

The United States Supreme Court Decision in the Case of the National Society of Professional Engineers

The decision does not require competitive bidding, it only states that the NSPE cannot prohibit its members from engaging in bidding if they wish to do so.

ON APRIL 25, 1978, Justice Stevens delivered the opinion of the Supreme Court of the United States in the matter of the suit against the National Society of Professional Engineers (NSPE) brought by the United States (Department of Justice). This suit was a civil antitrust action against NSPE in which the NSPE Canon of Ethics prohibiting its members from submitting competitive bids for engineering services was alleged to be suppression of competition in violation of the Sherman (Antitrust) Act. The decision rendered by the Supreme Court has provoked a great many conclusions which affect members of the American Society of Photogrammetry.

NSPE prepared an extensive and voluminous record in its defense which was heard initially by the District of Columbia Court, then by appeal to the U.S. Court of Appeals, and finally by the Supreme Court on a writ of Certiorari (a demand by a superior court directing an inferior court to send up to the former a pending proceeding—literally, to be informed of or to be made certain in regard to) to the Court of Appeals.

NSPE defended its canon prohibiting competitive bidding under the Rule of Reason because the canon was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work, endangering the public safety. The District Court, granted an injunction against the canon, rejected the justification holding that the canon on its face violated Section 1 of the Sherman Act, thus making it unnecessary to make findings on the likelihood that competition would produce dire consequences envisaged by NSPE. The Court of Appeals affirmed, but modified, a portion of the District Court's decree. A three part decision was delivered by the Supreme Court which basically affirmed the Court of Appeals. A final judgment by the District Court was prepared and rendered on August 3, 1978.

Of primary concern to photogrammetric engineers is the fact that the Supreme Court did *not* state or imply that competitive bidding is good, desirable, or necessary in obtaining engineering services. The Court merely held that NSPE, as a private organization, could not proscribe its members from engaging in bidding if they wanted to do so. If anything, the Court recognized the dangers to both quality and safety by a bidding process, but nevertheless said that the Society could not bar its members from engaging in such practices under the Sherman Act standard. Further, the Court specifically recognized that individuals and organizations have a right to lobby for legislation along the lines of the Brooks Law and similar state laws. Also, it indicated that state and local governments have an undoubted right to adopt laws and regulations calling for professional selection procedures.

Some governmental agencies are citing the Supreme Court's decision as requiring that bids be taken for all professional services. Other agencies add that competitive bidding roots out corruption and serves as a means of obtaining professional services at a reduced cost. Regretfully, many engineers are uninformed on these matters and they too are demanding competitive bidding for surveying and photogrammetric engineering services.

As outlined above, the Supreme Court decision does *not* require competitive bids nor does the Sherman Act. The recent GSA procurement scandals regarding the procurement of equipment and supplies on a bid basis are a case in point attesting that bidding does not eliminate corruption. One only has to read the newspapers to know that bidding is not a guarantee against outright corruption or the prevention of political influence in the award of contracts.

An infinite number of cases can be cited to prove that the lowest bid does not necessarily result in the lowest overall cost. The old cry, "Bid as

low as you dare, but make your money on the extras," is inevitable and the resulting relationship between a client and his engineer assumes an arms length status which is not conducive to the completion of professional assignments. By requesting bids, a client assumes the responsibility for defining the scope of the services required and, thus, does not take full advantage of the knowledge and background of qualified professional photogrammetrists engaged in providing such services. All too few administrators and even engineers are knowledgeable in surveying and photogrammetry, and their inadequacy in this regard is apparent in their requests for bids.

Gunther Greulich of Boston Survey Consultants has provided us with some notable quotes on the subject of bidding:

- *Confucius* said, "Pity the man who knows the price of everything and the value of nothing."
- *John Ruskin* said, "There is hardly anything in the world that some man cannot make a little worse and sell a little cheaper, and the people who consider price only are this man's lawful prey."

"It's unwise to pay too much, but it's worse to pay too little. When you pay too much, you lose a little money—that is all. When you pay too little,

you sometimes lose everything . . . because the thing you bought was incapable of doing the thing it was bought to do. The common law of business balance prohibits paying a little and getting a lot—it can't be done." "If you deal with the lowest bidder it is well to add something for the risk you run, and if you do that you will have enough to pay for something better."

- *Will Rogers* said, "It's not what you pay a man, but what he costs you that counts."

The decision of the Court makes it clear that societies and professional organizations (specifically NSPE) *cannot* "prohibit, discourage, or limit the submission of price or price quotations for engineering services. . . ." nor can they inform their members "that competition by members (of NSPE) based upon engineering fees is unethical, unprofessional, contrary to the public interest, or contrary to any policy of the defendant (NSPE)." As previously noted, neither the Sherman Act or the Court's decision require competitive bidding nor do they affect existing state laws governing the procurement of engineering services. Engineers may and should point out the advantages of professional selection and negotiation procedures in dealing with clients.

34th Annual Conference and Exhibit Society of Photographic Scientists and Engineers

New York City
10-14 May 1981

In keeping with the aims of the Society, ". . . to advancing the application of science and technology to photography and of photography to the sciences, industry, and education," session topics for this 1981 Conference include applied photography; business graphics/graphic arts; chemical photography mechanism; conservation and ecology; electronic data storage and retrieval; electronic journalism; electrophotography; imaging materials for the electronics industry; laser imaging; medical photography; NASA technology in imaging; novel image optics; optical and mechanical product evaluation; photo-finishing processing; photo-technology education; quality control in the photographic industry; scientific photography; silver halide materials and techniques; and unconventional imaging systems/materials.

For further information please contact

Society of Photographic Scientists and Engineers
1411 K Street, NW, Suite 930
Washington, DC 20005
Tele. (202) 347-1140