovery requests.

The Board is thus in a difficult position. It does not want to be in violation of its obligations under the Federal Rules, yet it believes that a limited stay of proceedings of the sort outlined above makes great sense and offers the best route to an efficient resolution of the case. Accordingly, the Board has moved for an order directing that proceedings herein be suspended until May 31, 1933, for purposes of pursuing a legislative resolution of this matter. The proposed order submitted by the Board also provides that proceedings may be resumed at an earlier date if the current session of the Alaska legislature enacts or rejects the proposed legislation or ends before May 31.

If its proposed legislative solution is unsuccessful, the Board is fully prepared to pursue this litigation -- and to respond to all discovery requests -- under an expedited schedule. [3/] In this way the interest of the Department

---

3/ Should the Court deny the Board's Motion, the Board will undertake to respond to the Department's outstanding discovery requests by whatever date the Court may direct (the Board suggests fifteen days after the Court's order), and will of course otherwise cooperate in moving the litigation forward.

1 in avoiding unnecessarily lengthy proceedings can be satis-
2 fied. Given this willingness, the Board believes that there
3 is no purpose to be served in engaging in the not insub-
4 stantial burden of discovery and pretrial preparation at the
5 very time that efforts are being made to resolve the contro-
6 versy in a way that would make this case totally unnecessary.
7
8 ## V. CONCLUSION

9 For these reasons, the defendant Board respect-
10 fully requests that the Court grant the Board's Motion to
11 Stay Proceedings.

12 Respectfully submitted,

13 DATED:
14 January 28, 1983

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, PROFESSIONAL ENGINEERS, AND LAND SURVEYORS, Defendant.	)	Civil No. A82-423 CIV Filed: 10/12/82 ORDER

For good cause shown:

1. It is hereby ORDERED that all proceedings in this action shall be stayed until May 31, 1983.

2. It is further ORDERED that either party may at any time prior to May 31, 1983, move for lifting of this stay and for resumption of proceedings herein on the grounds that (a) the current session of the Alaska legislature has ended, or (b) the Alaska legislature has enacted or rejected legislation approving and implementing the provisions of Rule 36.230(b) of the defendant Board of Registration for Architects, Professional Engineers, and Land Surveyors.

Dated this _____ day of _________, 1983.

____
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendants.	Civil No. A 82-423-CIV MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO DEFENDANT'S MOTION TO STAY

I

INTRODUCTION

This memorandum is filed in opposition to the motion of defendant Alaska Board of Registration for Architects, Engineers, and Land Surveyors ("Board") dated January 28, 1983 to stay all proceedings in this case.

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Three months after this case was filed and shortly before its discovery commitments were due, defendant, a state licensing board consisting entirely of practitioners, has made a last minute request to stay all proceedings in this case. According to defendant, the purpose of this stay is to permit the Alaska Legislature to consider legislation not yet even introduced, which defendant alleges would "make continuation of this case pointless." Defendant's Memorandum In Support of Motion at 2). Defendant fails to cite any legal authority or establish any factual predicate for its proposed stay. Defendant has failed to discharge its heavy burden of showing that (1) going forward with the litigation would impose on it clear hardship or inequity, and (2) this hardship or inequity outweighs any damage the stay may cause others. Defendant, who has already received two extensions of time in this case and is in default on its discovery obligations, has failed to demonstrate any cognizable hardship or inequity in complying with the Government's discovery requests or fulfilling its undertaking to seek to shorten discovery by stipulation. The requested stay will harm the public interest by prolonging the defendant's manifestly illegal conduct and depriving consumers of the benefits of competition. Furthermore, a stay should not be granted on the basis of mere speculation that legislation may someday be enacted. This is especially true here in view of the fact that the Alaska Legislature recently rejected considerably narrower legislation than that the defendant apparently will now seek.

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1 The Court should therefore deny defendant's motion and
2 enter the Government's proposed order attached to this
3 memorandum.

4 II

5 BACKGROUND

6 This case was filed on October 12, 1982 to prevent and
7 restrain the continuing violation by defendant Board of
8 Section 1 of the Sherman Act, 15 U.S.C. § 1. In particular,
9 the Complaint seeks to enjoin the Board, which consists entirely
10 of competing, private practitioners, from continuing to engage
11 in a conspiracy, the substantial terms of which "have been and
12 are that the defendant promulgate, adopt, publish and distribute
13 a provision in its Rules of Professional Conduct, Rule
14 36.230(b), prohibiting certificate of registration holders and
15 other architects, professional engineers and land surveyors
16 practicing in Alaska from knowingly soliciting or submitting
17 proposals for professional services on the basis of competitive
18 bidding." (Complaint ¶ 17). The Complaint also alleges that
19 "various other persons not made defendants herein have
20 participated as co-conspirators with the defendant in the
21 violation hereinafter alleged, and have peformed acts and have
22 made statements in furtherance thereof." (Complaint ¶4).

23 The defendant Board and its constituent professions in
24 Alaska have long been on notice of the issues raised in this
25 lawsuit. Nearly five years ago, in the landmark case of
26 National Society of Professional Engineers v. United States, 435
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U.S. 679 (1978), the United States Supreme Court held that a substantially identical competitive bidding ban applying to the engineering profession was illegal *per se* under the antitrust laws. The Supreme Court stated that "[N]o elaborate industry analysis is required to demonstrate the anticompetitive char[illegible] such an agreement . . . . On its face, this agre[illegible]strains trade within the meaning of §1 of the Sherm[illegible]." 435 U.S. at 692-93.

That state licensing boards as well as trade associations were subject to this rule was made clear one month later in United States v. Texas State Board of Public Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978), modf'd of aff'd, 592 F.2d 919 (5th Cir. 1979), cert. denied, 444 U.S. 925 (1979). In that case, the court held that a Texas general enabling statute (strikingly similar to two relied on here by the Board in issuing its price ban, Rule, A.S. §§08.48.101 and 111) was insufficient legislative authority under the state action doctrine to shield a *per se* illegal competitive bidding ban from the reach of Sherman Act. The court stated that

> In the instant case Rule 14 [the competitive bidding ban] is not mandated by any state regulation or action. Section 5 of the Accountancy Act is cast in permissive, not mandatory, language and, furthermore, only allows adoption of Rules appropriate for maintenance of high standards of integrity in the Accountancy profession. Nowhere in the Act does the State as sovereign mandate the anticompetitive conduct required by Rule 14, nor is such policy dictated by the

State. Additionally, it cannot be said that Section 5 of the Act in any way concerns or contemplates "the kind of action complained of" here.

464 F. Supp. at 404.

The clear holding in Professional Engineers that competitive bidding bans are *per se* illegal under the Sherman Act has been widely discussed and understood throughout the engineering and other professions. Numerous professional organizations and state licensing boards have taken steps to repeal their bans on competitive bidding. 1/ In contrast, the Alaskan Board has on several occasions resisted attempts to bring it into compliance with the mandate of Professional Engineers. In December 1980, for example, defendant Board voted to retain Rule 36.230(b), its ban on competitive bidding, despite the recommendation of the Alaska Attorney General that it be repealed. During this same period, as part of its effort Department of Justice commenced an antitrust investigation which led to this litigation. The Department made extensive efforts to contact professional licensing boards to determine whether they still enforced bans on competitive bidding, to dispose of this matter without recourse to suit. Beginning in April 1982 and continuing thereafter, attorneys from the Department

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1/ *E.g.*, United States v. American Institute of Architects, 1972 Trade Cas. ¶73,981 (D.D.C. 1972) (consent decree). United States v. American Society of Civil Engineers, 1972 Trade Cas. ¶73,950 (S.D.N.Y. 1972) (consent decree); and United States v. American Institute of Certified Public Accountants, 1972 Trade Cas. ¶74,007 (D.D.C. 1972) (consent decree). In May 1982, the West Virginia Board of Accountancy eliminated, among other things, a ban on competitive bidding after being advised the Government would otherwise sue (See attachment 1).

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contacted the Attorney General of Alaska or the Board on numerous occasions to discuss the Rule. The Alaska Attorney General again asked the Board to repeal the Rule, but after hearings in June and August the Board voted to retain it in September 1982.

In late September, the Assistant Attorney General in charge of the Antitrust Division authorized filing this lawsuit. Pursuant to the policy of the Attorney General, the Department on September 23, 1983 telephonically contacted the Governor, Attorney General of Alaska and the Board to put all on notice of the Department's intent to sue and to afford all affected parties a final opportunity to amend the Rule without the need of litigation. Since no response was forthcoming, this suit was filed two weeks later.

Since the suit was filed, the defendant has caused several significant delays in this litigation. Because the then Attorney General of Alaska initially took the position that he would decline to represent the Board, the Government in October agreed to defendant's request for a 20-day extension of time to permit it to seek new counsel. In November, the day after the Answer was filed, counsel for the parties met in Washington, D.C. to discuss how to proceed with this case. In order to expedite the case, the parties agreed, among other things, to exchange proposed stipulations on December 17, 1982 and so advised the court. The plaintiff on December 13 served Interrogatories and a Request for the Production of Documents upon defendant and on December 17 served its agreed-upon first draft of stipulations. Defendant, however,

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failed to serve its stipulations on December 17. Plaintiff's counsel was told by defendant's Washington, D.C. counsel that the holiday season and scheduling problems were causing delays in preparing stipulations; later the Government was advised that the new Attorney General of Alaska was considering a change of counsel. To date, defendant has failed to respond to the Governments proposed stipulations or fulfill its agreement to propose its own. On January 6, 1983, the Board requested a 30-day extension on defendant's discovery response due on January 13. The Government agreed to a shorter extension - to January 31.

Consistent with Local Rule 5 of the District of Alaska, Plainiff's counsel continued to discuss with defendant's counsel whether answers to discovery would be forthcoming. As late as January 19, 1983, counsel for the defendant represented that they intended to respond to plaintiff's discovery requests by the January 31 due date. On January 25, however, defense counsel reversed its position and instead requested a continuance of the case and a stay of all discovery for four or five months so that the Alaska Legislature could consider enactment of legislation which, according to defense counsel, might affect the outcome of this case. Other than to say that such legislation could, conceivably, moot this case, defendant has failed to furnish additional information about this legislation, provide the Government with a draft or outline of any proposed legislation or comment on the probability as to whether it will be introduced or enacted. Defendant has moved for a stay notwithstanding the

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fact that in the 1981-82 session the Alaska Legislature refused to enact legislation, introduced with practitioner support, which would have precluded state, borough, and municipal procurement officers from using competitive bidding for the purchase of architectural and engineering services. This so-called "Little Brooks Act" provision of House Bill No. 156 was of considerably narrower scope than the legislation for which defendant now apparently hopes because it would prohibit only competitive bidding in the public sector.

On January 28, 1983 defendant filed a Motion to Stay Proceedings which, in effect, stated that answering discovery would be fruitless since this Court might grant the requested stay. As a result, on January 31, defendant failed to produce the documentary discovery or interrogatory answers it was obligated to provide first on January 13 and then by agreement on January 31. Defendant never furnished the draft stipulations due on December 17, 1982.

III

ARGUMENT

Defendant bears the burden of showing that its proposed five month stay of discovery and all other proceedings is justified and will not harm the interests represented by Government. As the United States Supreme Court stated in Landis v. North American, Co., 299 U.S. 248 (1936), "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair

1 possibility that the stay for which he prays will work damage to
2 someone else," 299 U.S. at 255. Indeed, in Landis the Supreme
3 Court made clear that "the burden of making out the justice and
4 wisdom of a departure from the beaten track lay heavily on
5 petitioners, suppliants for relief . . ." 299 U.S. at 256
6 (emphasis supplied).
7 Given these standards, the courts generally disfavor stays
8 which tend to needlessly depart "from the beaten track" and
9 delay the normal course of justice. Landis, supra, at 254-55;
10 Filtrol Corp. v. Kelleher, 467 F.2d 242, 244-45 (9th Cir. 1972),
11 cert. denied, 409 U.S. 1110 (1973), citing CMAX, Inc. v. Hall,
12 300 F.2d 265 (9th Cir. 1962). See also, McDonnell v. Taban, 297
13 F.2d 731 (2d Cir. 1961); Druckman v. Forsyth Furniture Lines, 22
14 F.2d 59 (4th Cir. 1927); 9 F. Poore & E. Koeber, Cyclopedia of
15 Federal Procedure §§ 28.01-28.12 (3d ed. 1967). Consequently, a
16 defendant applying for a stay has a heavy burden of showing the
17 stay is justified since, as Judge Flannery held in Ellsberg v.
18 Mitchell, 353 F. Supp. 515, 517 (D.D.C. 1973), a plaintiff has
19 the right to prosecute his cause of action without delay. See
20 also, Dellinger v. Mitchell, 442 F.2d 782 (D.C. Cir. 1971).
21 This principle is particularly true in a case such as this where
22 the Government is suing in the public interest to enforce
23 well-defined and consistently applied federal law.
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Defendant has not met this heavy burden. Indeed, defendant has not even shown that a stay of discovery and other proceedings "makes great sense and offers the best route to an efficient resolution of the case." (Defendant's Memorandum In Support at 6). A five month delay in a case dealing with per se illegality where discovery has already started, which, according to defendant (Memorandum In Support at 3) "is not especially complex as a factual matter," and where discovery will be necessary regardless of legislative action is hardly "efficient". Nor does it make "great sense" to permit a state board comprised of practitioners to maintain and enforce a price ban for their own benefit at the expense of the Alaskan economy. Rather, the facts indicate that granting the proposed stay would be inequitable, harmful to the public, and a needless waste of time. The efficient way to handle this case is to get on with it, to answer discovery, and to submit motions for summary judgment.

A. Defendant Has Not Shown Clear Hardship or Inequity In Being Required To Go Forward

Defendant has not met the heavy burden it bears under Landis of showing hardship or inequity in going forward with this case. Indeed, its moving papers are totally devoid of any showing of hardship or inequity in responding to the Government's discovery requests. This failure in and of itself requires denial of defendant's motion, putting aside for the moment the fact that, as discussed below, any colorable claim

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of hardship by defendant would be outweighed by the significant harm to the public caused by continuing the competitive bidding ban.

That proceeding with this litigation would not give rise to any cognizable hardship or inequity is evidenced by the fact that, until this motion was filed, the parties were proceeding with a mutually agreed upon discovery schedule which would have brought this case to resolution within the very five month period for which defendant now seeks a stay. The parties had notified the Court of this schedule and plaintiff had undertaken to serve discovery requests and proposed stipulations. That defendant suddenly decided, on the eve of its deadline for complying with discovery requests, that going forward with this case was a "potentially unnecessary expenditure of resources" (Motion at 2) suggests that the proposed stay was not so much needed to prevent "hardship" or "inequity" as to delay some embarrassing discovery.

Weighing the effects of the stay on the government's important law enforcement interests in prosecuting this case, there can be no dispute that the stay would disrupt and protract pretrial proceedings already under way, would put off motions for summary judgment and would preclude any settlement discussions. Plaintiff has already made considerable effort to serve reasonable discovery requests and defendant concedes that it could respond to that discovery on 15 days' notice. (Memorandum In Support at 6, n.3). Given that the main

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discovery can be completed in a short time, it cannot impose such burden on defendant to go forward with discovery responses it was originally obligated to provide by mid-January.

On the other hand, if defendant is permitted to withhold its discovery responses and, as happened in the past, it does not obtain the complete legislative relief it hopes for, the progress of this case will have been seriously slowed and plaintiff's efforts to expedite trial preparation inappropriately frustrated. Thus, the only risk of "hardship" or "inequity" attendant to defendant's motion occurs if the stay is granted.

Finally, it is clear that in any weighing of the equities in this matter, defendant has failed to sustain its burden under Landis. Indeed, inconvenience to defendant resulting from going forward with this case is of defendant's own making. Defendant has had over four years to seek the legislation it is now proposing, and yet, despite clear notice, did not do so. Moreover, defendant can hardly claim surprise at the institution of this litigation, having at least three times since the Supreme Court's decision in Professional Engineers disregarded the advice of the Attorney General of Alaska to repeal its competitive bidding ban. Finally, having already caused two lengthy delays in this case and appearing in default on its discovery obligations, 2/ defendant can

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2/ See Plaintiff's Motion For Order Compelling Discovery, filed February 14, 1983.

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1 hardly be said to suffer "inequity if ordered to proceed in this
2 case." Landis, 299 U.S. at 255-56.
3 B. The Proposed Stay Would Harm The Public
4 Even if the Court found some hardship or inequity to defendant
5 in having to go forward with this litigation, defendant clearly has
6 not sustained its heavy burden given the demonstrable harm the
7 public would suffer from the proposed stay.
8 The Supreme Court in Professional Engineers held that bans like
9 Alaska's are illegal per se under §1 of the Sherman Act because
10 they inevitably cause serious economic harm. 3/ They severely
11 inhibit the way architects, professional engineers, and land
12 surveyors would otherwise compete. They prevent consumers from
13 receiving and practitioners from giving competitive bids. They
14 inevitably raise prices, add to inflation, and misallocate
15 resources.
16 Such restrictions are illegal per se because they transgress
17 the fundamental national policy of free competition which
18 Professional Engineers reconfirmed is embodied in the Sherman Act:
19 The Sherman Act reflects a legislative judgment
20 that ultimately competition will not only produce lower prices, but also better goods and services. "The heart
21 of our national economic policy long has been faith in the value of competition." Standard Oil Co. v. FTC, 340
22 U.S. 231, 248. The assumption that competition is the best method of allocating resources in a free market
23 recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the
24 immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even
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27 3/ The Supreme Court confirmed in Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980), that competitive bidding bans are per se illegal.
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> assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad. 435 U.S. at 695.

As Justice Blackmun cogently stated in his concurring opinion in Professional Engineers:

> As petitioner concedes, § 11 (c) [the competitive bidding ban] forbids any simultaneous consultation between a client and several engineers, even where the client provides complete information to each about the scope and nature of the desired project before requesting price information. To secure a price estimate on a project, the client must purport to engage a single engineer, and so long as that engagement continues no other member of the Society is permitted to discuss the project with the client in order to provide comparative price information. Though § 11 (c) does not fix prices directly, and though the customer retains the option of rejecting a particular engineer's offer and beginning negotiations all over again with another engineer, the forced process of sequential search inevitably increases the cost of gathering price information, and hence will dampen price competition, without any calibrated role to play in preventing uninformed bids. 435 U.S. at 699-700 (emphasis added; citation omitted).

Despite this clear precedent, defendant has continued to actively monitor compliance with its ban on competitive bidding. As recently as October 1982, shortly after the filing of the Complaint, Wallace Wellenstein, a member of defendant board, approached the Anchorage School Board on behalf of defendant and indicated that procurement regulations the School Board was considering enacting would violate defendant's competitive bidding ban. In March 1982, several members of defendant contacted the Administrator of the City of Sitka and

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1 told him that Sitka, by requesting bids on an addition to the
2 city library, was in violation of defendant's rules and was
3 making "outlaws" of defendant's certificate of registration
4 holders. These two incidents indicate that the Board intends to
5 continue to enforce compliance with the Rule. Nothing in
6 defendant's moving papers suggest anything to the contrary.

7 Furthermore, even if defendant did not actively enforce
8 the Rule during the stay, the continued presence of the Rule
9 alone would effectively deter competitive bidding and hence
10 persist in depriving the people in Alaska of the benefits of
11 competition. For example, practitioners frequently cite
12 defendant's ban to discourage purchasers who ask for competitive
13 bids. Subsequent to the filing of the Complaint, Harley
14 Hightower, representing the Alaska Chapter of the American
15 Institute of Architects, urged the Anchorage School Board not to
16 adopt regulations which would have authorized the use of
17 competitive bidding in the procurement of architectural and
18 engineering service in part because "presently the state law
19 prohibits architects and engineers from bidding so we would be
20 in violation of laws even though this law has been challenged
21 . . . ." (See Attachment 2).

22 Hence, if the stay is granted the defendant's Rule will
23 continue to harm the public for at least another five months,
24 perhaps longer, despite the Supreme Courts' ruling nearly five
25 years ago that the practice was illegal <u>per se</u> under the Sherman
26 Act. In sum, the Government respectfully submits that with
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regard to this proposed stay, as was the case in Landis, "[r]elief so drastic and unusual overpasses the limits of any reasonable need, at least upon the showing made when the motion was submitted." 299 U.S. at 257. A proceeding at equity should not become an instrument for private gain by those practitioners who seek by their motion to extend the life of the price bidding ban.

C. A Stay Based On Such Uncertain Circumstance Is Inappropriate And Would Needlessly Delay The Case

Without discussing the content or likelihood of passage of legislation, defendant forecasts events which will purportedly obviate the need for the Government's requested relief. At a minimum, the following sequence of events would have to occur under defendant's scenario: (1) Someone will sometime in the future introduce legislation in the Alaska Legislature which will require the Board to promulgate a rule identical to its present ban on competitive bidding; (2) that legislation will be enacted promptly and without any significant amendment or revision; (3) the Governor of Alaska will sign such a bill; and (4) on the basis of that legislation this Court, after an appropriate hearing, will then conclude that California Retail Liquor Dealers Assn. v. Mid-Cal Aluminum, Inc., 445 U.S. 97 (1980), is controlling and that this case is moot. 4/

4/ Midcal provides that there are "two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself.'" 445 U.S. at 105 (citation omitted).

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This is too uncertain and speculative a basis for staying this litigation.

The fact that the Board has been on notice of the antitrust deficiencies in its competitive bidding ban for over four years and that the Legislature has already refused to enact an even less restrictive statute than the one the Board now seeks makes defendant's hoped for legislative bailout all the more speculature. The argument that such legislation would pass is predicated on the assumption that, contary to the experience of the last legislative session, the legislature will vote to eliminate the possibility for public and private purchasers to reduce the costs they pay for architectural, engineering, and land surveying services through competitive bidding. 5/

5/ The tenuousness of that assumption is also evidenced by the testimony of Charles Torkko, President of the Consulting Engineer Council of Alaska and one of the major proponents of the "Little Brooks Act" provision at the last legislative session, concerning the proposed repeal of the Rule:

> [O]ne of the difficulties that we faced [in getting the Little Brooks Act enacted] was State administrative pressure on the legislature that demanded from the Governor's Office an alternative to the final procedure for sequential negotiations with the topped rank firm. If those failed, they demanded that there would be an option for concurrent negotiations with the three top firms. We felt that this was in violation of the concept and the regulations and the intent of the efforts that we have been working for the State of Alaska and could not support that."

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In sum, in these circumstance it is inappropriate to stay litigation on the mere possibility that controversial legislation will someday be enacted; moreover, given the recent experience in the legislature it is clear that there is no substantial likelihood that defendant's hoped for legislation will be passed.

Even if legislation completely forbidding competitive bidding by all engineers, surveyors and architects is enacted, it is not at all clear that this suit will be automatically mooted. At the very least plaintiff would be entitled to ascertain through discovery whether the defendant's conduct is allegedly illegal activity has indeed been "immunized". Thus it seems that the only certain result of granting a stay would be to delay this litigation.

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IV.

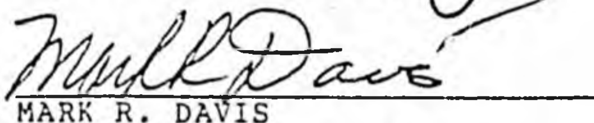
CONCLUSION

Defendant has not met its burden of showing that the proposed stay is justified. Indeed, there is no good reason to stay proceedings and plaintiff's discovery. Defendant's motion should therefore be denied.

Dated: February 14, 1983

Respectfully submitted,

EDWARD D. ELIASBERG, JR.



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FILED

OCT. 12 1982

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By............................

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, v. ALASKA BOARD OF REGISTRATION FOR ARCHITECTS, ENGINEERS, AND LAND SURVEYORS, Defendant.	)	Civil No. Filed: 15 U.S.C. §1 (Antitrust Violation Alleged) 15 U.S.C. §4 (Equitable Relief Sought)

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendant and complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This complaint is filed under Section 4 of the Sherman Act, as amended (15 U.S.C. §4), in order to prevent and restrain the continuing violation by the defendant, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. §1).

2. The defendant, Alaska Board of Registration for Architects, Engineers, and Land Surveyors (hereinafter referred to as the "Board"), maintains its principal office, transacts business and is found within the District of Alaska.

II

DEFENDANT

3. The Board is made the defendant herein. The Board is comprised of practicing architects, professional engineers, and land surveyors and is organized and exists under Section 3 of

Chapter 179 of the 1972 Session Laws of Alaska, as amended (Alaska Statutes § 08.48.011 et seq.). The Board maintains its principal office in Juneau, Alaska.

III

CO-CONSPIRATORS

4. Various other persons not made defendants herein have participated as co-conspirators with the defendant in the violation hereinafter alleged, and have performed acts and have made statements in furtherance thereof.

IV

TRADE AND COMMERCE

3200

5. There are approximately 2100 architects, professional engineers and land surveyors, more than one-half of whom are residents of states other than Alaska, licensed to practice in Alaska. These persons provide architectural, professional engineering or land surveying services to individuals, private businesses and governmental entities in Alaska. These services include the design, study and supervision of the construction of buildings, roads, bridges, dams, industrial plants and other structures. Over $17 million dollars are spent annually by Alaska residents and governmental entities for such services.

6. The Board is the sole licensing authority for the practice of architecture, professional engineering and land surveying in the State of Alaska. The Board administers written examinations and otherwise supervises the qualification, certification and registration for practice within the State of Alaska of resident and nonresident architects, professional engineers, land surveyors and corporations offering architectural, professional engineering or land surveying services. Upon payment of a fee, the

Board annually issues certificates of registration to all properly certified or registered architects, professional engineers, and land surveyors.

7. It is unlawful in Alaska for individuals to practice or offer to practice the profession of architecture, professional engineering or land surveying, or to represent that they are architects, professional engineers or land surveyors unless they have been properly certified or registered by the Board and hold a current Board certificate of registration to practice architecture, professional engineering or land surveying in Alaska.

8. The Board consists of nine members appointed to six-year terms by the Governor of Alaska. Three of the Board members must be architects, one must be a land surveyor, two must be civil engineers, one must be a mining engineer, and two must be engineers from other branches of the engineering profession. Board members must have been residents of Alaska for at least three consecutive years before their appointments. Board members must hold Board certificates of registration and have a minimum of five years of professional practice in their respective fields. While serving their membership terms, Board members may, and do, continue to engage in the practice of architecture, professional engineering or land surveying in Alaska. Board members are compensated on a per diem basis when attending to the work of the Board. In addition, Board members are entitled to receive travel expenses incurred in carrying out their duties.

9. Pursuant to the terms of Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, the Board may promulgate and amend a code of ethics or professional conduct for architects, professional engineers, and land surveyors.

Under Alaska law, the Board, except in emergencies, must hold a public hearing or proceeding before promulgating or amending its code of ethics or professional conduct. The laws of Alaska are silent as to the form or content of any such code of ethics or professional conduct and neither direct, require, nor mandate restrictions upon, or the regulation of, price competition in the offering of architectural, professional engineering, or land surveying services. Nor has any policy of restricting or regulating price competition in the offering of architectural, professional engineering or land surveying services been established or dictated by the State of Alaska.

10. In 1974, the Board adopted "Rules of Professional Conduct" intended to regulate the practice of architecture, professional engineering and land surveying in Alaska. Among the Board's rules is Rule 36.230(b), which provides that an architect, professional engineer or land surveyor may not knowingly solicit or submit proposals for professional services on the basis of competitive bidding. This rule is still in effect. In December, 1980, the Board rejected a proposal to repeal Rule 36.230(b). In May, 1982, the Board refused to repeal Rule 36.230(b) on an emergency basis. In September, 1982, the Board voted to retain Rule 36.230(b).

11. Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, provides that the Rules of Professional Conduct of the Board shall be made known in writing to every registrant and applicant for registration and shall be published with the roster of registrants, which the Board must annually publish, mail to registrants and state, borough, and city officials and distribute or sell to the public. Board Rule 36.240(b) provides that an architect, professional engineer or land surveyor having knowledge or reason to believe that another person or corporation may be in violation of any

of the Rules of Professional Conduct shall present that information to the Board in writing and shall cooperate with the Board in furnishing such further information or assistance as may be required.

12. The Board is authorized by Section 3 of Chapter 179 of the 1972 Session Laws of Alaska, as amended, to take disciplinary action against any Board certificate of registration holder who violates any of the Rules of Professional Conduct. Such disciplinary action may include the reprimand of a registrant or corporation or the suspension, refusal to renew, or revocation of the offender's certificate of registration.

13. The architectural, professional engineering and land surveying services provided by the Board certificate of registration holders involve and affect individuals, corporations and other business entities throughout the United States. These services facilitate, direct and shape the conduct of interstate business and contribute directly to the flow of persons, money, goods and services into and out of the State of Alaska.

14. In the course of rendering architectural, professional engineering and land surveying services, Board certificate of registration holders located in Alaska often travel to states other than Alaska and make substantial use of interstate mail and wire services in the transport of funds, documents, plans, reports, plats, drawings and other communications throughout the United States. In addition, many certificate of registration holders located outside Alaska perform architectural, professional engineering and land surveying services within Alaska.

15. The activities of the Board and its certificate of registration holders, as described herein, are within the flow

of interstate commerce and have a substantial effect upon interstate commerce.

V

VIOLATION ALLEGED

16. Beginning at least as early as 1974, and continuing up to and including the date of the filing of this complaint, the defendant and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act. Said violation is continuing and will continue unless the relief hereinafter prayed for is granted.

17. The substantial terms of said agreement, understanding and concert of action have been and are that the defendant promulgate, adopt, publish and distribute a provision in its Rules of Professional Conduct, Rule 36.230(b), prohibiting certificate of registration holders and other architects, professional engineers and land surveyors practicing in Alaska from knowingly soliciting or submitting proposals for professional services on the basis of competitive bidding.

18. For the purpose of effectuating the aforesaid combination and conspiracy, the defendant and co-conspirators have done those things which, as hereinbefore alleged, they agreed and conspired to do.

VI

EFFECTS

19. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Competition in the sale of architectural, professional engineering and land surveying services has been suppressed and eliminated;

(b) Consumers of architectural, professional engineering, and land surveying services have been deprived of the benefits of free and open competition in the sale of such services; and

(c) Architects, professional engineers, and land surveyors have been restrained in their ability to make their services readily and fully available to customers requiring such services.

PRAYER

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that the defendant and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act.

2. That the defendant, its members and all other persons acting or claiming to act on its behalf be enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing the aforesaid combination and conspiracy or from engaging in any other combination, conspiracy, contract, agreement, understanding or concert of action having similar purposes or effects, and from adopting, ratifying or following any practice, plan, program or device having similar purposes or effects.

3. That the defendant, its members and all persons acting or claiming to act on its behalf be enjoined and restrained from promulgating, publishing, distributing or otherwise

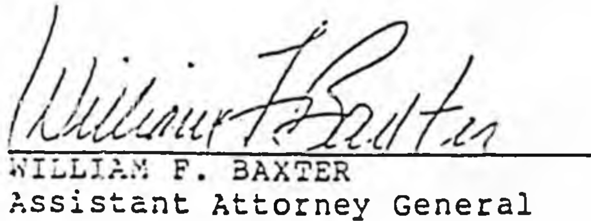
suggesting, and from adhering or agreeing to adhere to, any rule prohibiting competitive bidding by Board certificate of registration holders.

4. That the defendant be required to cancel Rule 36.230(b) of its Rules of Professional Conduct and every other resolution or statement of policy which has as its purpose or effect the suppression or elimination of competitive bidding by Board certificate of registration holders.

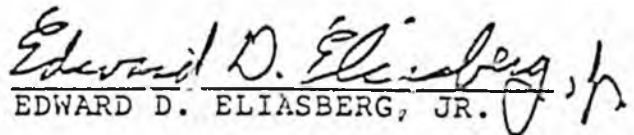
5. That the defendant be required to notify all Board certificate of registration holders, the general public, and all Alaska city, borough, and state officials that it has cancelled and rescinded Rule 36.230(b) of its Rules of Professional Conduct and every other resolution or statement of policy which has as its purpose or effect the suppression or elimination of competitive bidding by Board certificate of registration holders.

6. That the plaintiff have such other and further relief as the Court may deem just and proper.

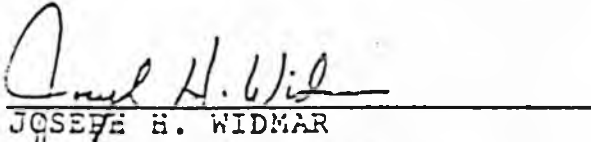
7. That the plaintiff recover the costs of this suit.



WILLIAM F. BAXTER
Assistant Attorney General

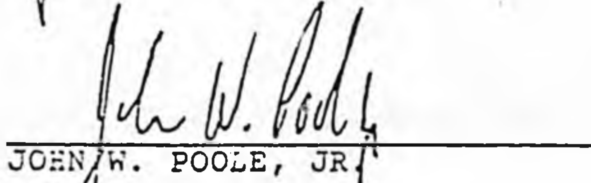


EDWARD D. ELIASBERG, JR.



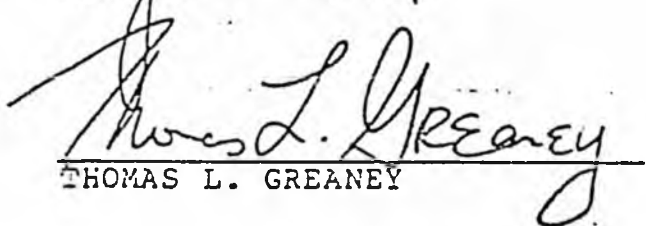
JOSEPH H. WIDMAR

CAROLYN L. DAVIS



JOHN W. POOLE, JR.

MARK R. DAVIS



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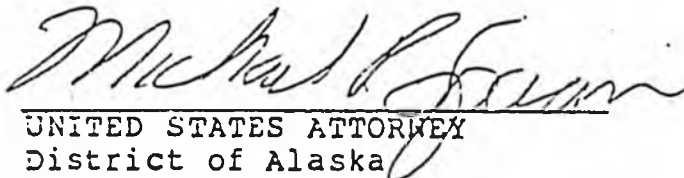


UNITED STATES ATTORNEY
District of Alaska

Dated: October 7, 1982

CENTURY ENGINEERING, INC. CONSULTING ENGINEERS • PLANNERS

RECEIVED 3-22-83

March 17, 1983

Representative Mike Szymanski
Pouch V
Juneau, Alaska 99811

Dear Mike:

John and I have read over House Bill No. 211 concerning architectural and engineering services. The procedures outlined sound pretty much like the way things have been handled lately, at least as far as our recent experience is concerned.

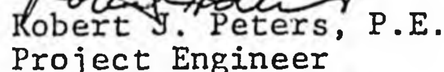
I would think something in the bill giving guildlines as to how "fair and reasonable prices" are determined might be helpful. Most national professional organizations, such as the National Society of Professional Engineers or American Institute of Architects have booklets to help owners determine fee ranges for project types.

On page 2 of the bill, line 23 makes reference to "bids". A bid is usually a monetary figure and would then seem to conflict with other portions of the bill. Possibly "offers of or proposals for" would be more suitable language.

Thanks for allowing me the time to comment on this legislation which affects an area of direct impact on my profession..

Sincerely,

CENTURY ENGINEERING, INC.



Robert J. Peters, P.E.
Project Engineer

RJP/css