

MINUTES

AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTRACT LAW QUARTERLY MEETING

DENVER, COLORADO
NOVEMBER 3, 2007
BROWN PALACE HOTEL

Prior Day Programs

At approximately 8:30 a.m. Chair Pat Meagher called the meeting to order.

The first order of business was to thank Agnes Dover and Dan Doogan for their efforts on the previous day's seminar. Pat mentioned it was one of the best attended and received seminars the Section has ever held. She also thanked Agnes Dover for managing the tour of the National Renewable Energy Laboratory (NREL) on Thursday and for arranging for the luncheon speaker for the seminar on Friday.

Approval of August 11, 2007 Annual Council Meeting Minutes

There was a motion to approve the minutes of the annual meeting. The motion was seconded and approved by unanimous voice vote.

Chair's Introduction of New Council Members/Officers

Pat then welcomed the new Council Members Linda Maramba of Northrop Grumman, Annejanette Heckman of EDS, Mark Hanson of Smith Pachter, Rocco Maffei of Lockheed Martin, and Ty Hughes, Office of the Air Force General Counsel. She also welcomed the new Secretary, Don Featherstun of Seyfarth Shaw. Mike Hordell moved that the Council extend a formal welcome to the new Council Members and Secretary. The motion was seconded and passed by unanimous voice vote.

Scholarship Application Decision

Jenny Kim then presented the proposed draft scholarship application. The first point she made was that the question regarding racial diversity was vetted with the ABA and found to be proper as long as it was optional.

A motion was made to delete the second subpart question of questions 2 and 3 which dealt with having the applicant make a commitment to maintain both an ABA and Section membership in return for receiving the scholarship. This motion also included a requirement that either the form or the scholarship description express the desire of the section to have the recipient maintain both memberships. The motion was seconded and passed by unanimous voice vote.

Legislative Coordinating Committee Report

Todd Overman then reported on the activities of the Legislative Coordinating Committee. He mentioned the new co-chair Roger Waldron. The Committee meets on a monthly basis. In October they had approximately 40 attendees. He took the Council briefly through the three different exhibits to his report.

He then addressed the False Claims Corrections Act of 2007. He presented five major revisions. They were (1) modifying the Act to include liability for property as well as money; (2) revisions to the Public Disclosure bar; (3) liability for non-U.S. Government funds when funds are placed in the trust and control of the U.S. Government; (4) revising the statute to allow Federal employees to pursue a claim if the U.S. Government fails within twelve months of filing an action to take up this action; and (5) amending the statute of limitations to ten years.

Procurement Fraud Committee

Bob Huffman reported on the Procurement Fraud committee and its upcoming meeting on November 14, 2007. There will be two speakers addressing the proposed changes to the False Claims Act statute. Jeff White of Taxpayers Against Fraud and Jack Boese from Fried Frank will each address the proposed revisions.

Pat urged the group to consider the possibility of a white paper to discuss the changes, but cautioned that it would be important that the panel include all stakeholders' views.

Use of White Papers

Pat then mentioned that she was appointing a task force to look at when a white paper is appropriate and what the boundaries and uses of the white paper will be. The task force includes Greg Smith, Al Purdue and Sandy Hoe. Anyone who is interested in participating should contact any of these three.

Contractors in the Battle Space

At this stage Mike Mutek made a presentation concerning contractors in the battle space. He noted there was a draft letter for dissemination to the Council which had been circulated on November 1, 2007. He noted that Pat Wittie had spotted the issues several years ago which led to the white paper, a task force and eventually a committee.

Mike pointed out that Tab 4 of the Council book included a background DoD Memorandum and a DoD Instruction on the criminal jurisdiction over civilians employed by or accompanying the Armed Forces outside the United States.

Draft Letter on H.R. 2740 Military Extraterritorial Jurisdiction Act

The Council then considered a proposed draft letter for comment on H.R. 2740, the Military Extraterritorial Jurisdiction Act (MEJA) which provides for the extension of the MEJA to all agency contracts and contractors and contractor personnel "where the work under such contract is carried out in an area, or in close proximity to an area where U.S. Armed Forces are

conducting contingency operations.” The bill also provides for the Department of Justice (DOJ) Inspector General (IG) to report on investigations and prosecutions under MEJA. The Federal Bureau of Investigation (FBI) is directed to establish a Theater Investigations Unit (TIU) to (a) investigate suspected criminal misconduct by contractor personnel; (b) investigate reports of fatalities resulting from potentially unlawful use of force by contractor personnel and (c) refer cases to the Attorney General of the United States where appropriate.

The draft comments expressed support for the intent of H.R. 2740. At the same time the draft comments suggested several steps to strengthen the bill. First, the comments suggest the Act require DOJ, in consultation with DoD and the Department of State, to issue regulations implementing the expanded jurisdictions. Second, the draft comments propose the Attorney General be empowered to appoint a U.S. Attorney to handle and prosecute as appropriate reports from the TIU.

The comments also requested that a distinction be made between contractors generally and private security contractors. The comments suggest that the use of deadly force by private security contractors should not raise a presumption of criminal activity in hostile environments like Iraq. The comments go on to suggest that the contracting agency be initially responsible for determining when the use of deadly force was “potentially unlawful.” The draft comments conclude by suggesting that Congress enact legislation requiring DoD, in consultation with DoS and other affected agencies to issue regulations governing the conduct of private security contractors.

The Council discussed the proposal but was not willing to put it to a motion for approval. Instead, the Council directed the Secretary to send a Sense of the Council email to Mike Love to help guide the Committee with its next draft, which was done.

There were many points raised and discussed during the debate. At a very high level it was clear that the Council believes it is essential that the Section be involved in commenting on the contract issues arising out of the contractors in the battle space. It was also clear that the Council is very appreciative of the excellent efforts of the Committee to date. With respect to the specific draft, there was a certain unease expressed during the discussion that the draft was focused in the criminal law area and might be outside the Section’s scope. In addition, it is clear that any comments will need to be shared and coordinated with at least the Criminal Justice and International Law Sections.

Some of the members of the Council were uncomfortable with the suggestion that the contracting agency be initially responsible for determining when the use of deadly force was “potentially unlawful.” At the same time, some Council members were concerned with what was viewed as another attempt to criminalize the contracting process. Other members seemed to view the determination of when the use of deadly force was appropriate as not a contracting function.

The sense of the Council was that future drafts in the contractors in the battle space area should be more focused on contracting issues. In addition, the Section should be concerned with contractor employees being treated fairly in the evaluation process. In addition, the Section should seek on contracts containing clear and understandable rules for contractors to follow.

There was also a sense that this is a highly complex area of the law and that the Council needs to be better educated on all of the issues so that as they arise, the Council will be better prepared to deal with the issues.

Norm Thorpe then provided historical context in an effort to support the sense of the Council that the Section has an important role in this area. Norm reminded the Section that twenty years ago the Section was involved with a five year effort to define the role of contracting officers in the procurement fraud area.

He also noted that prior to 1950, civilians at military facilities outside the United States were subject to military justice, including court martials, for their conduct overseas. He indicated that eventually the United States Supreme Court ruled that these laws did not apply to civilians.

Since that time, there has been a jurisdictional void. The question of what laws cover the conduct of civilian contractors working overseas has been handled under Status of Forces Agreement, particularly in NATO countries. In essence, the United States does not want its citizens subject to local jurisdictions. The Status of Forces Agreements generally prevent local jurisdictions from having jurisdiction over U.S. citizens.

Norm's conclusion was that the Section has a real role to play here. However, it is not on details of criminal law. He believes that we need to serve as the voice of the contracting officer and the contractor.

Acquisition Advisory Panel Recommendations

Roger Waldron then reported on the status of the Acquisition Advisory Panel Recommendations and related publications. He commented on the superlative efforts of both Marcia Madsen and Marshall Doke. He gave an overview of the recommendations and discussed the current efforts to implement. He noted that the FAR Council has opened FAR cases on many of the recommendations and that it is anticipated that they will soon begin to appear in the Federal Register for comment.

Roger Waldron also reported on S.680. There is no active opposition to it. However, industry groups have opposed a bid protest for task orders because it is feared that bid protests will bog down the process.

Combating Trafficking in Persons

The Section then focused on recent comments submitted on the proposed revisions to the FAR on Combating Trafficking in Persons. Pat Meagher complimented Mike Mutek and Tara Lee for their fine work. The coordination effort with the International Law Section, which contributed to the comments, was discussed. Also, the Section on Individual Rights and Responsibilities (IRR) was kept informed of the effort. At the conclusion of the discussion, a video recently run by Fox News Network concerning the apparent involvement of the U.S. military in prostitution near military bases in Korea was shown. Also, a Chicago Tribune report

concerning U.S. companies' treatment of foreign nationals under contracts with Iraq was discussed.

Research and Development

Next, the Research and Development committee made a brief report, presented by Bob Huffman and Herman Levy. In it they described their efforts to revitalize this committee. In particular, they hope to focus on the definition of "developed at private expenses" under Section 802(b).

State Legislative & Regulation Coordination Committee

Bryan Arnold then presented a short report on the State Legislative and Regulation Coordination Committee. He summarized his recent report on the status of State False Claims Act statutes. Bryan reported that in the last six months, five states have enacted FCA statutes similar to the Federal False Claims Act. There are now fourteen state statutes that have qui tam provisions. There are currently bills pending in ten states that would either create a status for whistleblowers similar to the Federal FCA or amend the States' current FCA versions in a significant way.

NASPO 2007 Cronin Award Winner

Richard Pennington then reported on the National Association of State Procurement Officials (NASPO) 2007 Cronin Award Winner, the State of Minnesota. Richard also reported on a letter authored by Pat Meagher for the Section which congratulated the State for its award. This letter is another step in the growing liaison between the two organizations.

ABA House of Delegates Vote on Individual Rights and Responsibilities Proposal on State Secret Privilege

John Pachter then reported on the Section's efforts to coordinate with the Individual Rights and Responsibilities Section at the Annual Meeting on the vote dealing with the State Secret Privilege. The Section's efforts resulted in the proposal being altered from one in which District Court judges were to look at claims of state secret privilege de novo to one in which Federal District Court judges were to look at whether the government had a rational basis for its claim. The proposal passed the House of Delegates and the Section was complimented on its constructive suggested changes.

Public Contract Law Journal 2007 Writing Competition

Karen Manos then reported on the Public Contract Law Journal 2007 writing competition. There were 14 students and 7 Young Lawyers who submitted articles. In the Young Lawyers Division competition, the winners were:

1. Ioannis Petrou, and
2. Jillian L. Morrison

An honorable mention was given to Todd J. Canni. Ioannis Petrou's article was "Institutional Purchasers in the Civilian Space Market in Europe and in the U.S., a Comparative Study of the Procurement Systems of the European Space Agency (ESA) and of the National Aeronautics and Space Administration (NASA)." Ms. Morrison wrote "Post Disaster Contracting: An Examination of the Costs Associated With the Stafford Act's Local Contracting Preference and Implementation Proposals to Maximize Community Revitalization." Mr. Canni wrote "Who's Making False Claims, the *Qui Tam* Plaintiff or the Government Contractor? A Proposal to Amend the FCA To Require All *Qui Tam* Plaintiffs Possess Direct Knowledge."

Karen also announced that the student winners had not yet been selected. She also announced the 2008 competition. Articles are due September 30, 2008.

CEELI Institute

Norm Thorpe then reported on his participation in the Central European and Eurasian Law Initiative (CEELI) course in procurement recently delivered by Norm, Carl Vacketta and others. Norm discussed how the organization helps to train judiciary from developing Eastern European countries on the basics of an independent judiciary. He noted how several of the judges trained by CEELI have been subsequently assassinated. He also spoke of the need for volunteers and the need for donations. He noted the course in government contracts was a two week course that may be given again. He mentioned that several U.S. law firms have sponsored a summer law intern in Prague and suggested perhaps there were others who would like to participate.

Sponsorships

Peter Balch discussed the efforts to obtain outside funding and mentioned that there were several opportunities for sponsorship available. He noted that since 2005, the Section has received \$152,000 from sponsors. The sponsorships are not exclusive so others can participate. He mentioned a need for a sponsor for the construction division lunch at the Federal Procurement Institute since Navigant had moved up to a gold level sponsor of the entire event.

Young Lawyers Committee and the International Procurement Committee

Jenny Kim reported on both the Young Lawyers Committee and the International Procurement Committee.

The Young Lawyers Committee arranged for a meeting and tour of the GAO. They had about 20 to 30 people attend. Many were government attorneys and some were law students.

On December 6, 2007, they are going to have a happy hour for the group. In the spring they hope to visit the Court of Federal Claims and also hope to visit the ASBCA.

On the International level, they have organized a three part teleconference on India procurement. The first two conferences were held on October 23 and November 14. On December 5, 2007 the third conference will occur and plans on covering the nuts and bolts of hiring consultants in India.

Adjournment

At 12:06 p.m. a motion was made and seconded to adjourn the meeting. It passed by unanimous voice vote.

Donald G. Featherstun
Secretary
Section of Public Contract Law
American Bar Association

ATTENDANCE ROSTER
November 3, 2007 Council Meeting

<u>Last Name</u>	<u>First Name</u>	<u>Title</u>
Neforas	Marilyn	Section Director
Leibas	Ernestine	Section Assistant
Manos	Karen	Vice-Chair
Meagher	Pat	Chair
Hordell	Michael	Immediate Past Chair
Mutek	Michael	Chair-Elect
Schaefer	Rob	Past Chair
Doogan	Dan	Council Member
Hoe	Sandy	Council Member; Co-Chair Finance
Pickens	Scott	Council Member
Pachter	John	Section Delegate
Svetz	Holly	Council Member
Thorpe	Norm	Past Chair
Joseph	Allan	Past Chair
Hanson	Mark	Council Member; Co-Chair Construction Division
Kim	Jenny	YLD Liaison; Co-Chair YLC
Williams	Mary Ellen	Section Delegate
Featherstun	Donald	Secretary
Park-Conroy	Carol	Budget Officer
Maffei	Rocco	Council Member; Co-Chair State & Local Division
Maramba	Linda	Council Member
Larkin	Sharon	Council Member
Innis	David	Council Member
Bell, Jr.	Hubert	Past Chair
Heckman	Annejanette	Council Member
Doke	Marshall	Past Chair

<u>Last Name</u>	<u>First Name</u>	<u>Title</u>
Vazakas	Tom	Section Member
Doyle	Gerry	Vice-Chair, Bid Protest
Lee	Tara	Section Member
Silberman	Aaron	Co-Chair, Construction Division
Stoughton	David	Section Member
Hickey	David	Vice-Chair, Professional Responsibility & Contracting Ethics
Arnholt	Richard	Young Lawyer Committee Co-Chair
Askew	Mike	Vice-Chair, Bid Protest Committee; R&D and IP Committee
Colley	Mark	FPI Co-Chair; Vice-Chair Bid Protest
Ford	Burt	Section Member
Gardner	Rob	Associate Member
Ash	George	Section Member
Walz	Jerry	Section Member
Ricketts	Robin	Co-Chair, Strategic Alliances, Teaming & Subcontracting Committee
Overman	Todd	Co-Chair, LCC
Dover	Agnes	Hogan & Hartson
Williams	Steven	Hogan & Hartson
Greene	Boyd	Federal Court
Whytzell	Eric	Jackson Kelly
Lathrop	Bruce	Law Offices of Bruce Lathrop
Levy	Herman	Co-Char, R&D and IP; Vice-Chair RCC, CPS, CSP; Assistant Ed. PCLS TPL
Huffman	Bob	Co-Chair, Procurement Fraud Committee; R&D and IP Committee

<u>Last Name</u>	<u>First Name</u>	<u>Title</u>
Balch	Peter	Co-Chair, Federal Procurement Division
Langevin	Mark	Vice-Chair, Accounting, Cost & Pricing
Rose	Mike	Section Member
Ostiller	Rick	Associate Member
Owren-Wiest	Nicole	Vice-Chair, Accounting, Cost & Pricing
Davis	Philip	Vice-Chair, Professional Responsibility & Contracting Ethics
Khoury	Paul	Co-Chair, Quarterly & Annual Programs; Co-Chair Bid Protest
Kasanow	David	Co-Chair, Bid Protest
Purdue	Al	Section Member
Jones	John	Section Member
Ehrhart	Dave	Section Member
Dickson	Alan	Strategic Alliances Committee Member
Waldron	Roger	Co-Chair, Legislative Committee
Pompeo	Paul	Co-Chair, Accounting, Cost & Pricing Committee