

IN THE MATTER OF

ASFE

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3430. Complaint, June 11, 1993--Decision June 11, 1993*

This consent order prohibits, among other things, a Maryland-based association of engineering firms from engaging in a variety of practices designed to prevent its members from participating in price competition, giving favorable pricing or credit terms, engaging in competitive bidding, or advertising. The order also requires the respondent to remove from its policy statements or guidelines any statements that violate the order.

Appearances

For the Commission: *Renee S. Henning, Ronald B. Rowe and Norris E. Washington.*

For the respondent: *Richard J. Favretto and Kerry Edwards Cormier*, in-house counsel, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that ASFE, the Association of Engineering Firms Practicing in the Geosciences (hereinafter sometimes referred to as "respondent" or "ASFE"), a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. ASFE is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland. ASFE has its principal office and place of business at 8811 Colesville Road, Suite G106, Silver Spring, Maryland. ASFE

is an association serving or representing geotechnical engineering firms and other engineering firms that practice in the geosciences. In 1986, ASFE had approximately 300 member firms. These members did work in geotechnical engineering. ASFE members have provided geotechnical engineering services or other engineering services for a fee. According to ASFE, in 1986, the business volume of ASFE members was about \$368,000,000, and, in 1987, ASFE members were responsible for an estimated 80% or more of all consulting geotechnical engineering contracted for annually in the United States. In 1991, ASFE had approximately 330 member firms. Some ASFE members have provided geotechnical engineering services or other engineering services throughout the United States.

PAR. 2. Geotechnical engineering is the branch of civil engineering that deals primarily with foundations, soils, rocks, and other earth materials. Geotechnical engineers develop foundation design recommendations for dams, buildings, and other structures and provide other soil and foundation engineering services.

PAR. 3. ASFE's functions include substantial activities that further its members' pecuniary interests. By virtue of its purposes and activities, ASFE is a corporation within the meaning of Section 4 of the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been restrained as herein alleged, members of ASFE have engaged in competition among themselves or with others in the geotechnical engineering business or in other engineering businesses.

PAR. 5. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the late 1970s, ASFE implemented the first association peer review program in engineering. As part of the ASFE peer review process, ASFE peer reviewers have examined, among other things, ASFE members' policies or practices as to bidding, including competitive bidding; pricing; credit terms; and advertising. Policies or practices of ASFE members competing in

geotechnical engineering have been reviewed by other ASFE members competing in geotechnical engineering.

PAR. 7. Terra Insurance, Ltd. (hereinafter sometimes referred to as "Terra"), has provided, directly or indirectly, professional liability insurance to ASFE members. Firms that founded ASFE in the late 1960s also founded Terra or a predecessor to Terra. Terra shareholders have been ASFE members. Terra's geotechnical professional liability insurance program has been restricted to ASFE members. ASFE peer review has been a condition of obtaining or retaining Terra's geotechnical professional liability insurance program coverage.

PAR. 8. The application or approval process for obtaining professional liability coverage from Terra or an insurance firm chosen by Terra has taken into consideration an insurance applicant's policy or practice as to bidding, including competitive bidding; pricing; credit terms; and advertising. Terra or an insurance firm chosen by Terra has reviewed the amount of the applicant's work obtained on a bidding basis and the applicant's pricing. During that review, the insurance firm has given a reduced score in the application or approval process to an ASFE member considered to be engaging in too much bidding or to be charging too low prices. Low scores in the process have affected insurance applicants' likelihood of receiving Terra professional liability insurance.

PAR. 9. Members of other professional organizations, acting for themselves or on behalf of a client, have sometimes requested bids from ASFE members. ASFE and at least one national professional organization worked out an anti-bidding arrangement under which ASFE has asked ASFE members to notify ASFE of any bid solicitation from any of this organization's members. Pursuant to this arrangement, ASFE has reported to this organization bid solicitations from the organization's members, with the purpose of discouraging such bid solicitations through the intervention of this organization.

PAR. 10. Some ASFE members have declined to bid on a certain project with the knowledge, understanding, or agreement that

another member or another engineering professional would also decline to bid on that project.

PAR. 11. Some ASFE members have exchanged with, or have provided to, another member or another engineering professional competitively sensitive information, such as a fee schedule, salary schedule, contract, or other financial data. Members have given such information to other members or other engineering professionals through the ASFE peer review program, by telephone, by mail, or by other means.

PAR. 12. Respondent has acted as a combination of at least some of its officers or members, or has combined or conspired with at least some of its officers, its members, or others, to, among other things:

- a. Impede or restrain bidding, including competitive bidding, through the use of a peer review program, an insurance program, or other means;
- b. Raise prices through the use of a peer review program, an insurance program, or other means;
- c. Refuse to submit bids to bid requestors;
- d. Exchange price information, salary information, contract information, other financial information, or other information that facilitates anticompetitive collusion;
- e. Impede or restrain credit, including interest-free credit, through the use of a peer review program, an insurance program, or other means; and
- f. Impede or restrain advertising, including self-laudatory advertising.

PAR. 13. The aforesaid acts and practices of respondent have had the purpose, effect, tendency, or capacity of:

- a. Raising prices of members of ASFE;
- b. Hampering or restraining price competition or other competition in the provision of geotechnical engineering services or in the

provision of other services in the United States, in portions of the United States, or among members of ASFE;

c. Depriving the public of the benefits of competition by hampering or restraining price competition or other competition for such services; or

d. Hampering or restraining certain advertising by members of ASFE .

PAR. 14. The aforesaid acts and practices of respondent constituted, and now constitute, unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, will continue or recur in the absence of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record

for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent ASFE, the Association of Engineering Firms Practicing in the Geosciences, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland. Respondent has its principal office and place of business at 8811 Colesville Road, Suite G106, Silver Spring, Maryland.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. "*ASFE*" or "*respondent*" means ASFE, the Association of Engineering Firms Practicing in the Geosciences, a corporation, its predecessors, subsidiaries, successors, and assigns, and their respective directors, officers, committees, other organizational subgroups, agents, representatives, and employees, and their respective successors and assigns;

B. "*Bidding*" or "*competitive bidding*" means a method of procurement whereby one or more engineering professionals are asked to submit or do submit a partial or full bid, fee quotation, price quotation, cost estimate, cost proposal, or fee schedule, or a proposed partial or full bid, fee quotation, price quotation, cost estimate, cost proposal, or fee schedule (for work of which any part is to be or was performed by, or under the direction, supervision, or guidance of, an engineering professional). For purposes of this order, "*bidding*" or "*competitive bidding*" also means a request (to an engineering professional) for a partial or full bid, fee quotation,

price quotation, cost estimate, cost proposal, or fee schedule, or a proposed partial or full bid, fee quotation, price quotation, cost estimate, cost proposal, or fee schedule;

C. "*Engineering professional*" means an engineering firm, an engineer or other employee of an engineering firm, a design consultant firm, a design consultant or other employee of a design consultant firm, a design professional firm, a design professional or other employee of a design professional firm, a design firm, a designer or other employee of a design firm, a member of ASFE, or an employee of a member of ASFE;

D. "*Insurer*" means an insurance firm, a reinsurance firm, or a person that performs any underwriting service or any other insurance-related or reinsurance-related service;

E. "*Member*" means an engineering firm or other person that belongs to ASFE;

F. "*Or*" means "and/or." (In other words, for purposes of this order, "or" includes "and" and may have a disjunctive or conjunctive meaning; *provided, however*, that in sentences where "or" is preceded by "either," that "or" has only the disjunctive meaning.);

G. "*Peer review*" means the examination or review of any policies or practices of any engineering professional by another engineering professional or by the respondent; and

H. "*Person*" means a natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity.

II.

It is ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Entering into, threatening or attempting to enter into, participating in, or carrying out any agreement, between or among

engineering professionals, to withdraw from, threaten to withdraw from, refuse to enter into, or threaten to refuse to enter into, bidding; or

B. Disseminating to any engineering professional any information relating to any specific, named or unnamed, engineering professional's intention or decision with respect to engaging in or not engaging in bidding.

III.

It is further ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from restricting, regulating, impeding, declaring unethical, interfering with, or advising against any engineering professionals:

A. Engaging in or being asked to engage in price competition or bidding;

B. Offering or charging or being asked to offer or charge a low price, a price below another engineering professional's price, a reduced price, or any particular price;

C. Offering or granting or being asked to offer or grant interest-free credit or any other credit term; or

D. Engaging in or being asked to engage in advertising, other than false or deceptive advertising.

Nothing contained in Parts II and III of this order shall prohibit respondent from disseminating truthful and non-deceptive information relating to the effect of any method of procurement upon public health, safety, and welfare, or liability exposure, including information regarding advantages or disadvantages of any method of procurement, provided that, for a period of ten (10) years after the date this order becomes final, any such information shall be accompanied by a statement that respondent takes no official position with respect

to any method of procurement and that the ultimate choice as to the method of engaging the services of an engineering professional in any circumstance is a matter of independent judgment freely exercised by individual engineering professionals and their prospective clients.

IV.

It is further ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from initiating, promoting, adopting, entering into, continuing, carrying out, or pursuing any peer review program; or other plan or course of action, that calls for or authorizes or that ASFE knows or has reason to know allows any review, evaluation, or consideration of any engineering professional's fee schedule; contract containing any pricing information or credit term; price proposal; or policy or practice concerning pricing, bidding or other method of procurement of the services of an engineering professional, or any credit term.

V.

It is further ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from disseminating to any insurer any information relating to any engineering professional's fee schedule; contract containing any pricing information or credit term; price proposal; pricing; bidding or other method of procurement of the services of an engineering professional; credit term; or advertising.

VI.

It is further ordered, That respondent, individually or in concert with any other person, directly or indirectly, through any corporate or other device, in connection with any of respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from stating that any of the following activities affects any engineering professional's ability to obtain or retain insurance:

- A. Engaging in or being asked to engage in price competition or bidding;
- B. Offering or charging or being asked to offer or charge a low price, a price below another engineering professional's price, a reduced price, or any particular price;
- C. Offering or granting or being asked to offer or grant interest-free credit or any other credit term; or
- D. Engaging in or being asked to engage in advertising.

VII.

Nothing contained in this order shall prohibit respondent from:

- A. Exercising rights protected under the First Amendment to the United States Constitution to petition any federal or state government executive agency or legislative body concerning legislation, rules, or procedures, or to participate in any federal or state administrative or judicial proceeding; or
- B. Formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to advertising representations that are false or deceptive.

VIII.

It is further ordered, That, within ninety (90) days after the date this order becomes final, respondent shall remove from its policy statements or guidelines and from any of its governing documents or other publications any provision, policy statement, or interpretation of policy that is inconsistent with the provisions of Parts II, III, IV, V, VI, or VII of this order.

IX.

It is further ordered, That, for a period of five (5) years after the date this order becomes final, respondent shall maintain in its files a copy of the minutes of each meeting of its members and of each meeting of its board of directors; a copy of all correspondence relating to price competition, competitive bidding, other method of procurement of the services of an engineering professional, engineering professional fee or price or pricing, credit, or advertising; and a copy of all of its publications relating to price competition, competitive bidding, other method of procurement of the services of an engineering professional, engineering professional fee or price or pricing, credit, or advertising. Respondent shall make such copies of minutes, correspondence, and publications available for inspection and copying by representatives of the Federal Trade Commission upon written request and reasonable notice.

X.

It is further ordered, That, within forty-five (45) days after the date this order becomes final, respondent shall mail to each of its directors, officers, employees, and members a copy of the order and complaint in this proceeding.

XI.

It is further ordered, That, for a period of five (5) years after the date this order becomes final, respondent shall provide a copy of the order and complaint in this proceeding to each new employee of ASFE at the time that employee is hired and to each new applicant for ASFE membership at the time that applicant becomes a member of ASFE.

XII.

It is further ordered, That: (A) within ninety (90) days after the date this order becomes final, respondent shall file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order; and (B) one year from the date this order becomes final and continuing annually for four (4) years thereafter and at such other times as the Commission may by written notice request, respondent shall file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order.

XIII.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the respondent that may affect its compliance obligations arising out of the order.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I concur in the Commission's decision today to accord final approval to the Consent Order with the Association of Soil and Foundation Engineers ("ASFE"). I find more than sufficient reason

to believe that ASFE's actions violate Section 5 of the FTC Act. But I am concerned that the Consent Order with ASFE may be interpreted to permit the very activity it is aimed to prevent. ASFE's troublesome activities can be characterized accurately as a concerted campaign to prevent its members from bidding competitively against each other. In the place of competitive bidding, ASFE encouraged "negotiated contracts," in which an engineering firm is selected prior to any discussion of price. In its newsletter, ASFE has boasted of its widespread success in discouraging competitive bidding. Moreover, there is clear evidence that negotiated contracts result in higher prices than competitive bidding.

The actions of ASFE include a grass-roots campaign to discourage members from competitive bidding, another campaign to discourage customers (including local, state, and federal government agencies) from soliciting bids, a peer review program that criticized members for bidding and sometimes suggested price increases to members, and misrepresentations to members about the effect of competitive bidding on their liability insurance coverage.

In addition to the fact that this activity is facially egregious, it flies in the face of the Supreme Court's ruling in *National Society of Professional Engineers*.¹ In that case, the Court held unlawful a professional association's canon of ethics prohibiting its members from competitive bidding, finding: "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement . . ."² The Court went on to reject the claimed defense that bidding adversely affected the quality of services, stating that such a defense was "nothing less than a full frontal assault on the basic policy of the Sherman Act . . . tantamount to a repeal of the statute."³

Even though ASFE did not forbid competitive bidding in a canon of ethics, it engaged in a concerted campaign to discourage bidding. This distinction can be relevant in cases in which the

¹ 435 U.S. 679 (1978).

² *Id.*, at 692-93.

³ *Id.*, at 695.

potential competitive consequences of restraints are ambiguous. Anticompetitive consequences may not always be inferred when an association does not compel adherence, and when the degree of adherence is ambiguous. But in this matter, we have evidence that ASFE's campaign was widely successful in achieving an anticompetitive result.

Egregious violations such as those of ASFE merit strong action by the Commission. I would have preferred a stronger and more explicit reference in the Complaint to ASFE's anticompetitive campaign. The Complaint's vague references to actions that "impede or restrain" bidding⁴ do not specifically address the widespread and multifaceted campaign to thwart competitive bidding.

My concern with the Consent Order is with a possible interpretation of the "safe harbor" in Part III. While ASFE is ordered to "cease and desist from restricting, regulating, impeding, declaring unethical, interfering with, or advising against" bidding,⁵ the safe harbor permits ASFE to disseminate "truthful and nondeceptive information relating to the effect of any method of procurement upon public health, safety, and welfare, or liability exposure, including information regarding advantages or disadvantages of any method of procurement . . ."⁶ This safe harbor does not explicitly require substantiation, and it could be interpreted to allow unsubstantiated claims that otherwise violate the Order.

When the Commission enforces Section 5 of the FTC Act in consumer protection cases, we insist that an objective claim be supported by a reasonable basis for it to be "truthful and nondeceptive."⁷ In concurring with the Commission's decision to accord final approval to the Order, I do not interpret the safe harbor in Part III to allow ASFE to make unsubstantiated assertions to members, customers, and potential customers that otherwise violate

⁴ Complaint, paragraph 12.

⁵ Consent Order, Part III.

⁶ *Id.*

⁷ See FTC Policy Statement Regarding Advertising Substantiation, 104 FTC 839 (appended to *Thompson Medical Co.* 104 FTC 648 (1984)).

the Order. In my view, ASFE cannot take advantage of the safe harbor unless it bears the burden of substantiating such representations. Absent such a requirement, it appears that much of ASFE's egregious behavior may be "fenced out" rather than "fenced in" to the proposed Order.

Complaint

116 F.T.C.

IN THE MATTER OF

CONAIR CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3431. Complaint, June 14, 1993--Decision, June 14, 1993*

This consent order prohibits, among other things, a Connecticut-based manufacturer of personal health care and consumer electronic products from representing that sound waves emitted by the California Facial Skin Rejuvenating System, or by any substantially similar product that uses sound waves with a frequency of no more than 20 kilohertz, will firm and tone facial muscles or improve the efficacy of a facial skin clarifying toner or scrub. The order requires the respondent to have competent and reliable scientific evidence to support certain future representations it makes regarding sound waves emitted from any product.

Appearances

For the Commission: *Sylvia Kundig and Jeffrey Klurfeld.*

For the respondent: *Andrew Krulwich, Wiley, Rein & Fielding,*
Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Conair Corporation ("respondent"), a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Conair Corporation is a Delaware corporation, with its principal office or place of business at 1 Cummings Point Road, Stamford, Connecticut.

PAR. 2. Respondent is a manufacturer of personal health care products and consumer electronic and kitchen appliances. It has