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June 10, 1996

Anne K. Bingaman, Esq.
Assistant Attorney General
Department of Justice, Antitrust Division
Main Justice Building
10th & Constitution Ave., N.W.
Washington, D.C. 20530

Re: Request for Business Review Letter

Dear Assistant Attorney General Bingaman:

On behalf of the seventeen lawyers identified in the attachment to this letter, this is to request a statement, pursuant to the Department of Justice Business Review Procedure, 28 C.F.R. § 50.6, of the Department's present enforcement intentions regarding a proposal by the said lawyers to offer a new form of legal services to clients engaged in the U.S. and international construction industry.

Participants in the construction industry (owners, contractors, design professionals, subcontractors and suppliers) have rebelled against the cost, inconvenience and uncertainty of traditional dispute resolution through arbitration or litigation. While the industry has embraced many forms of alternative dispute resolution (ADR) such as mediation, dispute review boards and partnering, ADR frequently produces unsatisfying results inconsistent with perceived contract rights and obligations. To ameliorate these industry concerns, a group of seventeen senior construction lawyers from sixteen unrelated law firms in thirteen different cities propose to offer a new form of legal service to be known as Flat Fee Dispute Avoidance.

The essence of the service is that the participating lawyers will guide their respective clients through a construction project from contract structuring through performance and dispute resolution so as to entirely avoid entanglement in arbitration or litigation. While it may be appropriate to employ certain forms of ADR, such as partnering, the lawyers involved will

seek to promote consensual dispute resolution through reasonableness and compromise. Current forms of representation foster tendencies to prolong and intensify disputes, whereas this new approach would create the opposite incentives. The lawyers and their firms are sufficiently convinced of their ability to avoid prolonged disputes that they are willing to share the risks with their clients by offering representation for a flat fee returnable in full if, at either client's discretion, litigation or arbitration should be required.

The services will be offered and promoted by group members on the basis that each major participant in a construction project (e.g., owner, contractor and design professional) will hire a member of the group, and that all of the members who are retained will accept the same flat fee and refund structure so as to assure that there are shared incentives. The obvious financial risks to the group members will generally be acceptable to them because they each have confidence in the judgment and ability of the others, and they know that each will have the same risks and incentives. Each member will be free to establish the proposed amount of his flat fee independently, and each member will be free to compete for the business on the basis of the fee he proposes to charge. Each member and firm will also be free to market services independently on the same or different terms, and with or without participation by other group members.

This new service will be offered on a national and international basis and there is considerable geographic dispersion among the group members. The group consists of only seventeen of the thousands of lawyers that practice in the construction and ADR areas (the current membership of the American Bar Association Forum on the Construction Industry, the professional group to which most construction lawyers belong, is over 5,000). Accordingly the participants do not have market power.

The participating attorneys who propose this service will remain free to withdraw from the program at any time and to accept client engagements on other or similar terms without withdrawing from the program. Thus, for example, a member is free to accept an engagement on exactly the same terms as this program contemplates except that his counterpart is not a member of the group. There will nothing to prevent any competing group from offering the same service on the same terms.

To the extent that this service successfully avoids traditional dispute resolution, it should be financially beneficial to the clients because their gross legal fees will likely be less than they are currently experiencing, and the fixed nature of the fee allows for reliable budgeting and planning. Thus, from the standpoint of the client consuming these legal services, the services will

be purchased because, among other things, there is both certainty as to and an overall reduction of the legal costs incident to a specific construction project.

Thank you for your consideration of this request.

Yours truly

Jesse B. Grove, III

JBG/jh
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