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INFORMATION AND GUIDANCE

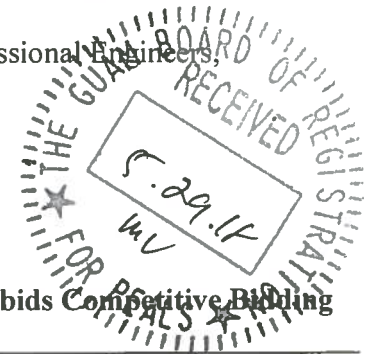
Ref: DPW 17-0497

To: Chairman, Guam Board of Registration for Professional Engineers, Architects and Land Surveyors

Via: Attorney General 

From: Deputy Attorney General

Subject: PEALS Rule of Professional Conduct that Forbids Competitive Bidding



This is in response to a request for a legal guidance from the Office of the Attorney General concerning the prohibition on competitive price bidding found in the Guam Board of Registration for Professional Engineers, Architects, and Land Surveyors' ("PEALS") Rules of Professional Conduct.

QUESTIONS PRESENTED

You have requested legal advice as follows:

1. A recent inquiry from a registrant notifying the Board that a client had requested fees for the purpose of competitive bidding against other registrants and that the client had challenged the legal standing of the Board's Code of Ethics on the matter, citing the Sherman Act. The registrant requested advice from the Board on how to respond to this client.
2. Another notification from a registrant that informed the Board that the most recent Invitation to Bid for the new Simon Sanchez High School prepared by the Department of Public Works contains instructions to bidders to submit fees for engineering and architectural designs on a bid form that is visibly separate from the construction costs. The Board believes the publication of these design fees is a violation of its Code of Ethics as it forms a basis for competitive bidding between registrants.

SHORT ANSWER

It is the opinion of this Office that the Board's blanket prohibition in its Code of Ethics on competitive bidding does, indeed, violate the Sherman Act and is therefore unenforceable on its face. That being said, because a blanket prohibition on the use of competitive bidding

by a purchaser of engineering, architectural, or surveying services is unenforceable, the second question which asks whether Guam's procurement laws violate the PEALS rules of conduct is moot.

DISCUSSION

The PEALS Board's Rules of Professional Conduct were adopted on April 5, 1974 and have since been codified at 25 GAR, Ch. 1 Art. 2 §§ 1201 to 1210. The rule at issue provides:

The engineer, architect or land surveyor shall seek professional employment on the basis of qualification and competence for proper accomplishment of the work (and shall charge a professional fee for all professional services rendered). *He shall not solicit or submit proposals for professional services on the basis of competitive bidding contrary to law.* Competitive bidding is defined as the formal or informal submission or receipt, or verbal or written estimates of costs of proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering, architecture and land surveying services on a price basis prior to the time that one engineer, architect or land surveyor or one engineering, architecture and land surveying organization, has been selected for negotiations.

Rules of Professional Conduct for Professional Engineers, Architects and Land Surveyors 25 GAR § 1206(b) (emphasis added).

Four years after the PEALS Board's adoption of the rule prohibiting competitive bidding the United States Supreme Court addressed a nearly identical rule of ethics in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). The National Society of Professional Engineers ("Society") was organized in 1935 to deal with the nontechnical aspects of engineering practice, including the promotion of the professional, social, and economic interests of its members which at the time numbered 69,000 nationally and internationally. *Id.*, 435 U.S. at 682. The Society's ethical rules included the following section:

Section 11 – The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding. . . .

c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical

practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professions.

Nat'l Soc. of Prof'l Eng'rs, 435 U.S. 683 at n.3 (emphasis added). In its complaint filed in the district court the United States Government alleged that prohibiting the submission of competitive bids for engineering services constituted an unlawful restraint of trade or commerce in violation of Section 1 of the Sherman Antitrust Act which states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

In its defense, the Society argued that § 11(c) satisfied the "Rule of Reason," arguing that competition among professional engineers was contrary to the public interest, that competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering, and that awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare. The Supreme Court flatly rejected the Society's arguments.

Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of the profession is nothing less than a frontal assault on the basic policy of the Sherman Act.

The Sherman Act reflects a legislative judgement that, ultimately, competition will produce not only lower prices but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

Id., 435 U.S. 695 (quoting *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 248 (1951)). The Court found that the Society's rule was an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. *Id.*, 435 U.S. 692. Therefore, Section 11(c) violated the Sherman Act on its face.

While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive nature of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the

ability to utilize and compare prices in selecting engineering services.” *On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.*

Id., 435 U.S. 692-693 (citations omitted; emphasis added). The Court then upheld the lower court’s order enjoining the Society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical. *Id.*, 435 U.S. 697, 699.

In view of the Supreme Court’s ruling, it is the opinion of this Office that that the language of 25 GAR § 1206(b) of the PEALS Rules of Professional Conduct is likewise contradictory to and therefore in violation of § 1 of Sherman Antitrust Act. The PEALS Board cannot lawfully forbid its registrants from offering prices in their bids as this would be an unlawful restraint on trade. Section 1206(b) is unenforceable.

Having determined that the prohibition on competitive bidding found at 25 GAR § 1206(b) is unenforceable, we have determined your next question concerning whether Guam’s procurement laws which *require* competitive bidding violate the Code of Ethics to be moot.

CONCLUSION

The PEALS Board’s Rules of Professional Conduct which forbids registrants from submitting proposals based upon competitive bidding is an unlawful restraint of trade in violation of § 1 of the Sherman Antitrust Act. It therefore unenforceable.

We trust this addresses your inquiry. For further information concerning this matter, please use the reference number shown above.

Respectfully submitted,


Karl P. Espaldon
Deputy Attorney General