

## MINUTES

### AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTRACT LAW MIDYEAR COUNCIL MEETING

MARCH 6, 2010

LOEWS ANNAPOLIS HOTEL  
ANNAPOLIS, MARYLAND

#### Call to Order

Section Chair Karen Manos called the meeting to order at 8:47 a.m.

At Chair Manos's request, the Officers, Past Chairs, Council members, liaisons introduced themselves.

Charles English, the ABA Board of Governors liaison to the Section was introduced and briefly addressed the meeting. He complimented the Section's membership and professionalism. He explained that the new ABA dues structure reduces dues for small/solo firms and government lawyers, and includes a free Section membership.

#### Approval of Minutes

A motion was made to approve the minutes of the November 14, 2009 Fall Meeting of the Section Council. The motion was seconded and the minutes approved by unanimous vote.

#### Accounting Cost & Pricing Committee

Jay Weitzel reported on a variety of Committee activities, including its focus on anticipated CAS Pension Harmonization rule and the coming impact of migration to IFRS in place of GAAP (particularly in light of FAR references to GAAP). In addition, the Committee next week will be conducting a webinar regarding implementing the *Tecom* decision.

The Committee is preparing comments on a proposed DFARS rule issued in January that would allow Administrative Contracting Officers to withhold payments if they determine that a contractor's business systems contain deficiencies. 75 Fed. Reg. 2457 (Jan. 15, 2010). The proposed rule provides that the contracting officer (CO) will have responsibility to decide whether a contractor's business systems are deficient. The proposed rule also delineates what will constitute an adequate system. There is a process provided to impose penalties for deficient systems: the auditor (or other functional specialist) will make a deficiency finding; a report is then presented to the CO (to include potential magnitude of the amount at risk); the CO will then make a determination and advise the contractor; the contractor will have time to respond; if the contractor disagrees, then the CO can withdraw or insist on correction within 45 days; if not corrected, then a 10% (or greater, up to 100%) payment withhold may be applied (and perhaps other actions as allowed by the contract). Weitzel briefly reviewed some of the issues the Committee intends to address in the comments being prepared for Council consideration,

including various implications of the new proposed oversight activity, and the intersection with existing oversight authorities and remedies.

### **Anticipated Comment Letters Regarding Limits On Employee Arbitration**

Michael Mutek, David Stoughton and David Dowd discussed a comment letter being developed regarding the so-called “Franken Amendment” (Section 8116 of the 2010 Defense Appropriation Act). This provision requires that government contractors performing contracts valued over \$1M amend employment agreements so that there is no requirement to arbitrate Title 7 disputes. Contractors must flow this requirement down to subcontracts in excess of \$1M.

The Department of Defense (DoD) subsequently issued a comparable DFAR class deviation requiring certification that employees working on a contract are not required to arbitrate Title 7 claims. The deviation does not require mandatory flow down, but does require that the certification encompass “covered subcontracts” (which is not defined).

Neither the Amendment nor the deviation reference what subcontract tiers may be affected, and to which tier the prime must certify compliance.

An interim rule is anticipated, and comments have been invited by DoD in advance of its issuance of the interim rule. The Comments being prepared now will focus on the class deviation, and there will be another opportunity to comment on proposed rules.

Past Chair Don Gavin noted that amendments to the Federal Arbitration Act currently under consideration propose similarly to limit mandatory arbitration imposed on consumers, employees and franchisees.

### **Comment Letter On Pass-Through Charges**

Michael Mutek and David Stoughton discussed a Comment letter that the Section presented to GSA on an interim rule issued October 14, 2009, regarding limitations on pass-through charges. The Comment letter built on prior Comment letters that the Section has submitted on previous interim regulations in this area. The Section continued to encourage issuance of additional guidance and clarifications in order to facilitate application of the rule in a variety of complicated areas. The Section’s Comment letter also flagged conflicts between the interim rule and other existing policies and the need for a consistent threshold for flowing down these requirements to subcontracts.

### **OCI/PCI Task Force**

Marcia Madsen and Ty Hughes discussed recent and anticipated developments regarding Organizational Conflicts of Interest (OCI) and Personal Conflicts of Interest (PCI). The FAR council has been considering a proposal to develop guidance in these areas. Marcia and Ty reported on their testimony at a hearing on provisions regarding OCIs in the Weapons Systems Acquisition Reform Act (WSARA), focusing on methods to mitigate OCI concerns. A DFAR proposal is anticipated soon, per direction in WSARA, but so far nothing has appeared. Marcia

explained that a task force is being formed, drawing members from multiple Section committees, and includes government representatives. Additional volunteers were solicited.

Chris Yukins noted that the OCI/PCI issues are being addressed in parallel with questions about what constitute “inherently governmental” activities. These two initiatives address similar concerns with regard to maintaining government control and objectivity over government matters.

### **ADR Committee Working Group**

Gerry Doyle presented an update from the working group of the Alternative Dispute Resolution Committee addressing implications of the Federal Circuit’s *Geren v. Tecom, Inc.* decision on alternative dispute resolution opportunities. That decision makes unallowable the costs associated with settlement of disputes unless a sufficient showing can be made that the underlying claim resolved had very little likelihood of success on the merits. An important issue is how this development impacts the viability of ADR as a means to resolve government contract claims. There is little guidance on how to determine when there is “very little likelihood of success.” In addition, various FAR and court rules encourage ADR processes to address claims, and the working group will be addressing the decision’s impact on these directives, as well as the complications in these settings associated with making the necessary showings to the contracting officer in order to recover costs. This may include very limited or restricted decisional materials regarding the resolution of the claim, thus undermining the ability to make the necessary showing of “very little likelihood of success.”

Don Featherstun commented that the *Tecom* decision has acted as a disincentive to settlement, and encouraged unnecessary litigation, which imposes additional costs on the government. He suggested that this is an area where industry and the government should be able to reach agreement on changing this policy. Linda Maramba noted that the ADR Committee’s working group is charged with trying to determine the best approach to deal with the *Tecom* decision’s implications, rather than pursuing actions to reverse or change the policy established by the *Tecom* decision.

### **Model Procurement Code**

Norman Thorpe presented a draft letter to the City of Detroit advocating consideration of the Model Procurement Code regarding contemplated improvements to the city’s business process. He encouraged the Section to reiterate its previous offers to help the city with such improvement efforts. Chair Manos suggested that the letter and offer of assistance should come from the Section, a position endorsed by Donald Featherstun. On motion made and seconded, the proposal was agreed to unanimously.

Mr. Thorpe also reported on his participation at a program in New York last November on “Building in the 21<sup>st</sup> Century” co-sponsored by the New York City Bar, The American Institute of Architects New York State, and Albany Law School. Mr. Thorpe participated on a panel that addressed the topic “Modernize Public Construction Procurement.”

## **ABA House of Delegates**

John Pachter reported for Allan Joseph on the House of Delegates' February meeting in Orlando. Former Section Chair Mary Ellen Coster-Williams was elected unanimously to the ABA Board of Governors at the meeting.

ABA's Executive Director, Hank White, resigned in late 2009. A committee, led by Chair of the House William Hubbard, is conducting the search for a successor. In the meantime, Tom Howell, currently the ABA General Counsel, is serving as the acting Executive Director.

The ABA is dealing with some serious financial problems. Primary among these is the cost of the ABA's Defined Benefit Pension Plan, which was impacted by adverse market conditions. ABA leadership and staff hope to advance a proposed solution before the Annual Meeting.

The House adopted a significant decrease in the ABA dues for solo-practitioners. In August, the House will consider a proposed dues decrease for Class 5 and Class 7 (lawyers with more than seven years of practice) by \$100, which is being contemplated as a means to reverse the decline in ABA market share of practicing lawyers. Joseph reports that he is among a group of "fiscal conservatives" who remain to be convinced that such a dues decrease has a significant enough chance of success to overcome the assured loss in general revenue at least for the short term. He communicated concern that such a revenue shortfall will affect not only the overall activities of the ABA, but will affect every entity of the ABA, including the Sections. When the Sections see the consequences, he believes they may have some serious concerns about this proposal.

The other major debate at the House of Delegates Meeting was on a proposal by the New York delegation to have the ABA go on record objecting to the on-going activity by U.S. News & World Report to rank law firms. The House adopted a resolution to study the matter.

## **Canada-US Procurement Agreement Negotiations**

Gerry Stobo reported on these negotiations relating to current disputes between the United States and Canada associated with the Buy American provisions of the American Recovery and Reinvestment Act (the "stimulus" bill). Canada has opened to U.S. vendors a number of markets at the provincial and municipal level as a result of agreements reached during these negotiations (provinces must sign on, but the provinces can commit their municipalities). Most Canadian government procurements had been open to U.S. vendors, but with some exceptions reserved to Canadian suppliers (which will not be opened as a result of this agreement). There are also some special rights extended for the protection of U.S. suppliers in connection with these procurements, which are not available to Canadian suppliers. The U.S. has agreed to open state procurements to Canadian vendors in the U.S. for the 37 states that have committed to WTO principles. The U.S. has not opened local/municipal government markets to Canadian vendors. The U.S. has also agreed to waive until September 2011 the Buy America limitations in Section 1605 of the stimulus bill with regard to seven U.S. programs being funded.

Notably, both governments have committed to trying to develop a continental procurement agreement (presumably also bringing Mexico into the dialog). This may be a significant opportunity for the future.

### **International Symposium**

Chris Yukins and Carolyn Lindsey from Trace, International reported on the Section's co-sponsorship of a special program on international and comparative public procurement law, the "U.S. – European Summer Procurement Law Institute" to be held at the Law School of the University of the Ruhr / Bochum (Germany) from July 19-24, 2010. The Institute will be run by Professor Martin Burgi, currently dean of the law school in Bochum, and by the Government Procurement Law Program at the George Washington University, which is co-directed by Chris Yukins, Steve Schooner and Joshua Schwartz. The event will be structured as a primer on U.S. and European procurement law. The last day will feature a forum on emerging issues in procurement law internationally with leaders from the United Kingdom, German and French procurement communities.

### **Comment letter on DFAR Class Deviation**

Michael Love and Jim McCullough reported on a comment letter that the Section has transmitted regarding a Class Deviation issued by the Department of Defense to implement Section 854 of the FY 2009 National Defense Authorization Act, which requires contractor self reporting of crimes committed by or against contractor employees in Iraq and Afghanistan.

The Comment letter suggests a number of clarifications and improvements in an effort to assist the Agency in implementing the Act's requirements more effectively and with fewer burdens.

Mr. Love credited Mr. McCullough, along with William Speros, Michael Navarre and Jerry Miles with having taken leading roles in drafting the Comment letter.

### **Comment letter on Proposed Personal Conflicts of Interest Rules**

Michael McGill from the Ethics and Professional Responsibility Committee reported on a January 12, 2010 Section Comment letter in response to the FAR Council's proposed rules under FAR Case 2008-025 regarding Personal Conflicts of Interest. The Section's Comments recommended that the FAR Council consider clarifying the definition of "acquisition function closely associated with inherently governmental functions" (a repeatedly-used and important term in the proposed rule), the financial interests that create PCIs, the requirements related to non-public government information (particularly the need for guidance regarding the scope of the rule and non-disclosure agreement issues), and the rule's application to subcontractors. The Section also suggested that the FAR Council consider further revisions regarding the requirement for mandatory financial disclosure by all covered employees, the time allowed for contractor investigations prior to disclosure, and the opportunity for waivers by the contracting officer.

## **Special Committee Presentation--Bid Protest Committee**

Sharon Larkin reported on the Bid Protest Committee, noting its high level of activity. Meetings held on the third Tuesday of each month are attended regularly by up to 100 members. Recent programs at these meetings have included subjects such as best practices, OCIs, corrective action, and debriefings. The March meeting will focus on the FAA Office of Dispute Resolution and Adjudication (ODRA) protest and ADR activities. A monograph is nearing completion regarding bid protest procedures at the Court of Federal Claims. The Congressional Research Service has contacted the Committee seeking input on its upcoming report on bid protest activity. Several Committee members will be supporting the Section's OCI task force.

Ms. Larkin reported on Mike Golden's recent retirement from being in charge of the GAO's bid protest operations, and praised his skill, leadership and many contributions to GAO, as well as his encouragement of GAO attorneys to be involved with the Section. Mr. Golden was applauded warmly in appreciation.

Ralph White is serving as acting director of the GAO protest function, and reportedly shares Mr. Golden's support for GAO attorney involvement with the Section.

Ms. Larkin also reported on recent statistics regarding protest activity at the GAO. There was a 20% increase from the prior year, which also had a 20% increase. The increase in merit decisions, however, is not similarly dramatic because so many cases are dismissed or resolved early. Changes in the sustain rate may not be particularly meaningful, given that the sustain rate is calculated by counting each protest when multiple protests were filed regarding a given procurement, which may skew the number up. Ms. Larkin also stressed that hearings are not held because there is some need to better understand the record or to address questions, not because a sustain is anticipated.

As for the increase in the number of protests, Ms. Larkin noted the expansion of GAO's jurisdiction the past couple of years to encompass protests involving task orders, TSA procurements, and A-76 competitions. Historically, there are about 1 1/2 protests per billion dollars in spending, so that increased spending may also account for some of the escalation in protests.

Ms. Larkin noted that CICA limits the extent of procurement delays. She noted that agencies can take efforts to expedite cases through case narrowing (through motions to dismiss), shortened deadlines by agreement, early document production, and ADR.

GAO does not track sustained protests, but she said there is no particular agency or type of procurement that stands out. She commented that protest issues being seen very frequently include problems arising from ill-defined requirements and lack of documentation. She also mentioned cost realism, price reasonableness and OCIs.

Congress asked GAO to testify before House Defense Appropriations Subcommittee. The discussion related to larger acquisition issues (such as acquisition workforce concerns). Sen. McCaskill's committee is also looking to schedule hearings on acquisition issues.

## **Commission on Women**

Ms. Larkin also reported in her role as the Section's liaison to the Commission on Women. The Commission's Women in Law Leadership (WILL) Academy will be hosting a two day program in Philadelphia on April 29 and 30. The Academy program is directed primarily at young women partners and associates, providing opportunities for mentorship and training with regard to professional and leadership development in areas such as business development, networking and marketing.

## **Special Committee Presentation--Contract Claims and Dispute Resolution Committee**

Co-chairs Stuart Nibley and Dan Graham reported on the Committee's activities, including in particular the Committee's annual program on "5 Most Important Government Contracts Related Decisions" (and follow-up webinar). This year the program turned somewhat on a theme regarding recent decisions dealing with so-called "plain language" contractual interpretation. Mr. Nibley elaborated on three of those decisions: Bell BCI Company v. U.S., Co., Lai Services, Inc. v. Gates, and States Roofing Corporation v. Winter. In the past, the "plain language" of a contract was typically interpreted in the context of the contract, and a variety of interpretation principles were commonly applied. These recent Federal Circuit cases have interpreted contract language independent of its context, historical practice, party intent and the like. In addition, the Circuit Court decisions to some extent appear to have reached into the fact finding province of the lower court. Mr. Nibley noted the concern shared by many that there is a need on the Federal Circuit for greater knowledge and expertise regarding government contracting matters. Mr. Nibley noted that a Webcast is scheduled for March 18 dealing with the U.S. Supreme Court's reversals of Circuit Court decisions, including the 83% reversal rate for cases heard from the Federal Circuit. Mr. Graham noted that the leadership of the Federal Circuit is changing, which may present an opportunity for the Section to air some of its concerns regarding the court's handling of government contract matters.

## **Special Committee Presentation--Legislative Coordinating Committee**

Kristen Ittig reported on the Committee's activity, presenting the legislative tracking chart that the Committee maintains and posts on the Section's website. With the focus last fall in Congress on health care reform legislation, there was less activity on acquisition reform than in recent years. Some Senate staffers have predicted a quiet year in 2010, but such predictions in the past have not proven accurate. Moreover, the draft report issued by the House Armed Services Committee's Defense Acquisition Reform Panel indicates a strong potential for more reform activity, especially related to services contracting and rapid acquisition methods. There is also a considerable amount of activity in both the House and the Senate on oversight. Additional False Claims Act amendments may be anticipated, as well as activity related to cyber security, acquisition workforce, small business contracting, private security contracting, and contractors in the battlefield.

The Committee heard reports at recent meetings regarding the prospect of legislation on services contracting and rapid acquisition methods, shifting emphasis from long term development programs to prompt purchases meeting unique needs (*e.g.*, MRAP). At least one speaker also noted concerns regarding inadequate publication of agency needs, with adverse

impacts on competition, and the prospect of repealing the stimulus act's provision requiring 3% withholding of contractor payments, but perhaps combined with a requirement to include tax payment history in past performance information. There will also likely be continuing attention on fraud in connection with HUBZone contracting.

The Committee was also tasked with providing a report on insourcing. The Committee presented a report, based in part on independent research but also on a program co-sponsored by the Acquisition Reform and Emerging Issues Committee and the Privatization, Outsourcing and Financing Transactions Committee, featuring former OFPP head Rob Burton, DLA's Elizabeth Grant, and PSC's Alan Chvotkin, who provided insights on the developing redirection in Federal activities from outsourcing to insourcing. The program and the LCC report both emphasized that insourcing will not be achieved overnight, but the momentum for it pre-dates the Obama administration initiative and enjoys strong Congressional support. Ms. Ittig distributed a history on "insourcing," which details its treatment in legislative activity during 2006-2010. The consensus seems to be that, while the multi-sector workforce is a reality that is here to stay, there is an increasing push for greater in-house capabilities and resources, which is likely to trigger further legislative activity this year. Ms. Ittig raised the prospect that FAR Part 7 amendments may be in order, and that the Section should be attentive to such developments.

### **Spring Meeting in Seattle**

Aaron Silberman and Kara Sacilotto reported on the Section's upcoming State and Local Procurement Symposium in Seattle, May 13-14, 2010. Brochures for the program were distributed.

### **Federal Procurement Institute**

Recognizing the particularly high caliber of the program this year, Chair Manos congratulated the Co-Chairs of the Annual Federal Procurement Institute, Marcia Madsen and Jim McCullough, as well as the Annual and Quarterly Program Co-Chairs, Pat Meagher and Holly Svetz. The assembled attendees acknowledged their contributions with generous applause.

### **Appointment of 2010-2011 Nominating Committee**

Chair Manos reported the appointment of the 2010-2011 Nominating Committee members: Michael Mutek (Chair), Mark Langevin and Angela Hinton.

### **Adjournment**

By motion made, seconded and approved unanimously, the meeting was adjourned at 12:05 p.m., with the Council luncheon and officer/committee chair training to follow.

Respectfully submitted,

Mark D. Colley  
Secretary, ABA Section of Public Contract Law

ABA PCLS Midyear Council Meeting

March 6, 2010

Annapolis, Maryland

Attendance Sheet

<b>Last Name</b>	<b>First Name</b>	<b>Title</b>
Colley	Mark	Secretary
Manos	Karen L.	Chair
Featherstun	Don	Chair-elect
Park-Conroy	Carol	Vice Chair
Hordell	Michael	Past Chair
Mutek	Michael W.	Immediate Past Chair
Ehrhart	David G.	Budget & Finance Officer
Thorpe	Norm	Past Chair
Madsen	Marcia	Past Chair
Gavin	Donald	Past Chair
Bell, Jr.	Hubert J.	Past Chair
Maffei	Rocco J.	Council
Hughes	Ty	Council
Maramba	Linda	Council
Wheeler	Tom	Council
Swisher	Kate	Council
Dees	C. Stanley	Past Chair
Doke	Marshall	Past Chair
Maddin	Tom	Past Chair
Khoury	Paul	Council
Donohue	Anne	Council
Wittie	Pat	Past Chair
Kasanow	David	Council
Smith	Greg	Past Chair
Schaefer	Rob	Past Chair
Long	Herman D.	Council
Hanson	Mark E.	Council
English	Charles E.	BA-Bd. Liaison
Rose	Mike	council
Pachter	John	Past Chair

Allen	Richard	Past Chair
Yukins	Chris	Council
Williams	Mary Ellen Coster	Past Chair
Meagher	Patricia	Previous Past Chair
Lindsey	Carolyn	ABA Int'l Section/TRACE International
Stoughton	David	Vice Chair, Strategic Alliance, Teaming
Flanagan	Kevin	Vice chair, Battle Space
Caldwell	Herman	Contracting Officer/GSA
Caldwell	Mary Ellen	Contractor/ARL
Ford	Burt	Vice Chair, Strategic Alliance, Teaming
Ricketts	Robin	Co-Chair, Strategic Alliance, Teaming & Subcontracting Committees
Balch	Peter	Co-Chair, Fed. Procurement Div.
Pickens Heckman	Annejanette	Chair, Cybersecurity Committee
Ittig	Kristen	Co-Chair, Legislative Coordinating Center
Moss	Fred	Editor, PROCEEDINGS
Janecek	John	Vice Chair Bid Protest Acquisition Reform Legislative Coora.
Romero	Lorraine	
Nibley	Stu	Co-Chair, Contract Claims Comm, Vice C Bid Protest
Soya	Stan	Member
Svetz	Holly Emrick	Co-Chair Annual & Quarterly Programs
Love	Mike	Co-Chair, Battle Space
McCullough	Jim	Co-Chair, Battle Space
McAlwee	Marty	Vice Chair Ethics, Compliance
Scalia	Hazel	Member
DeRose	Vince	Member
Stobo	Gerry	Member
Brown	Jim	Vice Chair, Comm. Peod & Suc.
Hinton	Angela M.	Co-Chair, St/Local IT Procurement
Golden	Michael	Member
Graham	Daniel	Co-Chair, Contract Claims
Howard	Tracye	Vice Chair, Strategic Alliances, Teaming & Subcontracting
Burd	Jon	Vice Chair, Acquis. Reform & Energy
Sacilotto	Kara	Chair, Regulatory Coord. Comm.

		Vice Chair, Battlespace Procur.
Tuttle	Thane	Member
Kassekert	Kristine	Member
Talati	Gunjan	Member, gtalati@crowell.com
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Bachman	Marcia	Member, marcia.bachman@pentagon.af.mil
Langevin	Mark	Co-Chair, Fed. Procure. Div. mark.langvin@ngc.com
Burkholder	John	Ed.-In-Chief, The Procurement Lawyer
Neforas	Marilyn	Section Director
Leibas	Ernestine	Section Assistant
Ebner	Susan Warshaw	Member, PCL, susan.ebner@bipc.com
Kienlen	Ronald A.	Member, rkienlen@earthlink.net
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Haws	Matthew	Co-Chair, Int. Procurement Committee
Molari	Russ	Assoc. Member, russ@DirectedAward.com
Zirkelbach	Gail	Member
Weitzel	Jay	Co-Chair, AC&P, jay.weitzer@ngc.com
Kidalov	Max	Asst. Prof., Naval Postgraduate School, mkidalov@nps.navy.mil
McGill	Mike	Vice Chair, Young Lawyers Committee
Dover	Agnes	Co-Chair, Ethics Committee
Roth	Howard	Member-to-be, howard.roth@usar.army.mil
Pickens	Scott	Member
Silberman	Aaron	Co-Chair, Construction Div./Co-Chair, State & Local Proc. Sympos.
Ostiller	Rick	Associate Member
Grant	Elizabeth	Scholarship Recipient
Hoe	Sandy	Co-Chair, Privatization, Outsourcing & Fin.
Levy	Fred	Co-Chair, proc. Fraud; Vice Chair, Deb. & Susp.
Wimberly	Gerard	Co-Chair, Div. of State & Local
Larkin	Sharon	Co-Chair, Bid Protest Committee
Walz	Jerry	Co-Chair, Elect. Access

Newsom	Beth	Co-Chair, Bid Protest Committee
Doyle	Gerry	VC-Bid Protest, VC-ADR