

MINUTES

AMERICAN BAR ASSOCIATION SECTION OF PUBLIC CONTACT LAW SPRING MEETING

NEW ORLEANS, LOUISIANA
MAY 16, 2009
HOTEL INTERCONTINENTAL

Call to order

The Section Chair, Michael Mutek, called the meeting to order at 8:30 a.m.

Approval of Minutes

A motion was made to approve the minutes of the March 7, 2009 Mid-Year meeting. The motion was seconded and the minutes approved by unanimous voice vote.

Implementation of American Recovery and Reinvestment Act of 2009

Don Featherstun and David Innis prepared a special handout for their presentation of Implementation of the American Recovery and Reinvestment Act. (The handout is Attachment A to these minutes and the Recovery Act Guidance prepared by the Office of Management and Budget (OMB) is at Tab 2 of the Agenda Book.) The Guidance emphasizes unprecedented transparency and the www.recovery.gov web site is updated continuously. Recipient reporting is scheduled to begin October 10, 2009. There is also increased and focused federal oversight through a Recovery Act Accountability and Transparency Board.

The OMB Guidance provides that fixed price contracts be awarded on the basis of competition will be the norm and will be structured to achieve outcomes consistent with the goal of economic stimulus. Existing FAR policy goals must still be met. Additional special guidance is provided for grants and cooperative agreements and loans and loan guarantees.

New FAR interim rules were effective in March 2009 and are now subject to comment. Quarterly reporting will be required, even for commercial item products, and could apply to the compensation of senior executives. There are new and detailed whistleblower protections, expanded audit requirements provisions, and unique buy American requirements for construction materials, subject to limited trade agreement exceptions. The CFR provisions parallel the FAR provisions, except that the trade agreement exceptions generally will not apply. There currently are no CFR references to whistleblower protections and Inspector General access.

The Section committees will evaluate whether comments are appropriate for the FAR and CFR changes.

Slideshow Presentation of FPI Celebration

Kate Swisher presented a wonderful slide show of the birthday celebration for Section Director Marilyn Neforas at the Federal Procurement Institute reception.

Mandatory Disclosure Rule Task Force

Section Chair Michael Mutek provided an update of the Mandatory Disclosure Rule Task Force activity, which includes 13 working groups. A consolidated work product is anticipated by the Annual meeting at which there will be a program entitled "Implementation of the Contractor Code of Business Ethics and Conduct Under the Mandatory Disclosure Rule" moderated by the Task Force Co-Chairs, Robert K. Huffman and Frederick M. Levy.

Acquisition Reform Task Force

Section Chair Michael Mutek reported that Marsha G. Madsen is the Chair of the Acquisition Reform Task Force.

ABA Task Force on Financial Market Regulatory Reform

Section Chair Michael Mutek read a memorandum report summarizing the effort of the ABA Task Force on Financial Market Regulatory Reform prepared by Pat Wittie and an email response from Allan Joseph. Pat Wittie's report emphasized the excellent work of Allan Joseph, Alyson Doyle, Chris Yukins, Susan Ebner and Phil Davis and noted that other members of the Task Force were extremely impressed by the quality and timeliness of the Section's work. The result was a March 24, 2009 Comment Letter on "Interim Rule on TARP Conflicts of Interest" submitted to the Department of the Treasury jointly by the Public Contract Law and Business Law Sections under blanket authority. The comment letter is found at Tab 8 of the Agenda Book.

Legislative and Regulatory Coordinating Committees

Section Chair Michael Mutek drew attention to the information contained at Tabs 6 and 7 of the Agenda Book reflecting the fine work of the Legislative and Regulatory Coordinating Committees. He singled out the March 27, 2009 Comment Letter submitted on GSAR Part 538 Rewrite, Federal Supply Schedule Contracting, at Tab 9 prepared by the Commercial Products and Services Committee and the April 9, 2009 letter and the attachment summarizing the background of the Model Procurement Code supporting the comments by the Construction Law Committee of the New York City Bar Association at Tab 11 prepared by the State and Local Model Procurement Act Committee.

Special Committee Reports: Division II, State and Local Procurement Division

Jennifer Dauer, Division II Co-Chair, began the presentation showing the working committees of Division II, which include Grant Law, IT Procurement, Legislative and Regulation Coordination, Model Procurement Code, State and Local Bid Protest and State Law Database Coordination.

Missy Copeland reported on the State Law Database Committee's progress on the state law summaries prepared by GW law students under a grant from the Section. The summaries are reviewed by members of the Committee and by state officials. She noted that all state summaries are now complete and that 31 state summaries already are posted. The Committee is looking at preparation of a summary of state bid protest laws.

Richard Pennington reported on the IT Procurement Committee. The written report was prepared by Karen Walker and Anne Donohue and is Attachment B to these minutes. He introduced Keith McCook who is the information representative to the National Association of State Procurement Officials (NASPO).

Bryan Arnold presented the Legislative and Regulation Coordination Committee report, found at Tab 13 of the Agenda Book. The Committee is tracking false claims legislation at the state level and reports significant legislative activity, particularly with respect to the Model Procurement Code.

Norm Thorpe reported on Model Procurement Code Committee and the April 9, 2009 letter relating to Construction Law Committee of the New York City Bar Association at Tab 11 about which Section Chair Michael Mutek had commented. Also related to this committee is the Blackberry message sent by Section Chair Michael Mutek to ABA Executive Director Hank White, which was reprinted in the ABA's SOC eNews and is found at Tab 33 of the Agenda Book. The message relates to the Section's work with the ABA's Governmental Affairs Office relating to the Stimulus Bill. The Section provided critical input into the final Bill language. As drafted, the Bill required that the FAR be applied to contracts awarded by state and local recipients of stimulus funds. This would have been the first such mandate implementing the FAR at the state and local level; however, state and local governments would not have been able to conduct contracting activities in accordance with the FAR. Deletion of the requirement from the Stimulus Bill language was accomplished in less than 24 hours. The ABA is promoting the Section's view that the Model Procurement Code represents the best practices for achieving competition and transparency in federally-funded state and local procurements and is a "safe harbor" for state and local contracts.

Other Committee Reports of Note

Section Chair Michael Mutek highlighted the summaries of the excellent work of the Bid Protest, the Strategic Alliances, Teaming and Subcontracting, the Contract Claims and Disputes Resolution, the Accounting, Cost and Pricing and the Battle Space and Contingency Procurement Committees, found at Tabs 21, 22, 24, 25 and 28 of the Agenda Book.

Peterson Thank You Letter

The Section's special thank you for the \$15,000 gift from the Alan and Mildred Peterson Charitable Foundation is found at Tab 34 of the Agenda Book. The Peterson gift permits the Section to pay travel expenses to speakers, in particular from the government, who otherwise could not participate in Section programs.

Programs

Section Chair Michael Mutek thanked Jennifer Douer and Michael Hordell for their hard work in organizing the Spring educational program. The Annual meeting program is now complete and includes very timely subjects for the Section membership.

Financial Report

Mark Colley reported on Section finances. He noted that the ABA is passing some administrative costs to the Sections. The Section's investment balance has pretty much followed the financial markets. He commented that income from new publications and teleconferences is important to the Section.

Federal Circuit Task Force

Michael Hordel reported that Chief Judge Paul Michel, U.S. Court of Appeals for the Federal Circuit, is very interested in increasing communication with the Section. The Task Force is looking for diverse representation and considering methods of responding to the Chief Judge's request.

Teleconference Programs

Teleconference programs were discussed. Section Chair Michael Mutek encouraged the continued conversion of well-attended and well-received live Section and Section committee programs into teleconference programs. David Innis reported that recent successful programs included bid protest and compliance topics and that the committee is always looking for additional teleconference ideas. The committee report is at Tab 30 of the Agenda Book. Hugh Bell suggested that Yolanda Mohamed from the ABA staff provide teleconference training at the Annual meeting in Chicago.

Federal Procurement Institute

Section Chair Mutek asked for the sense the Council as to whether to approach the Federal Bar Association (FBA) about becoming a co-sponsor of the FPI. There was positive response from the Council regarding this possibility of attracting additional participation, particularly from government lawyers. Sharon Larkin will make initial contact with FBA.

Adjournment of Meeting

At 11:05 a.m. a motion was made and seconded to adjourn the meeting. The motion was carried by unanimous voice vote.

Respectfully submitted,

Carol N. Park-Conroy

**Secretary
Section of Public Contract Law
American Bar Association**

**ABA Section of Public Contract Law
May 16, 2009 Council Meeting
Attendance Sheet**

Last Name	First Name	Title
Copeland	Missy	Council Member
Kasanow	David	Council Member
Larkin	Sharon	Council Member
Bell	Hubert, Jr.	Past Chair
Hordell	Michael	Previous Past Chair
Park-Conroy	Carol	Secretary
Manos	Karen	Chair-Elect
Mutek	Michael	Chair
Featherstun	Don	Vice Chair
Colley	Mark	Budget and Finance Officer
Maffei	Rocco	Council Member
Maramba	Linda	Council Member
Innis	David	Council Member
Pickens	Scott	Council Member
Pachter	John	Section Delegate
Weiner	Heather Kilgore	YLD Liaison
Thorpe	Norman	Past Chair
Soya	Stan	Section Member
Arnold	Bryan	Section Member
Grant	Elizabeth	Scholarship Recipient
Collins	Margie	Section Member
Pennington	Richard	NASPO Liaison
Settlemyer	Laura	Section Member
Swisher	Kate	Section Member
Kassekert	Kristine	Section Member
Rose	Mike	Section Member
Dauer	Jennifer	Co-Chair, Division II
Ocumarez	Felicia Collins	Section Member
Hinton	Angela	Section Member
McCook	Keith	Section Member
Springer	Fred	Section Member
Hoe	Sandy	Co-Chair, Privatization
Bingham	Greg	V-C, Accounting Cost & Pricing

Last Name	First Name	Title
Neforas	Marilyn	Section Director
Levy	Herman	Council Member
Pickens	Annejannette Heckman	Council Member
Yukins	Chris	Council Member

**IMPLEMENTATION OF THE
AMERICAN RECOVERY AND
REINVESTMENT ACT OF 2009**

**Presented to
ABA Section of Public Contract
Law**

**Council Meeting
MAY 16, 2009**

Donald G. Featherstun
Seyfarth Shaw LLP
560 Mission Street, Ste 3100
San Francisco, CA 94105

David F. Innis
Rogers Joseph O'Donnell
311 California Street, 10th Fl
San Francisco, CA 94104

IMPLEMENTATION OF THE AMERICAN
RECOVERY AND REINVESTMENT ACT OF
2009

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Donald G. Featherston
Seyfarth Shaw LLP
560 Mission Street, Ste 3100
San Francisco, CA 94105

David F. Innis
Rogers Joseph O'Donnell
311 California Street, 10th Fl
San Francisco, CA 94104

I. Introduction

- A. The American Recovery and Reinvestment Act (the Recovery Act), signed on February 17, creates significant opportunities to contractors, grantees, States, and local governments, but those opportunities are accompanied by additional obligations beyond what is normally required to do business with the federal government.

I. Introduction

- 1. The Recovery Act will fund massive spending on contracts and grants:
 - a. \$60 billion in contract dollars
 - b. \$300 billion in grants
- 2. At the same time, all contracts and grants funded by the Recovery Act come with higher levels of
 - a. Transparency: complete and rapid public disclosure of
 - 1) Contract performance
 - 2) Job creation and retention
 - b. Oversight
 - 1) Whistleblower rights
 - 2) GAO and IG audit access
 - c. Buy American requirements for construction materials

I. Introduction

- B. OMB has published Interim Guidance for implementation of the Recovery Act
1. OMB issued Initial Implementing Guidance on February 18.
 2. Updated Implementing Guidance issued on April 3
 3. Additional memo clarifying the guidance is expected in May.

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I. Introduction

- C. New regulations also have been issued to implement the Act:
1. Contracts: Five sets of interim FAR provisions with comments due June 1:
 - a. Buy American Requirements for Construction Materials
 - b. Whistleblower Protections
 - c. Publicizing Contract Actions
 - d. Reporting Requirements
 - e. GAO/IG Access
 2. Grants, Cooperative Agreements, and Loans: New 2 CFR Part 176, containing four sets of new award terms with comments due on June 22:
 - a. Reporting and Registration Requirements
 - b. Buy American Requirement
 - c. Wage Rate Requirements
 - d. Single Audit Information for Recipients of Recovery Act Funds

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I. Introduction

- D. This presentation
1. Addresses the impact of the OMB Interim Guidance on contractors, grantees, States and local governments
 2. Describes each of the new regulations

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II. OMB Recovery Act Guidance

- A. Drafted as guidance to federal agencies that are implementing the Recovery Act, but contains information useful to state and local governments and to contractors.
1. Divided into 7 sections:
 - a. General Information
 - b. Agency Plans and Public Reporting
 - c. Governance, Risk Management, and Program Integrity
 - d. Budget Execution
 - e. Grants and Cooperative Agreements
 - f. Contracts
 - g. Loans and Loan Guarantees

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II. OMB Recovery Act Guidance

- B. "Unprecedented" Transparency
1. OMB's guidance emphasizes that the Recovery Act requires timely and accurate reporting to achieve high level of transparency and accountability.
 - a. The OMB expects to "provide unprecedented transparency into how and where Federal funds are spent."
 - b. Recovery Act reporting will be separate from all other reporting of results
 - c. All Federal agency guidance must be immediately posted on the agency's Recovery Act web page.
 - d. Agencies will be providing weekly funding reports to the OMB.
 - e. States are supposed to be given flexibility in collecting and transmitting required information

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II. OMB Recovery Act Guidance

2. www.recovery.gov
 - a. Recipients are responsible for reporting on funds used by themselves and by any sub-awardees.
 - b. Information to be posted on Recovery.gov
 - 1) Contracts
 - a) Contracts awarded
 - b) How prime contractor is using funds
 - c) Subcontracts awarded by prime
 - 2) Grants
 - a) Grants made
 - b) How the prime recipient is using funds
 - c) Sub-awards
 - c. Initial statutory reporting deadline: October 10, 2009
 - 1) 10 days after the end of each calendar quarter thereafter

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II. OMB Recovery Act Guidance

3. Job creation reporting
 - a. Recipients of Recovery Act funds must report jobs created and retained for each project or activity
 - b. Must provide
 - 1) Description of the types of jobs created or retained in the United States
 - 2) Estimate of number of jobs created and retained
 - c. Agencies could ask for additional information for oversight
4. National Environmental Policy Act reporting also required
 - a. Agencies must plan how to comply with energy efficiency and green building requirements
5. All reports will be made available to the public almost immediately on Recovery.gov or agency recovery websites.

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II. OMB Recovery Act Guidance

- C. Focused Federal oversight of Recovery Act projects
 1. Act created the Recovery Act Accountability and Transparency Board
 - a. Coordinates and conducts oversight of Federal spending under the Act to prevent waste, fraud, and abuse
 - 1) Not yet in place as of April Interim guidance, functions being carried out by OMB
 - b. Goals of the Board
 - 1) Timely spending of money in a fair and reasonable manner
 - a) Emphasizing fixed-price, competitive contracts
 - 2) Transparency
 - 3) Avoiding fraud, waste, and abuse
 - 4) Avoiding delays and cost overruns
 - 5) Meaningful and measurable outcomes

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II. OMB Recovery Act Guidance

2. Recovery Act funds will be accounted for separately, and cannot be co-mingled with other funds
3. New regulations provide additional tools to the federal government that apply only to Recovery Act funded projects
 - a. Whistleblower Protections
 - b. GAO/IG Access
 - c. Special Single Audit rights for grants, cooperative agreements and loans

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II. OMB Recovery Act Guidance

D. Special guidance for Recovery Act Contracts

1. Fixed-price contracts awarded on the basis of competition will be the norm
 - a. Fixed-price contracts will be used "to the maximum extent practicable"
 - 1) For other than fixed-price contracts, agencies must assure that all alternatives have been considered and qualified staff is available for monitoring
 - b. Competition strongly encouraged
 - 1) Agencies cannot engage in noncompetitive contracts unless fully justified and safeguards are in place

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II. OMB Recovery Act Guidance

2. Procurements should be structured to achieve outcomes consistent with goal of economic stimulus
 - a. Evaluation criteria should measure the likelihood of achieving meaningful and measurable outcomes
 - b. Special attention should be given to
 - 1) Responsibility determinations to mitigate risk
 - 2) Acquisition flexibilities to avoid delays in awarding contracts
 - c. Contract financing and deliverables should be set up to promote economic stimulus goals
 - 1) OMB suggests structuring contract line items to allow invoicing and payments based upon interim and partial deliverables, milestones, and percent-of-completion.
 - d. Agencies are encouraged to actively monitor Recovery Act contracts
3. Existing ID/IQ contracts may be used, but orders under existing ID/IQ contracts must be reported as Recovery Act actions.

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II. OMB Recovery Act Guidance

4. Existing FAR policy goals must still be met
 - a. Davis-Bacon Act and Service Contract Act, apply to contracts using Recovery Act funds
 - b. Provide maximum practicable opportunities for small business participation
 - c. Purchases from procurement list maintained by Committee for Purchase From People Who Are Blind or Severely Disabled.
 - d. FAR Part 23 requirements for
 - 1) environment, energy and water efficiency
 - 2) renewable energy technologies
 - 3) occupational safety, and
 - 4) drug-free workplace

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II. OMB Recovery Act Guidance

5. Transparency requirements
 - a. Changes to the pre-solicitation and award notice process
 - 1) Provide rationale for using other than fixed price or competitive approaches in fedbizopps.gov
 - 2) Fedbizopps.gov description of supplies and services that is clear and unambiguous
 - 3) Special posting requirements for modifications and orders under task and delivery order contracts
 - b. Agencies are directed to promote transparency to the maximum extent practicable when consistent with national security interests and restrictions on release of proprietary information or information covered under the Privacy Act.

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II. OMB Recovery Act Guidance

- E. Special guidance for Recovery Act Grants and Cooperative Agreements
 1. Competition will be promoted to the maximum extent practicable.
 - a. But limited competitions among existing high-performing projects encouraged.
 - b. Timeliness of award is important
 2. Grant award criteria should measure likelihood of creating and preserving jobs
 - a. May favor applicants with demonstrated ability to deliver programmatic result and accountability objectives of the Act.
 3. Recovery Act funds may be used for continuation or renewal of existing grants
 - a. But supplementation of funding on existing grants discouraged because of the separate reporting and tracking requirements

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II. OMB Recovery Act Guidance

4. Transparency: Single Audit reports will be made publicly available on the internet.
5. Oversight: OMB requires adding a mandatory disclosure clause to grants parallel to the new FAR requirement.

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II. OMB Recovery Act Guidance

F. Special guidance for Loans and Loan Guarantees

1. For loans and guarantees, OMB also encourages
 - a. Competition
 - b. Performance measuring
 - c. Accountability
2. Transparency: similar reporting requirements
3. Oversight: requires mandatory disclosure terms similar to recently promulgated FAR provisions

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III. FAR Provisions

A. Publicizing Contract Actions

1. Amends multiple FAR sections to implement requirements unique to the Recovery Act for
 - a. posting of presolicitation notices.
 - b. announcing contract awards.
 - c. entering awards into the Federal Procurement Data System (FPDS).
 - d. publicizing actions that are not fixed-price or competitive.
2. Requires pre-award publication of notice of orders under task and delivery contracts worth more than \$25,000. FAR 5.704(a)(2).
3. Requires post-award publication for contracts, modifications, or task or delivery orders over \$500,000 describing "the products and services (including construction) that is clear and unambiguous to the general public." FAR 5.708(a).
4. Requires post-award publication of all actions that are not fixed-price or competitive, along with rationale for doing so. FAR 5.705(b).

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III. FAR Provisions

B. Reporting Requirements

1. Introduces new FAR subpart 4.15 and new contract clause FAR 52.204-11.
2. Implements requirement for contractors who receive awards or modifications funded in whole or in part by the Recovery Act to report quarterly on the use of the funds.
 - a. First report due on July 10, 2009, and then 10 days after the end of the calendar year quarter.
3. Applies to all contracts funded by the Recovery Act, including
 - a. Commercial item contracts
 - b. Commercially Available Off-the-Shelf (COTS) item contracts
 - c. Contracts below the simplified acquisition threshold

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III. FAR Provisions

4. Required contents of quarterly report (FAR 4.1500):
 - a. The dollar amount of contractor invoices
 - b. The supplies delivered and services performed
 - c. An assessment of the completion status of the work
 - d. An estimate of the number of jobs created and the number of jobs retained as a result of the Recovery Act funds

III. FAR Provisions

- e. Names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded. But under FAR 52.204-11(d)(8), this information is only required if in the contractor's preceding fiscal year, the Contractor received
 - 1) 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
 - 2) \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
 - 3) the public does not have access to information about the compensation of the senior executives through periodic reports filed under the Securities Exchange Act of 1934 or the Internal Revenue Code.
 - f. Specific information on first-tier subcontractors.
 - 1) The information required for subcontractors over \$25,000 will be similar to what the prime contractor must report. FAR 52.204-11(d)(10).
5. These reports will be made available to the public. FAR 52.204-11(b).

III. FAR Provisions

- C. Whistleblower Protections
 1. Introduces a new FAR 3.907 and new contract clause at FAR 52.203-15
 2. Implements Recovery Act prohibition against non-Federal employers discharging, demoting, or discriminating against an employee as a reprisal for disclosing *certain covered information to certain categories of Government officials or a person with supervisory authority over the employee.*

III. FAR Provisions

- a. Covered information is defined extremely broadly under FAR 3.907-1 as information that the employee reasonably believes is
 - 1) evidence of gross mismanagement of the contractor subcontract related to covered funds
 - 2) gross waste of covered funds
 - 3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds
 - 4) an abuse of authority related to the implementation or use of covered funds, or
 - 5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) awarded or issued relating to covered funds.

III. FAR Provisions

- b. Covers disclosure to the following entities or their representatives under FAR 3.907-2:
 - 1) The Recovery Act Accountability and Transparency Board.
 - 2) An Inspector General.
 - 3) The Comptroller General.
 - 4) A member of Congress.
 - 5) A State or Federal regulatory or law enforcement agency.
 - 6) A person with supervisory authority over the employee or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct.
 - 7) A court or grand jury.
 - 8) The head of a Federal agency.

III. FAR Provisions

- 3. Procedures governing a whistleblower complaint:
 - a. Employee may submit a detailed complaint to a contracting officer or the Inspector General of the agency that awarded the contract. FAR 3.907-3.
 - b. Investigation will be conducted by the IG. FAR 907-4.
 - 1) IG has 180 days to complete investigation, but can also unilaterally grant a 180 day extension. ARRA § 1553(b)(2)
 - 2) Employee will be given access to the IG's investigation file. FAR 907-5
 - c. Burden of proof on reprisal issue favors the employee.
 - 1) To establish a reprisal, employee need only show that the employee's disclosure of information was "a contributing factor" in the reprisal, and this can be established by circumstantial evidence. FAR 9B-6(a).
 - 2) In response, the non-federal employer must show by clear and convincing evidence that it would have taken the reprisal action in the absence of the disclosure.

III. FAR Provisions

- d. Agency response to investigation. FAR 907-6
 - 1) Within 30 days after receiving report from IG, head of the agency must determine whether there was a reprisal.
 - 2) If the determination is that there was a reprisal, the agency head shall order the employer to do one or more of the following:
 - a) Abate the reprisal
 - b) Reinstatement of the employee with back pay and compensatory damages
 - c) Pay the employee's costs and expenses, including attorney's fees and expert witnesses' fees.
 - 3) Employer may appeal the order to the Court of Appeals
- e. Employee may bring an action in District Court before a jury if the agency head
 - 1) denies relief
 - 2) has not made a determination within 210 days of submission of the complaint to the IG
 - 3) decides not to investigate or discontinues investigation

III. FAR Provisions

- 3. Applies to all contracts funded by the Recovery Act, including
 - a. Commercial item contracts
 - b. Commercially Available Off-the-Shelf (COTS) item contracts
 - c. Contracts below the simplified acquisition threshold

III. FAR Provisions

- D. GAO/IG Access
 - 1. Amends FAR audit requirements and adds new alternate clauses to standard FAR audit provisions.
 - 2. Implements Recovery Act provisions expanding GAO and IG audit rights
 - a. Agency IG is given the right to review concerns raised by the public regarding investments of funds under the Recovery Act.
 - b. GAO and agency IG are given the right to review any records of the contractor or subcontractor regarding transactions using Recovery Act funds.
 - c. GAO and agency IG are given the right to interview contractor officers or employees concerning such transactions.
 - d. GAO (but not agency IG) is given the right to interview subcontractor employees.

III. FAR Provisions

3. New audit rights apply to all contracts funded by the Recovery Act, including

- a. Commercial item contracts
- b. Commercially Available Off-the-Shelf (COTS) item contracts
- c. Contracts below the simplified acquisition threshold

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III. FAR Provisions

E. Buy American Requirements for Construction Materials

- 1. Introduces new FAR Subpart 25.6 and specific contract clauses in FAR Part 52.225-21 through -24
- 2. The Recovery Act prohibits the use of Recovery Act funds for any project for the construction, alteration, maintenance, or repair of a *public building or public work* unless *all of the iron, steel, and manufactured goods used in the project are produced in the United States.*

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III. FAR Provisions

- a. "Public building or public work" is defined to mean "building or work, the construction, prosecution, completion, or repair of which * * * is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency." FAR 22.401.

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III. FAR Provisions

- b. "all of the iron, steel, and manufactured goods used in the project are produced in the United States":
 - 1) Iron and steel are produced in the United States if all manufacturing processes take place in the United States, except metallurgical processes involving refinement of steel additives. FAR 25.602(a)(2)(i).
 - a) There is no need to do the component level analysis normally required by the Buy American Act for manufactured goods.
 - 2) For other manufactured goods, manufacture of the construction material must occur in the United States. FAR 25.602(b)(2)(ii).
 - 3) The new FAR provisions also apply the Buy American Act rules for unmanufactured construction material, even though such material was not addressed by the Recovery Act.
 - a) Unmanufactured construction material is defined in the same way as the Buy American Act. FAR 25.602(b).

III. FAR Provisions

- 3. Trade agreements requiring equal treatment for foreign materials do apply under the Recovery Act.
 - a. If the construction contract's estimated acquisition value is over \$7.443 million, and trade agreements apply, eligible construction material from designated countries will be treated the same as construction material produced in the United States. FAR 25.602(c).
 - 1) The Act's prohibition must be applied in a manner consistent with U.S. obligations under international agreements.
 - b. Applicability of trade agreements is based on FAR Subpart 25.4, "Trade Agreements".
 - 1) Except that designated countries do not include Caribbean Basin Countries.

III. FAR Provisions

- 4. The Act provides for waiver under three circumstances:
 - a. Nonavailability: Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. FAR 25.603(a)(1).
 - b. Unreasonable cost: Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the contract by more than 25 percent. FAR 25.603(a)(2).
 - 1) Cost adjustment: If the contracting officer determines that the unreasonable cost exception applies, the contracting officer must evaluate the offer by adding to the offered price—
 - a) 25 percent of the offered price for the entire project, if for iron, steel, or other manufactured goods. FAR 25.605(a)(1).
 - b) 6 percent of the value of foreign unmanufactured construction material included in the offer. FAR 25.605(a)(2).
 - c. Inconsistent with public interest: Applying the domestic preference would be inconsistent with the public interest. FAR 25.603(a)(3).

III. FAR Provisions

5. When exception claimed, the agency must publish a detailed written justification in the Federal Register, a new requirement not found in the Buy American Act. FAR 25.602(b).
 - a. Normally, the determination that an exception applies is made before award. FAR 25.604.
 - 1) Offeror may request such a determination. FAR 25.604(a).
 - a) Request must include detailed justification and market survey. FAR 52.225-21(c).
 - b) May also submit alternate offers based on use of foreign and domestic material, to avoid rejection of the foreign offer if the CO determines that the exception does not apply. FAR 25.605(c).
 - 2) Postaward requests must explain why the need for the exception was not reasonable foreseeable before award. FAR 25.605.
 - 1) If exception permitted after award based on unreasonable cost, the contract must be modified to add the 25% and 6% price penalties.

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III. FAR Provisions

6. Noncompliance: if CO determines that contractor made unauthorized use of foreign construction materials, CO may do one or more of the following:
 - a. Determine that an exception applies and modify the contract to add the price penalty. FAR 25.607(c)(1).
 - b. Require removal and replacement. FAR 25.607(c)(2).
 - c. Terminate the contract for default, seek suspension and debarment, or refer the matter for criminal investigation. FAR 25.607(c)(4).

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IV. 2 CFR 176: Assistance Agreements Award Terms

- A. Subpart A—Reporting and Registration Requirements
 1. Equivalent to FAR interim rule on Reporting Requirements.

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IV. 2 CFR 176: Assistance Agreements Award Terms

B. Subpart B—Buy American Requirement

1. Equivalent to FAR interim rule on Buy American Requirements for Construction Materials.
 - a. But does not include the 6% preference for domestic unmanufactured materials, because the Buy American Act does not apply to grants or cooperative agreements.
2. Trade agreements exception only applies to *gent recipients* that are required to treat the goods and services of designated countries the same as domestic goods and services. 2 CFR § 176.90(a).
 - a. 2 CFR Subpart B contains useful chart in Appendix that lists U.S. States, Other Sub-Federal Entities, and Other Entities Subject to U.S. Obligations Under International Agreements.

IV. 2 CFR 176: Assistance Agreements Award Terms

C. Subpart C—Wage Rate Requirements

1. Applies Davis-Bacon wage requirements to all laborers and mechanics employed by contractors and subcontractors on contracts in excess of \$2,000 for construction, alteration, or repair.

IV. 2 CFR 176: Assistance Agreements Award Terms

D. Subpart D—Single Audit Information for Recipients of Recovery Act Funds

1. Recipients required to maintain records that identify adequately the source and application of Recovery Act funds.
2. Recipients covered by the Single Audit Act Amendments of 1996 and OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations" agree to separately identify expenditures using Recovery Act funds.
3. Recipients also agree to identify each subrecipient of Recovery Act funds and require them to separately identify their own Recovery Act expenditures.

IV. 2 CFR 176: Assistance Agreements Award Terms

E. Omitted Terms

1. Whistleblower Protections
 - a. 2 CFR Part 176 does not create a term for Whistleblower Protection to parallel the FAR clause, but the Recovery Act provision requiring such protections clearly applies to both contracts and grants. See ARRA § 1553(a).
2. IG Access
 - a. 2 CFR Part 176 does not create a term for IG Access to parallel the FAR clause on GAO/IG access, but the Recovery Act provisions requiring IG access clearly apply to both contracts and grants. See ARRA §§ 1514, 1515.
 - b. In contrast, the Recovery Act provision creating GAO access applies only to contracts. ARRA § 902.

SPECIAL REPORT OF THE IT PROCUREMENT COMMITTEE (STATE AND LOCAL)

**ABA Section of Public Contract Law
Section Council Meeting
New Orleans, Louisiana
May 16, 2009**

History

The IT Procurement Committee (State and Local) was formed in August of 2004. The mission of the Committee is to provide a forum for education and the exchange of information relating to state and local public contract issues associated with the acquisition of information technology. The Committee monitors and reports on developments in information technology procurement, including modernized procurement models, at the state and local levels.

Leadership

Co-Chairs Since the Inception of the Committee:

Anne M. Donohue
SRA International, Inc., Fairfax, Virginia.

Karen D. Walker
Holland & Knight LLP, Tallahassee, Florida.

Vice Chairs:

Cheryl McManus Burtzel
McGinnis, Lochridge & Kilgore, LLP, Austin, Texas

Angela M. Hinton,
City of Atlanta, Georgia

Richard Pennington
McKenna Long & Aldridge, LLP, Denver, Colorado

Membership

- Official roster of 40 members (an increase in 9 members since 2008 and an increase of 17 since 2007).
- Individuals who are not on the official roster have participated in Committee activities.

- Individuals who participate in the work of the Committee are from many different states: Arizona, California, Colorado, Florida, Georgia, Illinois, Iowa, Maryland, Massachusetts, Minnesota, South Carolina, Tennessee, Texas, Virginia, Washington, D.C., and Washington.
- Participants include individuals in private practice, in house counsel and government attorneys.

Meetings

The Committee meets by teleconference the second Wednesday of every other month at 1:00 p.m. Eastern. An e-mail containing a teleconference number is sent each month to those individuals who have expressed an interest in the Committee reminding them of the teleconference. Minutes are distributed via e-mail following each teleconference.

In past years, the Committee met by teleconference on a monthly basis. However, to accommodate schedules and increase teleconference meeting participation, we moved holding our teleconference meetings every other month during the 2008-09 Bar year. This seems to have helped with participation.

The Committee also has met in person during ABA Annual Meetings and during the Section's Spring Meeting.

- August 7, 2005 – In person meeting in conjunction with ABA Annual Meeting in Chicago, Illinois.
- May 19, 2006 – In person meeting in conjunction with First Annual State and Local Procurement Symposium in San Diego, California.
- May 18, 2007 – In person meeting in conjunction with Second Annual State and Local Procurement Symposium in Nashville, Tennessee.
- August 11, 2007 – In person meeting in conjunction with the ABA Annual Meeting in San Francisco, California.
- May 2, 2008 – In person meeting in conjunction with the Third Annual State and Local Procurement Symposium in Austin, Texas.
- August 9, 2008 – In person in conjunction with the ABA Annual Meeting in New York, New York.

Guest Speakers

- October 2004 – Alan Chvotkin, Senior Vice President and Counsel for the Professional Services Council.

- November 2004 – Chris Tomlinson, Assistant CIO for Policy and General Counsel, Georgia Technology Authority.
- December 2004 – Joe Tasker, General Counsel and Senior Vice President for Governmental Affairs, Information Technology Association of America.
- March 2005 - Michael Sade, Director for Acquisition Management and Procurement Executive in the Office of the Secretary, U.S. Department of Commerce.
- September 2005 – Angela Hinton, Sr. Assistant City Attorney, City of Atlanta.
- March 2006 – Vern Jones, Chief Procurement Officer, State of Alaska.
- May 2006 – Michael K. Love, Senior Counsel with Computer Sciences Corporation.
- June 2006 – Richard Pennington, Of Counsel, McKenna Long & Aldridge LLP and former Director of Finance and Procurement, Colorado Department of Personnel & Administration.
- November 2006- Carl Mitchell, CEO of Virginia Economic Bridge, Inc.
- April 2007 – Dan Combs, President, Global Identity Solutions, LLC.
- July 11, 2007 – Gary Lambert, Vice President/Spend Management Solutions for CGI, Inc.
- September 12, 2007 – Rich Wyde, Owner, Garvey Schubert Barer, and Joe Figini, Vice President and General Counsel, CGI Technologies and Solutions, Inc.
- October 10, 2007 – Edward C. Gassman, Esq.
- December 12, 2007 – Caren Braun, Managing Director, AH&T Insurance
- September 10, 2008 – Arlinda McKeen, President of State Public Policy Group **(28 representatives from NASPO participated in this teleconference!)**
- November 12, 2008 – Peter Carino, Purchasing Director, University of Massachusetts' President's Office
- January 14, 2009 – Keith McCook, Assistant General Counsel, South Carolina State Budget & Control Board

Committee Sponsored CLE Teleconferences

- February 16, 2005 – "Competitive Purchasing Agreements – State and Local Government Use of GSA Schedules for IT Procurements."

Panelists

Fred Springer
Florida Director of State Purchasing.

Roger Waldron
Director, Federal Supply Service of the General Services Administration.

Kim Welch
DLA Piper Rudnick.

Bob West
Chief Information Security Officer, Department of Homeland Security.

Moderator

Anne M. Donohue
SRA International, Inc. and Co-Chair of IT Procurement Committee (State and Local).

- October 26, 2005 – "Legislative Developments in Offshoring: Opportunity or Potential Peril?"

Panelists

Jennifer L. Dauer
Attorney, Dipenbrock Harrison.

Ron Hira, Ph.D., P.E.
Author *Outsourcing America* and Assistant Professor of Public Policy,
Rochester Institute of Technology.

Bruce Josten
Executive Vice President, Government Affairs, U.S. Chamber of
Commerce.

Joe Tasker
Senior Vice President for Government Affairs and General Counsel,
Information Technology Association of America.

Moderator

Karen D. Walker
Holland & Knight LLP and Co-Chair of IT Procurement Committee (State
and Local).

- October 25, 2006 - "Liability Allocation in Information Technology Contracts."

Panelists

Hemant Pathak
Senior Attorney, Microsoft Corporation.

Richard Pennington
Of Counsel, McKenna Long & Aldridge LLP.

Richard S. Wyde
Partner, Garvey Shurbert Barer.

Moderator

Karen D. Walker
Holland & Knight LLP and Co-Chair of IT Procurement Committee (State
and Local).

Over 100 individuals participated in this CLE teleconference!

Examples of Topics Discussed by the Committee

- Application of accessibility standards in Section 508 of the Rehabilitation Act at the state and local levels.
- Outsourcing and offshoring of IT projects.
- Use by procurement officials of draft specifications provided by a particular vendor in issuing a statement of work for a competitive procurement.
- IT and telecommunications infrastructure needed to support "farm shoring" or "near shoring" initiatives.
- California's Alternative Bid Protest Pilot Project.
- Contractor personnel in the battle space.
- IT Procurement in Colorado.

- The Real ID Act.
- State legislative activity relating to IT procurement.
- Contract issues (particularly limitation of liability, liquidated damages and intellectual property) in IT procurement.
- Enterprise Resource Planning procurements.
- E&O insurance for IT companies.
- Training the judiciary on government contracting.
- Spend management.
- The State of Iowa's study on contract terms and conditions.
- Contracting of EDP project resources.
- Licensing commercial off-the-shelf software on a statewide basis.

Looking Toward the Future

- Model Procurement Code Project. The Committee has started work on a project to draft proposed amendments to the Model Procurement Code to incorporate purchasing processes which use information technology for source selection, project delivery, and contract management. Angela Hinton is leading this effort for the Committee and Keith McCook has agreed to assist. The Committee is currently looking for other individuals interested in assisting Angela with this project. Due to various demands on the time of the individuals involved, this project has moved a little slower than initially anticipated.
- NASPO IT Procurement Task Force. Keith McCook has been serving as the Committee's liaison to the NASPO IT Procurement Task Force which has been looking at issues involving indemnification, intellectual property, limitation of liability and warranties in state government IT contracts.
- Reaching Out to Other Committees. The Committee would like to have more interaction with other committees within the Section. The Committee would like to hold one or more joint teleconference meetings with at least one other Section committee.
- Increasing Membership. An on-going goal of the Committee is to increase participation in Committee activities. We also would like to have a more consistent base of participants. The change to meeting by teleconference every other month has helped

increase participation. Also, we had terrific participation in our teleconference meeting held during a NASPO meeting where attendees were able to dial in to our teleconference meeting.

- Guest Speakers. One of the most valuable aspects of Committee participation is the guest speaker program. We intend to look for new guest speakers on current topics of interest. We would like to have guest speakers from a variety of state and local jurisdictions.
- CLE Teleconference – October 22, 2009. The Committee is planning a CLE Teleconference to be held on October 22, 2009. The topic for the program will be revenue recognition. We are in the process of lining up speakers for this teleconference.

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