

MINUTES

AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTRACT LAW MID-YEAR MEETING

ANNAPOLIS, MARYLAND
MARCH 8, 2008
LOEWS ANNAPOLIS HOTEL

Approval of November 3, 2007 Quarterly Council Meeting Minutes

There was a motion to approve the minutes of the November 3, 2007 quarterly meeting. The motion was seconded and approved by unanimous voice vote.

Guidelines for Section Work Product – White Paper Task Force

Greg Smith presented a proposed set of guidelines for publication of white papers and other work product of the Section. There were two principle concepts behind the Task Force's recommendations. First, the Task Force believed that the work product of the Section should be accessible to the broadest possible audience, consistent with existing ABA policy regarding formal communications that purport to speak on behalf of the ABA or a Section of the ABA. Second, the Task Force also concluded that guidance should be developed that would govern the publication of Section work product that is not processed under existing FAR comment authority or blanket authority. As a result, the Task Force recommended the "Draft Policy for Publication of Committee Work Product" (Attachment A).

Questions were raised as to whether the policy was intended to apply to case summaries prepared in the normal course of committee meetings. In general, the view was that such work product would not be covered. However, anything that was to be published on the Section website should follow the procedure. The policy was primarily focused on detailed white papers.

The recommendation was moved for adoption, a second was had and the policy passed by unanimous voice vote. The Chair instructed the Section Director to include the policy in the Section Handbook and to post the policy on the Section's internet home page.

5-Year Plan

Holly Svetz reported on the progress of the Section against the 5-year plan adopted in the Fall of 2004. In certain areas the objectives have been achieved, in other areas progress has been made, and in yet other areas significant work needs to be done. The Committee anticipates presenting a series of recommendations at the annual meeting for revising the 5-year plan and at that point seek Council approval of the revisions. Pat Meagher thanked the committee for its work and encouraged anyone with comments on the draft recommendations to discuss their thoughts directly with the Committee members.

Battle Space and Contingent Procurements Committee

Jim McCullough gave a report on the multiple meetings the Committee has had in the last year. The Committee has proposed comments regarding FAC 2005-19; FAR Case 2005-012, Combating Trafficking in Persons; draft comments concerning HR 2740, the MEJA Expansion and Enforcement Act of 2007; and DFARS Case 2006-D035, DoD Law of War Program.

He pointed out the Committee maintains a robust web page. The next meeting is scheduled for March 11, 2008. They typically have 20-25 attendees in person and 20-25 attend by phone. The dates of meetings are posted on the website.

DoD Law of the War Draft Comment Letter

At the beginning of this discussion, Judge Mary Ellen Coster Williams recused herself from voting on this matter.

Mike Love presented the draft letter. The draft letter has three major sections to it. Section A comments on the proposed training program required by the proposed change to the DFARS. Section B comments on the section of the proposed regulation which requires contractor personnel to report “any suspected or alleged conduct for which there is credible information that (i) constitutes violation of the law of war; or (ii) occurs during military operations other than war and would constitute a violation of the law of war if it occurred during an armed conflict.”

Section C of the letter comments on the Joint Contracting Command for Iraq and Afghanistan contract clause issued in December of 2007 which requires contractors and their employees to obey all existing laws and permits area commanders to discipline contractor employees for violations of law.

Extensive discussion ensued at the meeting. There were those who thought the Section should not oppose efforts to get contractors to comply with the Law of War. Others felt it was inappropriate to make it mandatory to disclose Law of War violations for a variety of reasons including the complexity of the law and the rights of individuals.

Karen Manos proposed that the letter be revised to suggest a change in the regulation so that the regulation reads as follows:

(H)(3) The contractor shall report and require its personnel to report to the commander of the unit they are accompanying or the installation to which they are assigned, or to the Combatant Commander any conduct that –

(i) constitutes a clear violation of the Law of War; or

(ii) occurs during military operations other than war and would constitute a clear violation of the Law of War if it occurred during an armed conflict.

The motion also proposed that in Section A of the letter the preference for web based training be deleted. Also in Section B of the letter, the word similar was to be deleted in

reference to the Section's "previously expressed concerns regarding a similar self-disclosure obligation" It was proposed to add a sentence that states that the Section is generally opposed to mandatory obligations. Next, the letter should say that "However, we recognize as a nation we have an obligation to report violations of the Law of War" This sentiment was to be smoothed out in drafting. The motion was seconded, extensive discussion occurred and it passed by majority vote.

The Chair directed that the letter be returned to the Committee for revision in accordance with the Council's vote, and thanked the Committee for its efforts in this complex area of the law.

Guide to Service Subcontract Terms and Conditions

David Stroughton made a presentation on this new publication. This is an effort of the Strategic Alliances, Teaming and Subcontracting Committee. He commented on the extensive work performed by both the team members and a group of reviewers. He especially complimented Aileen Heim for her role as Editor. The guide includes all types of service subcontracts except for sealed bid and construction. It sets out mandatory clauses, advisable flowdowns, mandatory certifications, advisable certifications, DFARS intellectual property clauses, disputes resolutions mechanisms and a matrix of clauses, along with a checklist. The team is planning an update already. The possibility of issuing the book with an electronic version was discussed and it appeared to be the sense of the Council that this was a good idea.

Public Contract Law Journal

Karen Manos made a presentation regarding the Public Contract Law Journal. The Division I 2007 Writing Competition winners were announced. Ben Davidson was the first place. His article is entitled "Liability on the Battlefield: Adjudicating Tort Suits Brought by Soldiers Against Military Contractors."

Rebecca L. Hinyard placed second with an article entitled "Striking the Right Balance: Extending CF/IUS Review to Private Equity Transactions." Third place went to Isaac B. Rosenberg with an article entitled "Raising the Hue . . . and Crying: Do False Claims Act Qui Tam Relators Act Under Color of Federal Law."

Karen Manos reminded everyone that the 2008 competition was underway with articles due at the end of September. She also discussed an effort to team up senior government officials with junior associates in law firms to write outlines. Also if law firms or corporate in house counsel would like to work with a young lawyer from the government on an article, the Section will attempt to arrange a match.

Bid Protest Committee

Kevin Mullen reported on the Bid Protest Committee. They meet on the third Tuesday of each month. Approximately 70 people participate. They do case discussions, they have speakers. On April 15, 2008 they are going to meet with the Judges of the Court of Federal Claims. They had had an "Ask GAO" meeting where there was free and frank discussion with many GAO attorneys. The website is up to date and contains a significant amount of materials.

One topic they are monitoring is the DOJ proposal to change the COFC jurisdiction on timelines to match the GAO.

Commercial Products and Services Committee

Kevin Maynard provided a report on the Commercial Products and Services Committee. They typically meet at Wiley Rein. In April they had a presentation on GSA overview of state and local purchasing programs. In July, the presentation focused on GSA OIG updates provided by the Inspector General for Auditing. In September they had a joint meeting with the International Procurement Committee. The December 2007 meeting focused on the Smart Buy program. The January 2008 meeting focused on the Contractor Code of Ethics and Business Conduct.

The committee is monitoring the implementation of FY08 NDAA, SARA panel recommendations and other commercial item developments and considering a substantive monograph on GSA schedule contracting.

Nomination Committee

Pat Meagher announced that the 2008 Nominating Committee was Michael Hordell, Chair, Judge Jeri Somers and Anne Donohue. The Chair then asked Pat Wittie to make a presentation concerning the nominating committee process.

Pat Wittie described the process as involving few stated guidelines. There are no instructions or guidebooks on how it is to be conducted.

That said, the committee has traditionally looked at three categories (particularly for officer positions): (1) service to the Section; (2) diversity; and (3) leadership qualities. Service to the Section includes such items as attending meetings, participation on committees, writing for publications, participating on ad hoc committees and participating in programs. It was also noted that for officer positions, the participation of other members of the firm in similar positions is considered. The nomination process can involve a self nomination or someone can nominate you. Applications should be submitted to Michael Hordell or any of the committee members.

Contractor Claims and Disputes Committee

Judge Reba Page and Stu Nibley presented the report of the Contracting Claims and Disputes Committee. This committee meets on the second Wednesday of every month. This committee has had two recent very successful programs. The first was "Ask the Judge" meeting and the second was "The 5 Most Important Government Contracts Related Decisions of 2007 Presented by Some of the Most Experienced Members of the Bar." They have also had meetings focused on E-Discovery at the Court of Federal Claims and the transition of the Air Force Trial Team's operations from Ohio to Washington, DC. They have also been active in the preparation of four or five white papers in the last year and a half.

Procurement Fraud Committee

Bob Huffman presented the Procurement Fraud Committee report. This committee is tracking the proposed amendments to the False Claims Act submitted by Senator Grassley. They recently had a meeting where Jack Boese spoke just after testifying before Senator Grassley's committee. Jeff White also spoke. Bob mentioned these proposed changes are significant because many of the defenses available today to a company would be affected.

This presentation led to a discussion of whether we need a task force to study how the False Claim Act and the current atmosphere in the procurement arena is affecting the day to day procurement process. Marcia Madsen and Pat Meagher agreed to discuss the exact scope of the task force. It was also suggested this issue might best be handled by the Emerging Issues Committee.

Construction Division

Aaron Silverman reported on the efforts of the Construction Division. It is felt that there are still a significant amount of Section members who do construction work but do not participate in the Construction Division. The two most important programs this group holds are the FPI lunch and the breakfast meeting at the Annual Meeting. They are trying to hold quarterly meetings. Their plan is to hold quarterly meetings the first Tuesday of the month following the quarterly meeting. They also hope to improve information on the website.

Membership and Diversity Committee

Pat Meagher took the time to congratulate Jennifer Dauer, Chair of the Membership and Diversity Committee, for the impressive results in membership growth over the last year. She noted the scholarship application will soon be posted on the website.

Tributes to Recently Deceased Members

Tributes were presented concerning:

1. John Preston
2. David Fowler
3. O.S. Hiestand, Jr.
4. Craig Othmer

Each of these people were significant contributors to the Section and more importantly friends and colleagues that will be dearly missed.

Adjournment

At 12:15 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
March 8, 2008 Council Meeting

<u>Last Name</u>	<u>First Name</u>	<u>Title</u>
Mutek	Michael	Chair-Elect
Meagher	Patricia	Chair
Manos	Karen	Vice-Chair
Park-Conroy	Carol	Budget/Finance
Schaefer	Rob	Previous Past Chair
Thorpe	Norman	Past Chair
Madsen	Marcia	Past Chair
Williams	Mary Ellen	Delegate
Hoe	Sandy	Council Member
Heckman	Annejanette	Council Member
Larkin	Sharon	Council Member
Doogan	Dan	Council Member
Kinlin	Don	Past Chair
Innis	David	Council
Maramba	Linda	Council Member
Burg	Ruth	Past Chair
Dees	C. Stanley	Past Chair
Gavin	Donald	Past Chair
Hanson	Mark	Council Member
Kim	Jenny	YLD Liaison
Wittie	Pat	Past Chair
Pickens	Scott	Council Member
Featherstun	Don	Secretary
Svetz	Holly	Council Member
Nibley	Stu	Council Member
Hughes	Ty	Council Member
Joseph	Allan	Past Chair

<u>Last Name</u>	<u>First Name</u>	<u>Title</u>
Smith	Greg	Past Chair
Morrison	Kent	Co-Chair 2009 FPI
Brown	James	Vice-Chair, Commercial Products and Services
O'Sullivan	Lynda	Co-Chair, Federal Procurement Institute
Drabkin	David	
Drabkin	Aaron	
Myers	Chris	
Chudd	Daniel	Vice-Chair, Young Lawyers Committee
Merlowe	Taylor	
Levy	Herman	Co-Chair, R&D/IP; Vice-Chair CPs, ACSP, RCC; Assistant Editor, PCLJ TPL
Kasanow	David	Co-Chair, Bid Protest
Rose	Mike	Section Member
Dauer	Jennifer	Co-Chair, Membership; Co-Chair, State & Local Division
Silberman	Aaron	Co-Chair, Construction Division
Pearson	Rebecca	Editorial Board, PCLJ, Vice-Chair, Diversity
Passar	Larry	Visitor, CIA Office of General Counsel
Molari	Russell	Section Member
Davis	Julia	Section Member
Walz	Jerry	Section Member
Langevin	Mark	Vice-Chair, Accounting, Cost & Pricing
Moss	Frederick	Section Member
Kinlin	Karen	Vice-Chair, Battle Space & Contingency Procurements
Davis	Philip	Vice-Chair, Professional Responsibility & Contracting

<u>Last Name</u>	<u>First Name</u>	<u>Title</u>
		Ethics
Maynard	Kevin	Co-chair, Commercial Products & Services
Gardner	Rob	Associate Section Member
Whiteman	Neil	Section Member
Ricketts	Robin	Co-Chair, Strategic Alliances, Teaming & Subcontracting Committee
Bingham	Greg	Vice-Chair, Accounting, Cost & Pricing
Workmaster	Jason	Vice-Chair, Young Lawyers Committee; Co-Chair, Teleconference Lawyer
Collins	Laura	Section Member
Harrison	Nancy	Section Member
Pages	Krista	Vice-Chair, Intellectual Property and R&D Subcommittee
Swisher	Kate	Section Member
Colley	Mark	FPI Co-Chair; Bid Protest Committee Vice-Chair
Neforas	Marilyn	Section Director
Leibas	Ernestine	Section Assistant
Kohn	Phillip	Director
Burton	Rob	Section Member
Flanagan	Kevin	Section Member
Miller	John	Past Chair
Soya	Stan	Section Member
Page	Reba	Co-Chair, Contract Claims and Disputes Resolution
Kienlen	Ronald	Section Member
Ebner	Susan	Section Member
Bachman	Marcia	Section Member
Callahan	John	Richardson Callahan & Frederick LLP

<u>Last Name</u>	<u>First Name</u>	<u>Title</u>
Strauss	Robert	Section Member
Stroughton	David	Counsel, Raytheon
Arnholt	Richard	Section Member
Balch	Peter	Section Member
Vacketta	Carl	Section Member
McCullough	Jim	Co-Chair, Battle Space and Contingency Procurements
Love	Mike	Co-Chair, Battle Space and Contingency Procurements
Mullen	Kevin	Co-Chair, Bid Protest Committee
Doyle	Gerry	Vice-Chair, Bid Protest Committee
Pavlick	John	Vice-Chair, Suspension & Debarment
Haseman	Paul	Co-Chair, Homeland Security Committee
Huffman	Bob	Co-Chair, Procurement Fraud; Co-Chair, R&D/IP Committee
Pachter	John	Delegate