IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

MANAGEMENT ASSOCIATION FOR PRIVATE PHOTOGRAMMETRIC SURVEYORS, *et al.*,	)	Civil Action No. 1:06cv378
Plaintiffs,	)	(TSE/BRP)
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN GEOGRAPHERS, GIS CERTIFICATION INSTITUTE, GEOSPATIAL INFORMATION & TECHNOLOGY ASSOCIATION, UNIVERSITY CONSORTIUM FOR GEOGRAPHIC INFORMATION SCIENCE, AND URBAN AND REGIONAL INFORMATION SYSTEMS ASSOCIATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Amici curiae, the Association of American Geographers ("AAG"), GIS Certification Institute ("GISCI"), Geospatial Information & Technology Association ("GITA"), University Consortium for Geographic Information Science ("UCGIS"), and Urban and Regional Information Systems Association ("URISA"), by their undersigned counsel, hereby submit this memorandum in opposition to the plaintiffs' motion for summary judgment and in support of defendant the United States' cross-motion for summary judgment.

INTEREST OF AMICI

As described in the motion for leave to file this brief, amici AAG, GISCI, GITA, UCGIS, and URISA are directly and vitally interested in the federal procurement of "mapping" services and the outcome of this case, which could have serious consequences for them.

Amici are submitting this brief because the *MAPPS* plaintiffs do not represent the interests of, or speak for, the entire "mapping" industry. In particular, they do not speak for the geographical information systems ("GIS") and computerized mapping industry. This is a large and growing industry that, aided by modern digital information processing technology, depends on and applies the expertise of a wide variety of subject matter experts other than, and quite distinct from, land surveyors. *See generally* Affidavit of Jack A. Butler (Mot. for Leave, Ex. 1).

Amici seek to ensure that the Court is able to resolve the questions presented here "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982) (internal quotations omitted). In today's economy, "mapping" goes well beyond surveying and the resulting maps that surveyors have traditionally produced to evidence and establish legal rights in and to real property. *See* Butler Affid. ¶ 2; *see generally also* Affidavit of Douglas Richardson ¶¶ 7-15 (Exhibit A hereto).

The amici are vitally interested in such "mapping," particularly GIS and computerized mapping. As a result, amici would suffer injury if the *MAPPS* plaintiffs were to win this lawsuit. This is because a victory for plaintiffs would not only insulate *all* federal mapping contracts from price competition, but also *exclude* everyone else – that is, anyone and everyone other than licensed engineers and surveyors – from even being eligible to receive a federal mapping contract, even where engineers and surveyors lack the training and subject matter expertise needed to perform the contract. This result would follow from the requirement of the Brooks Act to award all contracts for "architectural or engineering" services only to "firms" licensed to practice architecture or engineering.

In short, a victory for the plaintiffs would ensure the surveyors a monopoly over *all* federal mapping contracts, to the detriment of the amici associations, their members, and the GIS and computerized mapping industry as a whole.

QUESTIONS PRESENTED

1. Whether the *MAPPS* plaintiffs have met their burden of proving injury-in-fact, an essential element of constitutional standing, where their conclusory affidavits fail to show that state law prohibited any of the three affiants from competing for the identified non-QBS contracts and plausibly threatened them with discipline, had they done so?

2. Whether, under *Chevron,* the challenged regulatory provision, promulgated in 1991, represents (a) the clear and unambiguous intent of Congress, as expressed unchanged in the Brooks Act since 1988, or (b) in the absence of such clear and unambiguous intent, a permissible construction of the Brooks Act?

SUMMARY OF ARGUMENT

The plaintiffs have failed to establish injury-in-fact, as they have not met the test that the Court formulated in its standing decision of December 13, 2006. Through their proffered affidavits, plaintiffs have established only that the three affiants, all non-lawyers, may have believed that state law precluded them from competing for the cited, assertedly non-QBS contracts. Plaintiffs have failed to establish, however, that (1) state law *actually* prevented any of the three affiants from competing for the contracts; and (2) the affiants faced a plausible threat of discipline, had they competed for them.

On the merits, plaintiffs have failed to show that the term "mapping," as it appears in the Brooks Act in the phrase "surveying and mapping," clearly and unambiguously includes mapping separate and apart from the traditional work of surveyors – that of surveying and

mapping land boundaries to establish legal rights to real property, typically in connection with the design, construction, alteration of, or transfer of rights in, such property. Further, plaintiffs have failed to show that the challenged regulatory provision, which draws a distinction between "mapping" services traditionally associated with the architectural and engineering ("A-E") industry and "mapping" services associated with other disciplines, is not a permissible construction of the phrase "surveying and mapping," as it appears in the Brooks Act.

FACTUAL BACKGROUND

The salient facts of this case, as they bear on the issues presently before the Court, are as follows:

A. The Initial Enactment of the Brooks Act in 1972

In 1972, Congress enacted the Brooks Architect-Engineers Act, which required the federal government to award contracts for "architectural and engineering services" using a non-competitive, qualification-based system ("QBS"). At that time, the Act did not define the term "architectural and engineering services" other than to state that it included "incidental services that members of these professions and those in their employ may logically or justifiably perform." *See* Pub. L. No. 92-582, 86 Stat. 1278 (Oct. 27, 1972).

In 1982, Congress extended the Brooks Act to military construction and family housing projects, DOD having been exempt from the Brooks Act until then under 40 U.S.C. § 474. *See* Pub. L. No. 97-214, 96 Stat. 166 (enacting, *inter alia,* 10 U.S.C. § 2855).

B. The Brooks Act Amendments in 1988

In 1988, Congress, in two identical statutes enacted around the same time, amended the Brooks Act to include a long list of services of an "architectural or engineering nature, or incidental services." This list, which Congress stated was intended to "clarify" the Act, included

"surveying and mapping," but did not define that term. *See* Pub. L. No. 100-656, 102 Stat. 3853 (Nov. 15, 1988) (small-business legislation); Pub. L. No. 100-679, 102 Stat. 4055 (Nov. 17, 1988) (OFPP Act amendments).

Other than recodifying the Brooks Act without substantive change in 2002, Congress has not amended the Brooks Act since 1988. *See* 40 U.S.C.A. § 1101 – 1104.

C. The Regulatory Implementation of the 1988 Amendments to the Brooks Act

1. The Issuance of the Interim Rule in 1989

In March 1989, the CAAC and DARC (collectively, the "FAR Councils") issued an interim rule implementing the 1988 amendments. *See* 54 Fed. Reg. 13332 (Mar. 31, 1989). In its notice of the rule, the FAR Councils noted Congress' stated intention to "clarify" the statutory definition of A-E services, rather than "expand" it. *Id.* (Supplementary Information, ¶ C, Item II). The interim rule broke the long list of services up into two lists, each derived from the language of the statutory amendment, deemed to be services of an "architectural or engineering" nature, or "incidental" services. *See* 54 Fed. Reg. at 13336-37.

In 1990, after (*not* before) the FAR Councils promulgated the interim rule and for reasons apparently not disclosed in the legislative history, Congress enacted a short provision requiring the FAR Councils, pursuant to the 1988 amendment, to modify FAR Part 36 to "specify that the definition of architectural and engineering services includes surveying and mapping services to which the selection procedures of Subpart 36.6 of the [FAR] apply." Pub. L. No. 101-574, § 403 (Nov. 15, 1990).

2. The Issuance of the Final Rule in 1991

In 1991, the FAR Councils issued a final rule implementing the 1988 congressional amendment to the Brooks Act. *See* 56 Fed. Reg. 29124 (Item V). This final rule included a

definition of A-E services that set forth, verbatim, the single long list of services that Congress had included in the 1988 amendment to the Brooks Act. The regulatory implementation included an additional paragraph – the regulatory provision under challenge here – further defining the type of "mapping" services to which the selection procedures of Subpart 36.6 of the FAR would apply and the type of such services to which they would not apply. *See* 56 Fed. Reg. at 29129 (adding FAR 36.601-4(a)(4)).

This provision, and the distinction that it drew, sprang not from the imagination of the FAR Councils but rather from a colloquy between Congressman Brooks, the sponsor of the original eponymous bill and the 1988 amendment, and Congressman Mavroules concerning the meaning of the phrase "surveying and mapping," as it appeared in the proposed amendment. In particular, Mr. Mavroules asked if Mr. Brooks' understood this phrase as *not* intended to include contracts such as those that DMA regularly awarded for the digital collection and processing of mapping data and related support services. Mr. Brooks confirmed that the phrase was not intended to capture such contracts or otherwise expand the scope of the original Brooks Act, and that "surveying and mapping," as used in the amendment, applied only to the type of mapping traditionally associated with A-E services:

> Mr. Speaker, the gentleman is correct, to the extent that the maps and mapping products to be produced as a result of the Defense Mapping Agency contracts are **not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities, or have not in themselves traditionally been considered architectural and engineering services.** The language contained in S. 2215 would not apply to procurements in those instances and they would not be required to be conducted under this provision. The purpose of this provision is to assure that professional services of an architectural and engineering nature and incidental services thereto, including mapping and surveying in those instances, are procured on the basis of quality. The definition of architectural and engineering

> services contained in S. 2215 is not an expansion of previous law, but a clarification of the definition of the term "architectural and engineering services" as it was incorporated into law by Public Law 92-582 in 1972.

See 134 Cong. Rec. H10606, 1988 WL 178065 at 21 (emphasis added). The emphasized language appears almost verbatim in the now-challenged regulatory provision:

> (4) *Professional surveying and mapping services o[f] an architectural or engineering nature.* Surveying is considered to be an architectural and engineering service and shall be procured pursuant to § 36.601 from registered surveyors or architects and engineers. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering service and is to be procured pursuant to § 36.601. However, **mapping services** such as those typically performed by the Defense Mapping Agency **that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities or have not in themselves traditionally been considered architectural and engineering services** shall be procured pursuant to provisions in parts 13, 14, and 15.

56 Fed. Reg. 29124, 29128 (June 25, 1991) (codified at FAR 36.601-4(a)(4)) (emphasis added).

Except for the reference to the Defense Mapping Agency ("DMA"), discussed below, this version of the challenged regulatory provision is still in effect today, more than fifteen years later. *Cf.* 56 Fed. Reg. at 29128 *with* 48 C.F.R. 36.601-4(a)(4) (2006).

D. Subsequent Legislative and Regulatory Actions

In 1992, Congress enacted further small-business legislation that, in a section titled "Relationship to Other Applicable Law," required the military departments and DOD agencies to comply with the existing provisions of 10 U.S.C. § 2855, but did not amend the Brooks Act or otherwise expand the definition of "surveying and mapping." *See* Pub. L. No. 102-366, § 202 (1992).

In 1998, in the Defense Appropriations Act for FY 1999, Congress enacted a provision generally prohibiting DMA (by then known as the National Imagery and Mapping Agency or "NIMA") from spending funds appropriated by that Act for "mapping, charting, and geodesy activities" unless it used the QBS procedures of the Brooks Act. *See* Pub. L. No. 105-262, § 8101, 112 Stat. 2279, 2320 (1998). This provision did not amend the Brooks Act itself, nor did it expressly require the FAR Councils to make any changes to the regulatory provision challenged here.

In June 1999, the FAR Councils nonetheless amended the challenged regulatory provision to delete the reference to NIMA as no longer apposite. *See* 64 Fed. Reg. 32746 (June 17, 1999) (removing from FAR 36.601-4(a)(4) the words "such as those typically performed by the National Imagery and Mapping Agency").

In March 2003, apparently in response to persistent lobbying efforts by ***MAPPS*** plaintiffs and other A-E industry representatives, the FAR Councils requested comments as to whether it should revise the regulatory provision challenged here so as to require the application of the Brooks Act to *all* mapping services and not just to those mapping services traditionally understood or accepted as A-E activities. *See* 69 Fed. Reg. 13499 (Mar. 23, 2004).

In April 2005, after receiving, reviewing, and evaluating comments from more than fifty respondents, the FAR Councils declined to open a new rule-making. *See* 70 Fed. Reg. 20329 (Apr. 19, 2005). Thus, except for no longer referring to DMA, the challenged regulatory provision remains in the very same form in which the FAR Councils promulgated it in 1991.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE INJURY-IN-FACT, AN ESSENTIAL ELEMENT OF CONSTITUTIONAL STANDING

The three affidavits that plaintiffs have submitted in support of their summary judgment motion fall well short of meeting the test that the Court imposed on plaintiffs in its standing decision.

As detailed below, even without striking the inadmissible lay opinion testimony central to the affidavits (and the plaintiffs' listing of undisputed facts), plaintiffs do not establish that:

(1) the state law of the affiants' home states, or any other state, prohibited them from participating in the cited procurements; or

(2) the affiants faced a plausible threat of disciplinary action, had they participated in the procurements.

A. The Court Articulated a Specific Test to Establish Standing in the Circumstances of This Case

As applied to the circumstances of this case, the Court articulated the following basic test:

> [P]laintiffs must adduce facts at summary judgment . . . establishing that one or more of their members was precluded from bidding on a federal mapping contract that was procured by non-QBS procedures *as allowed by the Brooks Act, the challenged regulatory provision, and the state law where the procurement occurred.*

Memorandum Opinion at 9 (Dec. 13, 2006) ("Mem. Op.") (emphasis added).

In articulating this test, the Court appears to have recognized that plaintiffs' members can suffer injury-in-fact, if at all, only in connection with procurements of mapping services to be performed in a state that permits persons not licensed in architecture or engineering to provide those particular kind of mapping services and, then, only if the member's licensing state (that state or a different state) prohibits him, merely because he has a license, from participating in

non-QBS procurements properly conducted as such (in that state or another state). Indeed, the Court appears to have framed the test even more narrowly than that, apparently on the presumption that a state that allows some non-QBS procurements of mapping services would not prohibit surveyors licensed in that state from participating in those procurements. As the Court put it,

> there is the *possibility* that a surveyor licensed in a QBS-only state might be precluded by the law of that state from bidding competitively for a federal mapping services contract in a state that does not require those services to be performed by a licensed, registered or certified person. Plaintiffs must demonstrate at summary judgment that this *possibility* is a *reality.*

Mem. Op. at 10 (emphasis added).

Summarizing the overall test, the Court emphasized the need for plaintiffs to show a "plausible" threat of discipline in such circumstances:

> To summarize, for one of plaintiffs' members to suffer injury in fact he must be *plausibly threatened* with discipline by a state authority if he bids on a federal project procured by non-QBS methods, and the law of the state where he seeks to bid must not define the services sought as "architectural or engineering" such that they must be performed by a licensed professional.

Mem. Op. at 13 (emphasis added).

B. Plaintiffs' Affidavits Fall Well Short of Meeting the Court's Test

To attempt to meet the test that the Court articulated, plaintiffs have proffered similar affidavits from three licensed surveyors – one licensed in both North Carolina and South Carolina, one licensed in South Carolina, and one licensed in Oklahoma. *See* Affid. of Patrick M. Olson (Pltfs' 1/5/2007 SJ Mem., Ex. 1); Affid. of Marvin E. Miller (Pltfs' SJ Mem., Ex. 2); Affid. of Mickey Blackwell (Pltfs' 1/11/2007 Mot. for Leave, Ex. B). For a number of independently sufficient reasons, none of the three satisfies the Court's test.

First, as a threshold matter, each of the affidavits, in largely identical language, contains inadmissible lay opinion testimony concerning the licensing laws of the state(s) in question. The Court should disregard this testimony (if not strike it) as barred by Rules 701 and 702, Fed. R. Evid., or give little weight to it. Indeed, the affidavits neither quote nor even cite the state laws to which they allude, nor explain how those laws prohibited them from participating in the cited procurements. Rather, they merely ask the Court to accept the broad, conclusory assertions of the affiants at face value. *See* Olson Affid. ¶¶ 5 & 7; Miller Affid. ¶¶ 5 & 7; Blackwell Affid. ¶¶ 5 & 7. The assertions themselves amount to little more than statements of the subjective belief of the affiants, which is not relevant to the issues before the Court or sufficient to carry the plaintiffs' burden under Rule 56, Fed. R. Civ. P.

Second, none of the affidavits shows that the "possibility" the Court described is, in fact, a "reality." Specifically, none of the affiants demonstrates, or even clearly avers, that the law of his licensing state(s) would have prohibited him from participating in the cited non-QBS procurements with respect to work to be performed in another state. *See* Olson Affid. ¶ 8 ("I believe that it is improper for me to respond to non-QBS solicitations for professional services that includes work in North Carolina or South Carolina"); Miller Affid. ¶ 9 (same, as to South Carolina); Blackwell Affid. ¶ 8 (same, as to Oklahoma).

Third, none of the affidavits shows that the licensing state's law prohibits the affiant, merely because he has a surveyor's license in that state, from responding to non-QBS solicitations for mapping services for which no license is required in that state. Stated differently, the affidavits do not prove that the mere possession of a license precluded the affiants from bidding competitively on mapping services that fell outside the licensing requirement in the state in which the contract work was to be performed.

Fourth, the affidavits proffer no evidence that the affiants would be "plausibly threatened" with discipline for participating in a non-QBS procurement of mapping services. The affiants do not identify a single instance in which the state of North Carolina, South Carolina, or Oklahoma has actually disciplined, or even threatened to discipline, a surveyor for participating in a non-QBS procurement of any sort, let alone of mapping services. Nor do the affidavits even allege that one of these states has done so.

In fact, based on official public records in these three states (readily accessible via the Internet), the possibility of discipline in such circumstances appears to be quite remote. According to the North Carolina Board of Examiners for Engineers and Surveyors, the board investigates approximately 150 possible disciplinary matters every year and refers them to the Attorney General's office for prosecution.[1] According to the North Carolina Department of Justice, only a fraction of those matters rise to the level of prosecution and result in a legal opinion. Significantly, none of those opinions refers to disciplining a surveyor for competitive bidding, let alone competitive bidding for a mapping services contract.[2]

In South Carolina, the licensing board for "Professional Engineers and Land Surveyors" maintains a publicly available list of all of its final orders and disciplinary actions taken since July 2004.[3] None of the 63 actions listed dealt with a surveyor bidding competitively on a solicitation of any sort, let alone one for mapping services.

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1 Questions for North Carolina Board of Examiners for Engineers and Surveyors, available at http://72.14.253.104/search?q=cache:Cw7XESgw2IQJ:www.cgia.state.nc.us/gicc/surveyor.html+surveyor+and+the+law&hl=en&gl=us&ct=clnk&cd=4

2 See North Carolina Department of Justice, Legal Opinion Search, available at http://www.ncdoj.com/legalservices/lg_legalopinions.jsp

3 See Board of Professional Engineers and Land Surveyors, Alphabetical Listing of Final Orders and Board Actions, available at: http://www.llr.state.sc.us/POL/Engineers/index.asp?file=Final%20Orders.htm

Similarly, the licensing board in Oklahoma publishes all of its disciplinary actions in its quarterly newsletter. Of the 120 reported disciplinary actions taken between July 2000 and December 2006, not one deals with a licensed surveyor responding to a non-QBS solicitation, for mapping services or otherwise.[4]

For all of the foregoing reasons, the affidavits that the plaintiffs have submitted fall well short of satisfying the specific test that the Court articulated. None of the affiants has shown that the challenged regulatory provision has caused him to suffer injury-in-fact. While the affiants may have subjectively believed that state licensing laws prohibited them from participating in the cited non-QBS procurements of mapping services, they have not proven that their beliefs were correct. Nor have they proven that they would have faced a plausible threat of discipline if they had participated in those procurements.

Because plaintiffs have not proven injury-in-fact, they have failed to meet an essential requirement for constitutional standing. Accordingly, the Court should dismiss the case, on that basis alone, for lack of jurisdiction.

II. THE CHALLENGED REGULATORY PROVISION, WHICH TREATS *SOME* "MAPPING" SERVICES AS OUTSIDE OF THE BROOKS ACT, IS FULLY CONSISTENT WITH THE BROOKS ACT

Even if the plaintiffs had standing to sue, the Court should deny their motion for summary judgment on the merits. Under *Chevron,* reviewing courts are obliged to uphold an agency's construction of a statutory term if its construction reflects the clearly expressed intent of Congress, or, where the statute does not clearly express Congressional intent, the agency's

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[4] See Oklahoma State Board of Licensure for Professional Engineers & Land Surveyors, The Board's Online Bulletin, available at http://www.pels.state.ok.us/admn/newsletter.html

construction is a "permissible" one, even if the court itself might have chosen a different one. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

Here, the FAR Councils' construction of the term "mapping," as it appears in the phrase "surveying and mapping" in the Brooks Act, passes muster under both of *Chevron's* alternative prongs.

A. As Used in the Brooks Act, the Term "Mapping" Is Clearly Limited to A-E Activities in General and Traditional "Surveying" Activities in Particular

Statutory construction begins, of course, with the language of the statute in question. *See, e.g., Chevron,* 467 U.S. at 842-43. The term "mapping" appears in a long list of services that the Brooks Act includes in its definition of services of an "architectural or engineering nature, or incidental services." The term must be understood, in the first instance, in the general context of A-E services. Otherwise, the "studies, investigations, . . . , tests, evaluations" and several other items that the list includes would grant the A-E community a monopoly over large chunks of federal services contracting that even they do not now claim.

The term "mapping" also must be read within a further, narrower context. Unlike the other items in the list, it does not stand on its own. Rather, it has a fraternal twin – "surveying." The twins are combined into a single phrase, "surveying and mapping," itself set off by commas from the surrounding items in the list. Because "surveying" comes first, it is the dominant twin, and "mapping" must forever trail around in its shadow, limited in scope to activities traditionally associated with surveying. At its essence, "surveying" has traditionally consisted of measuring and determining land boundaries with the precision needed to establish legal rights to real property. Surveyors document those rights by embodying them in work product – that is, maps.

Interestingly, plaintiffs only betray their recognition of the interpretive significance of the order in which the twins appear – "surveying and mapping" – by repeatedly inverting it into

"mapping and surveying." *See* Pltfs'Am. Cmplt. ¶ 7; Pltfs' 7/11/2006 Opp. at 2, 3; Pltfs' 1/5/2007 MSJ at 1.

If more than this were needed to construe the term "mapping," the legislative history of the 1988 amendments to the Brooks Act, as recited in the factual background section above, confirms that the sponsor of both the original legislation and the amendments in that year shared this understanding of the meaning of "surveying and mapping," as it appeared in the proposed amendment. In promulgating the regulatory provision challenged here, the FAR Councils did nothing more than memorialize that understanding.

Even beyond the colloquy between Messrs. Brooks and Mavroules, the history and purposes of the Brooks Act also support the FAR Councils' construction. *See, e.g., NLRB v. Hearst Publications, Inc.,* 322 U.S. 111, 124 (1944) (where Congress did not use the word "employee" as a term of art having a definite meaning, its meaning "must be read in the light of the mischief to be corrected and the end to be attained") (citation omitted). As the Court here has recognized, the nominal purpose of the Brooks Act was to ensure that the federal government obtains architectural and engineering services based on the qualifications of A-E firms rather than price. *See* Mem. Op. at 3 & 17 n.17. At least ostensibly, Congress intended the Act to protect primarily the interests of public safety, not the financial interests of the A-E profession. Public safety is not compromised, however, when the government procures mapping services that are not traditionally performed by or associated with A-E firms, that do not relate to legal rights in and to real property, and that require subject matter expertise that architects, engineers and surveyors do not possess. *See, e.g., Photo Science, Inc.,* B-296391, July 25, 2005, 2005 CPD ¶ 140, 2005 WL 1792192 (Comp. Gen.), where the "mapping" services at issue required the knowledge and skills of biologists and archeologists rather than engineers or surveyors. For

an extensive list of "mapping" services that would similarly require specialized subject matter expertise other than that of engineers and surveyors, see Butler Affid. ¶ 10 (Amici Mot. for Leave, Ex. A).

Finally, it is also relevant that Congress has been aware of the FAR Councils' long-standing construction of the term "mapping" and, except for one year's worth of appropriations for one particular agency, has not enacted legislation to amend the Brooks Act in the fifteen years since the FAR Councils first promulgated the challenged construction. *See, e.g., Zemel v. Rusk,* 381 U.S. 1, 11 (1965) (upholding agency's construction where Congress was aware of it and did not repudiate it). If Congress actually intended that the federal government procure *all* mapping services, not just *some* mapping services, using the procedures of the Brooks Act, it would be simple enough for Congress to amend the Act. Absent such an amendment, Congress as a whole must be assumed to have accepted the FAR Councils' construction.

It is legally irrelevant that a handful of Congressmen may have managed in 1998 to insert a more expansive "expectation" in a conference report, since Congress does not vote on such reports and they are not legally binding. *Cf. American Hosp. Ass'n v. NLRB,* 499 U.S. 606, 616, 617 (1991) (emphasis added):

> *Petitioner does not – and obviously could not – contend that this statement in the Committee Reports has the force of law,* for the Constitution is quite explicit about the procedure that Congress must follow in legislating. . . . .
>
> . . . .
>
> In any event, we think that *the admonition in the Committee Reports is best understood as a form of notice* to the Board that if it did not give appropriate consideration to the problem . . . , Congress might respond with a legislative remedy.

As it relates here to "surveying and mapping," with one minor exception (for one agency, for one year) in the more than fifteen years after the FAR Councils promulgated the challenged regulatory provision, Congress has yet to respond.

B. Even if the Term "Mapping" Were Unclear or Ambiguous, the Challenged Regulatory Provision Represents a Permissible Construction of the Term, to Which the Court Is Obligated to Defer

If the Court were to conclude that the Brooks Act is unclear or ambiguous on, or does not directly address, the precise question before it, the Court would still be obligated to uphold the FAR Councils' construction as long as it is a "permissible" one. *Chevron*, 467 U.S. at 843.

In particular, where Congress by its silence has implicitly delegated authority to an agency to fill a legislative gap, "a court may not substitute its own construction of a statutory interpretation for a reasonable interpretation" of the agency. *Id.*, 467 U.S. at 844. An agency's interpretation is deemed to be reasonable where it represents "a reasonable accommodation of conflicting policies," as long as Congress would not have disapproved of the accommodation. *Id.* at 845 (citation omitted).

Stated differently, it is for the politically accountable branches of the government to resolve policy disputes. In the first instance, this is Congress. But if Congress fails to resolve a policy dispute and leaves it to the cognizant agency to resolve, the dispute is for the agency to resolve. As long as Congress has not foreclosed the resolution that the agency adopts, the courts should not substitute their judgment. That is the essence of the teaching of *Chevron*.

As discussed above, Congress *did* resolve the policy dispute about "mapping" in enacting the 1988 amendments to the Brooks Act. It reached an accommodation that struck a legislative balance between the interests of public safety and the interests of the government and taxpayers in avoiding anti-competitive monopolies. *See, e.g.*, Mem. Op. at 17 n.17. If the Court were to

conclude otherwise, however, it is nonetheless clear that the FAR Councils, in promulgating the challenged regulatory provision in 1991, did not resolve the policy dispute in a way that Congress had foreclosed. As the Brooks/Mavroules colloquy demonstrates, the sponsor of the original Act and the 1988 amendments did not seek to extend the Act to services that were "not connected to traditionally understood or accepted architectural and engineering activities . . . ." *See* 134 Cong. Rec. H10606, 1988 WL 178065 at 21. Clearly, the FAR Councils, in embodying this language in the challenged regulatory provision, did not adopt a policy option that Congress had foreclosed. That should end the matter.

Plaintiffs argue, however, that the FAR Councils' decision is flawed under the standards set forth in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (a case involving a much more open-ended type of rulemaking than one involving the construction of a statutory term). In so doing, plaintiffs criticize the FAR Councils' responses to four assertions that it formulated to distill the essence of the comments submitted by the A-E respondents (they were the only ones supporting an expansion of the term "mapping" in the challenged regulatory provision; the government respondents all opposed any expansion) in response to the Councils' request for comments in March 2004. *See* 69 Fed. Reg. 13499 (Mar. 23, 2004). Most of these assertions were policy arguments; one was based on legislative history. The administrative record in this case, as well as the FAR Councils' analysis and evaluation of the comments (*see* 70 Fed. Reg. 20329 (Apr. 19, 2005)), evidence the Councils' careful consideration of the comments – as well as its ultimate primary reliance on "interpretation of the Brooks Act" itself (*id.* at 20333 ("Response")). Plaintiffs have not convincingly demonstrated any error in this review, let alone any prejudicial error. *See* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error").

As an example, with respect to Assertion 3, plaintiffs point in particular to the fact that the FAR Councils did not conduct a 50-state "blue sky" survey to determine whether various states prohibited licensed engineers and surveyors from competing for work. Plaintiffs have not shown, however, why such a survey would be relevant to construing the Brooks Act's definition of "surveying and mapping." After all, the Brooks Act already incorporates state law. *See* Mem. Op. at 12. Rather, it appears that plaintiffs were simply assuming the truth of their assertions and attempting to place the burden of disproving them on the FAR Councils. So, while some states may impose prohibitions of varying nature and scope on "mapping" services (as suggested, but hardly proven, by plaintiffs' Exhibit 3, which quotes fragments of various state laws), the Councils reasonably looked to the National Council of Examiners for Engineering and Surveying ("NCEES"), seeking the "pervading general essence" rather than the state-by-state details. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 122 (1944) (construing the statutory term "employee"). Plaintiffs have not shown this was error or prejudicial. Nor have they justified extending their monopoly on A-E contracts to *all* federal mapping contracts, to the exclusion of the GIS and computerized mapping components of the mapping industry.

CONCLUSION

Plaintiffs have failed to meet their burden on summary judgment.

As to constitutional standing, plaintiffs have failed in several respects to satisfy the specific test that the Court articulated.

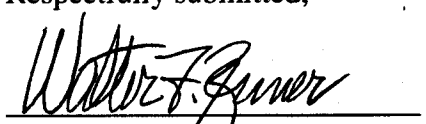
As to the merits, because Congress spoke clearly to the scope of "surveying and mapping" in the 1988 amendments to the Brooks Act (and not since then), because the challenged regulatory provision embodies that clear intent of Congress, and because the

challenged regulatory provision in any event does not represent a policy choice that Congress has foreclosed, plaintiffs have also failed to meet their burden.

Accordingly, amici request that the Court grant the motion of the defendant, the United States, for summary judgment, deny plaintiffs' motion for summary judgment, and dismiss the case with prejudice.

Dated: January 24, 2007

Respectfully submitted,



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