

MINUTES

AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTRACT LAW FALL COUNCIL MEETING

NOVEMBER 14, 2009

DISNEY'S CONTEMPORARY RESORT LAKE BUENA VISTA, FLORIDA

Call to Order

Section Chair Karen Manos called the meeting to order at 8:35 a.m.

Approval of Minutes

A motion was made to approve the minutes of the August 1, 2009 Annual Meeting of the Section Council. The motion was seconded and the minutes approved by unanimous vote.

Military Loan Repayment

Allan Joseph presented a request that the Section co-sponsor a recommendation of the General Practice, Solo and Small Firm Division to the ABA House of Delegates that the ABA endorse student loan forgiveness measures for judge advocates in the military services. The Section approved this request to also endorse the proposed recommendation.

Uniform Collaborative Law Act

Chair Manos reported on a request from the Section of Dispute Resolution that the Section endorse a presentation to the ABA House of Delegates on the Uniform Collaborative Law Act. Action on this request was deferred pending determination whether the Litigation Section will persist in opposing this recommendation.

Organizational Conflict of Interest Task Force

DoD has announced that it will conduct a public forum on December 8, 2009 to solicit comments regarding new regulations being developed regarding organizational conflicts of interest, as called for by the Weapons System Acquisition Reform Act of 2009. Chair Manos appointed a task force led by Council Member Ty Hughes to work on this issue, in order to prepare and provide comments in the short time available. Recent Section comments on OCI issues submitted in connection with the Troubled Asset Relief Program (TARP) can be a starting point.

Michael Mutek described the background of this issue and the Section's previous comments, and encouraged the Section to endorse policies that protect multiple interests. Mutek,

Ty Hughes, Marcia Madsen, Rocco Maffei, and Mark Colley offered to assist with this effort. Chair Manos agreed to testify and present the Section's comments at the public forum.

Chair Manos also suggested that the Section look forward to developing a monograph as the new OCI rules become promulgated. Marcia Madsen has offered to coordinate a task force to prepare such a monograph.

Best Practices Acquisitions Manual

Allan Joseph reported on the work product and pending expected publication of a new monograph on "Best Practices in the Acquisition of a Government Contractor." He complimented the vigorous and thorough work of the committee and other contributors who prepared the book. He also described the exceptionally useful and informative quality of the product, including practical tips and sample forms. The book is being printed and will be available by the end of November, being sold at \$50 to non-members and \$40 to section members. The Business Law and Antitrust Law Sections will also be "co-promoters" of the book. Mr. Joseph praised in particular the supporting efforts of Marilyn Neforas in getting this book prepared. Chair Manos praised and thanked Mr. Joseph and Ms. Neforas, accompanied by applause from the Council and others attending the meeting.

Mandatory Disclosure Rule Task Force

Robert Huffman reported that the Task Force has nearly completed its work and that the draft publication is now undergoing final review, edits and adjustments. Publication is anticipated in early January.

ABA Request for Blanket Authority Comments on "Defunding ACORN"

Allison Doyle reported on a request from the ABA that the Section review and consider comments on H.R. 3221, §602, 111th Cong. (2009), Defunding the Association of community Organizations for Reform Now ("ACORN") pursuant to the Section's blanket authority. The Ethics, Compliance and Professional Responsibility Committee prepared, and with Council approval, the Section provided comments. Status uncertain.

Geren v. Tecom, Inc.

John Pachter provided a report on this Federal Circuit decision, and noted that it has been the subject of a presentation at the Accounting Cost and Pricing Committee. Background materials were provided. Mr. Pachter explained that the Court has held unallowable costs to defend or settle litigation alleging conduct that, if proven, would violate any contract clause unless the contractor can prove, and contracting officer agrees, that the plaintiff had "very little likelihood of success on the merits." Mr. Pachter presented some recent writings on this decision and explained that this was an unanticipated extension of the *Boeing* decision, and has disrupted longstanding prior practice and understandings. He presented a number of concerns and practical problems that have been raised by this decision.

Mr. Pachter's report generated discussion among the Council and members in attendance about actions that might be taken. The possibility of the Accounting Cost and Pricing Committee trying to initiate a case before the FAR Council, and possibly comments by the ADR Committee.

Canadian Procurement

Gerry Stobo, from the Borden, Ladner, Gervais LLP firm in Ottawa, Canada, made a presentation regarding government contracting business opportunities in Canada. He explained that these opportunities may be impacted and diminished by provisions of U.S. law restricting non-U.S. supplier in sale to the U.S. Government (*i.e.* Buy America Act). Canada had sought, but has not secured, a waiver for Canadian suppliers to be able to sell goods and services that would be paid for with federal "stimulus" funding. The debate in Canada is now turning to support for protectionist measures to restrict U.S. suppliers from selling to Canadian governmental entities. The talks in this area are continuing, but latest reports are not encouraging that these various restrictive measures will be overcome.

Mr. Stobo graciously made available to attendees a monograph on Canadian procurement.

Comment Letters

Prohibition on Contracting with Inverted Domestic Corporations (August 31, 2009)

Herman Levy, on behalf of the Homeland Security Committee, described the Section's August 31, 2009 Comments on FAC 2005-34, FAR Case 2008-009 (74 Fed. Reg. 31661). An inverted Domestic Corporation is one that was formerly incorporated in the U.S. and is now incorporated in a foreign country (74 Fed. Reg. 31562). He described the Section's recommendation that the interim rule should have been issued as a proposed rule, as well as several reasons why the interim rule does not comport with the applicable statute.

Private Security Contractors Interim Final Rule (August 31, 2009)

Jim McCullough, on behalf of the Battle Space and Contingency Procurement Committee, described the Section's August 31, 2009 Comments on an Interim Final Rule regarding Private Security Contractors (PSCs) Operating in contingency Operations, 74 Fed. Reg. 34690 (July 17, 2009) [DOD-2008-OS-0125/RIN 0790-A138]. Mr. McCullough commended Mike Love and Kara Sacilotto for taking a leading role in developing these comments. Substantial contributions were also made by Tara Lee, Jerry Miles, David Ehrhart, Alan Chvotkin, Joe Davis, Jeffrey Chiow and Michael Navarre.

Mr. McCullough provided the background for the interim rule, identified multiple issues the rule both addressed and created, and summarized the Section's extensive, 24 page comments.

Acquisition of Commercial Items (September 11, 2009)

Bert Ford, on behalf of the Strategic Alliances, Teaming and Subcontracting Committee, described the Section's September 11, 2009 Comments on DFARS Case 2008-D011, Acquisition of Commercial Items, 74 Fed. Reg. 34263 (July 15, 2009). He described the background of the issues that this Case was intended to address, and summarized the concerns raised in the Comments regarding lack of clarity as to certain aspects of the interim rule, and suggested additional definitions and procedural protections.

Employee Notification of Rights Under Labor Laws (draft)

Chair Manos described draft comments prepared by the Employment Safety and Labor Committee in response to a Proposed Rule regarding Notification of Employee Rights Under Federal Labor Laws, 74 Fed. Reg. 38488 (Aug. 3, 2009). She explained the effort to secure the consent of the ABA Section of Labor and Employment Law, but that Section's objections to the proposed comments prevented the Public Contract Law Section's comments from being submitted.

Federal Circuit Judge Appointments

Former Section Chair Ruth Burg reported on an effort by several senior government contracts practitioners to organize a non-political, volunteer group, not affiliated with the ABA, to provide recommendations on candidates for the Federal Circuit Court of Appeals with regard to their qualifications and expertise as to government procurement law. This group is not going to sponsor potential nominees, but will try to encourage appointment of a judge with knowledge and expertise regarding government procurement law. The group is currently deliberating on appropriate criteria to consider when evaluating nominees for appointment to the court, and hopefully present them to those individuals that will be involved in selecting the nominees.

Tribute to Kathleen Barger

Ruth Burg described the many contributions to the Section by Kathleen Barger, who passed away October 10, 2009. Among other things, she served for several years as Chair of the Accounting, Cost & Pricing Committee, based on her background with AT&T and in private practice. She was a leader in promoting the activity of women in the Section, including development of the Section's annual luncheon for women government contracts practitioners.

Board of Governors Nominee

Chair Manos reported the Council's endorsement of Mary Ellen Coster Williams to a position on the ABA Board of Governors.

Public Contract Law Journal Awards

Chair Manos, in her capacity as Editor-in-Chief of the Public Contract Law Journal, announced the winners of the PCLJ Writing Competition, Division II (Young Lawyers): First

Place (\$5000)--Donovan Bezer, "The Inadequacy of Surety Bid Bonds in Public Construction Contracting"; Second Place (\$2500)--Capt. Sondra A. Bell, "Homeland Security Presidential Directive 12: A Survey and Discussion of How This National Security Directive May Limit Competition Unnecessarily and Suggestions for Reform."

Section Officers Conference

Committee of the Year/Competition Rules

Chair Manos announced revisions to the competition rules for determining the Section's award for Committee of the Year. Rather than being broken down by Division, nominations will be considered from the Section as a whole. Committees may self nominate. The award selection will be based on the extent and quality of a Committee's activities, to include such things as special reports, comment letters, publications, CLE conferences/teleconferences and membership development efforts (with specific attention to diversity objectives). The awardee will be selected by the Section officers. Nominations will be due on a date to be announced prior to the Section's annual meeting, and the award will be announced at the annual meeting.

Ethics Commission

Chair Manos advised that, at the Section Officer's Conference, ABA President Carolyn Lamm announced her establishment of the ABA Commission on Ethics 20/20, which is being co-chaired by Jamie Gorelick and Michael Traynor. The Commission is tasked with reviewing the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation, and ultimately making policy recommendations that will allow lawyers and law firms to better serve their clients, the courts and the public. Subject areas for the Commission's study include: state/country based regulatory rules affecting multinational legal practice; impact of technology on multijurisdictional practice; and impact of developments in technology on how lawyers and clients relate to each other and how lawyers practice. The Commission's work is expected to take three years. More information is available at the following web site: www.abanet.org/ethics2020.

Special Committee Presentations--Division IV, General Interest

Corporate Sponsorships

Peter Balch reported on the Section's success in securing corporate sponsorships, as well as the continuing opportunities for sponsorship in 2010 of various Section meetings and programs.

Alternative Dispute Resolution

Co-chair Linda Maramba reported on the activities of the Alternative Dispute Resolution Committee, noting at the outset its broad range of coverage. She and co-chair Judge Diana Dickinson oversee activities by a diverse membership that includes judges, neutrals, industry, government and private counsel. The Committee has sponsored a variety of ADR CLE

programs on ADR developments. Most recently, the Committee sponsored a teleconference program on November 3rd that generated 93 registrants, on ADR in state and local procurements. Another program is scheduled for November 18, which will address ethics issues in connection with settlements of contract disputes with the U.S. Government. Another program is coming in February 2010, to be cosponsored with Contract Claims and Dispute Resolution Committee, which will be “primer” for young attorneys on ADR. The Committee’s website has been improved with the addition of ADR statistics from the Boards of Contract Appeals, the Government Accountability Office, and the FAA’s Office of Dispute Resolution.

Battle Space and Contingency Procurements

Committee Co-chair Jim McCullough presented a report on the Committee’s activities, in addition to the substantial comments described above. The Committee intends to focus this year on several core areas: negotiation and application of the status of forces agreements in Iraq and Afghanistan, applicability of the UCMJ to contractors, activities of the Commission on Wartime Contracting set up under the 2008 National Defense Authorization Act (NDAA), and continuing regulatory developments (such as FAR case 2009-21 on PSCs). The Committee’s regular meetings include relevant government speakers on areas of interest to the Committee.

Cybersecurity, Privacy and Data Protection Committee

Committee Chair Annejanette Heckman Pickens reported on the newly reconstituted committee, which just held its first meeting featuring a briefing on cybersecurity and data protection issues.

Electronic Access Committee

Committee Co-chair Gerry Walz joked that hourly tweets from Karen Manos have been delayed pending development of ABA policy on social networking. Mr. Walz reported that the Committee websites are being well maintained by the Section Committees themselves, with many including very robust content. Updates to the Section’s home page have been more cumbersome. Additional efforts continue to improve the Section’s web site.

Privatization, Outsourcing and Financing Transactions Committee

Committee Co-Chair Richard Arnholt reported on the Committee’s focus on government access to and use of private sources of funding and support. The Committee developed a white paper on budget “scoring,” and is continuing to study developments in this area. The committee is also giving attention to public/private partnership activities.

Young Lawyers Committee

Committee Vice Chair Katherine Swisher reported on the Committee’s efforts to encourage young lawyer involvement. The Committee co-sponsored a program with the Business Law Section on practice before the SBA Office of Hearings and Appeals. Another program was co-sponsored with the Bid Protest Committee on “best practices” in bid protest. An

upcoming meeting will address Federal Appropriations Law. A happy hour is planned in December and a member survey is being developed, with particular focus on trying to learn how best to encourage participation by young in-house and government lawyers. The committee is also exploring ways to pair younger lawyers with more senior mentors to work on writing articles in the government procurement field.

Annual and Quarterly Programs

Chair Manos thanked again the co-chairs for the Fall Program, Sharon Larkin and Dan Graham, and their excellent efforts were applauded by the Council and meeting attendees.

Co-Chairs for the Federal Procurement Institute, Marcia Madsen and Jim McCullough, discussed planning for the upcoming program in Annapolis next year. Presentations under development include sessions on the role of the contracting officer and the impact of IG and DCAA activities, updates on Federal policy developments from Congress and the White House, developments related to Recovery Act funding (RAT Board, reporting requirements, etc.), activities of the Commission on Wartime Contracting, the 2009 False Claims Act Amendments, and an ethics panel. Shay Assad has agreed to appear as the luncheon speaker.

Welcome To The Three Scholarship Recipients

Chair Manos welcomed the Section's three scholarship recipients to the meeting: Felicia Collins Ocumarez, Angela Hinton and Elizabeth Grant.

Budget Report

Budget and Finance Officer David Ehrhart reported that the Section's financial picture is in good shape. Finances are being well supported by the many non-dues revenue generating activity. The Section has continued to follow a conservative investment strategy and that approach has continued to generate positive results.

GWU

Chris Yukins announced that the George Washington University Government Contracts Program will celebrate its 50th Anniversary at a function on February 18th at Mellon Hall in Washington, D.C.

Adjournment

By motion made, seconded and approved unanimously, the meeting adjourned at 11:12 a.m.

Respectfully submitted,

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

ABA Section of Public Contract Law
November 14, 2009 Council Meeting
Orlando, Florida
Attendance Sheet

Last Name	First Name	Title
Manos	Karen	Chair
Park-Conroy	Carol	Vice Chair
Ehrhart	Dave	Budget & Finance Officer
Wittie	Pat	Past Chair
Hordell	Michael	Past Chair
Madsen	Marcia	Past Chair
Hughes	Ty	Council
Maramba	Linda	Council
Maffei	Rocco	Council
Burg	Ruth	Past Chair
Wheeler	Tom	Council
Khoury	Paul	Council
Copeland	Missy	Council
Arnholt	Richard	Co-Chair, POFT Committee
Newsom	Beth	Co-Chair, Bid Protest Committee
Larkin	Sharon	Co-Chair, Bid Protest Committee
Pickens	Annejanette Heckman	Chair, Cybersecurity Committee
Nibley	Stu	Co-Chair, Contract Claims & Dispute Res. Committee
Strauss	Robert J.	Vice Chair, Contract Claims/Dispute/& Bid Protest
McAlwee	Martin	Vice Chair, Ethics Committee
Burton	Rob	Venable LLP
Colby	Dennis	Council-Battlespace
Walz	Jerry	Elect. Access Co-Chair
Svetz	Holly Emrick	Co-Chair Annual & Quarterly Meetings
McCullough	James J.	Co-Chair, Battle Space/Contingency Procurement Committee
Grant	Elizabeth	Scholarship Recipient

Stoughton	David	Vice Chair, SATAS Committee
Doyle	Gerry	Vice Chair, Bid Protest & ADR Committees
Ford	Burt	Vice Chair, SATAS Committee
Balch	Peter	Co-Chair, Fed. Proc. Div.
Huffman	Bob	Chair, Procurement Fraud Committee
Wimberly, Jr.	Gerard E.	Co-Chair, State & Local Procurmt. Div.
Pickens	Scott	Vice Chair, E-ACCESS
Langevin	Mark	Vice Chair, Acctg. Cost Pricing
Hinton	Angela M.	Co-Chair, S/L IT Procurement
Collins Ocumarez	Felicia	Co-Chair Grant Law; scholarship recipient
Kiraly	Stephen	Section Member
Gregory	Mary Pat	Committee Member-Bid Protest
Haws	Matthew	Co-Chair, International Proc. Comm.
Somers	Jeri	Section Member
Bernstein	Alexis	Section Member
Owren-Wiest	Nicole	Co-Chair, Accting Cost & Pricing
Bingham	Greg S.	Vice-Chair, Accting Cost & Pricing
Stobo	Gerry	Section Member
Doyle	Alison L.	Co-Chair, Suspension & De. Comm. And Co-Chair Small Business & Other Socioecon. Issues Committee
Neforas	Marilyn	Section Director
Leibas	Ernestine	Section Assistant
Rose	Mike	Section/Council Member
Joseph	Allan	Section Delegate
Pachter	John	Section Delegate
Williams	Mary Ellen Coster	Past Chair
Donohue	Anne	Council
Swisher	Kathryn E.	Young Lawyer Council Member
Yukins	Christopher	Council
Levy	Herman D.	Council
Keller	Matthew R.	Student Liaison
Mutek	Michael W.	Immediate Past Chair
Colley	Mark	Secretary