

MINUTES

AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTRACT LAW ANNUAL MEETING

NEW YORK, NEW YORK
AUGUST 9, 2008
WALDORF=ASTORIA HOTEL

Call to Order

At 8:40 a.m., the Section Chair, Pat Meagher, called the meeting to order.

Approval of May 3, 2008 Minutes

There was a motion to approve the minutes of the May 3, 2008 Spring meeting. The motion was seconded and approval by unanimous voice vote.

Approval of the Section Budget

Budget and Finance Officer, Carol Park-Conroy, presented the proposed budget for 2008-2009. A motion to adopt the budget was made. A second was had and the budget was approved by unanimous voice vote.

Report of the 2008 Scholarship Selection Committee

Jennifer Dauer made a report concerning the proposed scholarship recipients chosen by the committee comprised of Jennifer Dauer, Jenny Kim and Sandy Hoe. The Committee recommended Elizabeth M. Grant, Associate General Counsel, Defense Logistics Agency, Office of the General Counsel and Felicia Denise Collins Ocumarez of the Gallup Organization. A motion to accept the Committee's recommendation was made. A second was had and the motion was passed by unanimous voice vote.

As a part of the motion, the Council agreed to amend the scholarship terms.

The Council adopted a recommendation that recipients be reimbursed for travel costs up to \$4,000 per year, rather than \$1,000 per meeting. If a recipient misses a meeting the annual total would be reduced by \$1,000 per meeting missed.

The Task Force on Section Finance

The Task Force made a proposal to (a) revise the Section's Asset Allocation and Investment Policy and (b) create a Standing Committee on Section Funds Policy. The proposal is attached to these minutes as Attachment A.

A motion was made to adopt the proposal. A second was had and the motion was adopted by unanimous voice vote.

Request to Keep Judge Eileen Fennessy in Section Members Thoughts

Section Chair, Pat Meagher, reported that Judge Eileen Fennessy, member of the Section, was seriously ill and she asked that Section members keep Judge Fennessy in their thoughts.

Long Range Planning Committee Report

Holly Svetz presented the report from the Long Range Planning Committee which recommended additions and deletions to the Five Year Plan and the Implementations and Recommendations Memorandum. The original proposed revisions are attached as Attachment B to the Minutes.

It was recommended that the phrase “begin progress” in the introductory paragraph be changed to state “continue progress.” With respect to Recommendation Number 7, it was proposed that the phrase “In keeping with the goals of Tommy Wells, the ABA President-elect” be deleted from the recommendation. With respect to the addition to Goal I A, it was recommended that the phrase “Federal agency” be inserted between the word “other” and “initiatives.”

A motion was made to adopt the recommendations of the Committee as revised by the proposed changes discussed above. A second was had and the motion was passed by unanimous voice vote.

Model Procurement Code Initiative

John Miller and Norm Thorpe presented an update on the Model Procurement Code Committee Initiative on Transparency and Competition in Public Infrastructure Procurement. The report focused on the implementation of the plan approved by the Council at the Spring meeting in Austin, Texas. First, John Miller mentioned the website is being updated. In addition, South Carolina adopted the new code. In late June and July, letters were sent to President Bush, selected members of Congress and all of the state governors. There have been follow up discussions with at least one Congress person. Furthermore, the Section has been invited to a meeting September 10, 2008 with Tyler Duvall, Acting Under Secretary for Policy at the United States Department of Transportation.

Members interested in working with this project should contact John Miller or Norm Thorpe.

Annual Report from the Legislative Coordinating Committee

Todd Overman provided the Annual Report from the Legislative Coordinating Committee (LCC). A discussion of the different speakers and topics covered at the different meetings occurred. Of particular interest were efforts on the “Close the Contractor Fraud Loophole Act,” efforts relating to educating Congressional staff members on the benefits and processes relating to bid protests and efforts found on opening and maintaining transparency in the contracting process. The LCC website is continuously updated with meeting announcements, bill summaries and the most recent edition of the LCC Legislative tracking chart.

International Procurement Committee

Ross Branstetter reported on the International Procurement Committee. He stated that the committee meets periodically at the Washington, DC office of Crowell and Moring. Some of the committee's efforts have focused on understanding the European Union procurement process better. It appears the European Union is learning some of the benefits of transparency from the United States system. The committee routinely addresses the BAA/TAA issues. In particular, the committee stays abreast of new countries being admitted to the TAA regime. Members interested in participating should contact Ross Branstetter at Ross.Branstetter@MDA.Mil.

Special Joint Report of the Financing and Transactions Committee and Privatization, Outsourcing and Related Transactions Committee

Steven Sorett and Sandy Hoe presented a special joint report by both the Financing and Transactions Committee and the Privatization, Outsourcing and Related Transactions Committee. This report focused on a white paper prepared by the two committees entitled "The Crisis in the Federal Government's Infrastructure Federal Budgetary Scorekeeping: Impediments, Alternatives and Opportunities." There was an extensive discussion on budget scoring and the impact of rules adopted by the OMB on the ability of the Federal government to fund long term capital projects.

There was extensive discussion on whether this white paper should be turned into a monograph. It was the sense of the Council that the white paper should be reviewed by the Vice-chair for conformance to the Section's recently adopted white paper guidelines and published on the Section's website as soon as possible.

Strategic Alliances, Teaming and Subcontracting Committee

A report was provided by Annejanette Heckman, Robin Ricketts and George Ruttinger. The Committee meets monthly by phone and meets twice a year in person at the annual meeting and at the Federal Procurement Institute. The Committee published the Guide to Service Subcontract Terms and Conditions in February of 2008. It has resulted in over ten thousand dollars in sales.

The Committee provided regulatory comments on the DFARS interim rule prohibiting the paying of "Excessive Pass-Through Costs." In May of 2008, the Defense Acquisition Regulation System issued a revised interim rule which mentioned the Section's comments and made revisions to attempt to meet the Section's comments. The Committee also recently submitted comments on regulations involving United States verification system of employees in order to determine United States Citizenship.

Michael Mutek discussed the July 14, 2008 Section Comments on "Excessive Pass-Through Charges." In particular, he pointed out the Section's suggestions to provide additional guidance to contracting officers. In 2007, the Section recommended that DOD provide guidance to contracting officers so that they can more effectively implement the goal of the regulation. The 2008 interim rule mentions the Section's concern and promises to "monitor implementation and provide guidance when needed." In January of 2008, the GAO issued a report which also recommends guidance for contracting officers. It is believed that in preparing its report that the

GAO considered the comments that were submitted on the first Interim Rule. Both the Interim Rule and the GAO report provide examples of how the Section provides value to the procurement community.

Young Lawyers Committee

Dan Chudd provided a report from the Young Lawyers Committee. On May 21, 2008, the Civilian Board of Contract Appeals hosted the Committee at a Meet the Judges event. The Committee plans to set up events with the Court of Federal Claims and the Federal Circuit.

State Legislation and Regulation Coordination and State and Local Bid Protest Committee

Bryan Arnold reported on the joint activities of these two committees. The committees have held quarterly conference calls and prepared a fifty state survey of bid protest processes. A draft of that survey was passed out at the meeting. Bryan Arnold also reported on State False Claims Act activity. Five states currently have pending legislation. He also discussed California's Senate Bill 730 which would disqualify any contractor found to be in breach of contract with a State or Federal government.

"Contractor Compliance Program and Integrity Reporting" Regulation

Fred Levy reported on the Section's and ABA's comments on the above referenced regulation. Issues such as the effect on attorney-client privilege and the role of in-house counsel were discussed. Fred Levy serves as the Section's liaison to an ABA Task Force for the Attorney-Client Privilege. There is significant concern that the regulation impinges on the Attorney-Client Privilege due to its obligation to report a crime based on a "reasonable belief." There is also a concern that the regulation poses a chilling effect on internal investigations.

Cookies for Troops

The Section Chair, Pat Meagher, complimented Marilyn Neforas for her efforts to bake and ship cookies to troops serving in combat zones. Tab 15 of the Section Agenda's book has a series of letters and photographs from troops thanking Marilyn, her friends, and the Section for the cookies.

Regulatory Coordinating Committee Report

Kara M. Sacilotto reported on the activities of the Regulatory Coordinating Committee. In the quarter between April 1, 2008 and June 20, 2008, the Committee forwarded 46 procurement actions from the Federal Register for consideration by Section Committees. The Section commented on two of the procurement actions. One comment letter focused on revisions to the GAO bid protest rules and the second focused on service contractor employee personal conflicts of interest. Over the course of the prior year approximately nine comment letters were submitted.

Judge Ruth Cooper Burg

The Section Chair, Pat Meagher, drew the attention of the Council to Tab 14 of the Agenda book which contains nominating information submitted to support Judge Ruth Cooper Burg's nomination for the Margaret Brent Women Lawyers of Achievement Award. Judge Burg was scheduled to receive the award on Sunday, August 10, 2008.

Quarterly Meeting Scheduled for November 14-15, 2008 in Napa, California

The Section Chair, Pat Meagher, briefly reported on the next quarterly meeting scheduled November 14-15, 2008 in Napa, California.

Adjournment of the Meeting

At 11:45 a motion was made and a second had to adjourn the meeting. The motion carried by unanimous voice vote.

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