News from the CHAIR

ROBERT L. SCHAEFER, CHAIR

The Section of Public Contract Law is well known for providing an unbiased perspective when commenting on the government procurement process—unbiased in the sense of not being captive to an interest group, or personal interests. The Section’s hallmark is providing consensus statements reflecting the procurement process as it is and as it should be. We are not against change in the procurement process, but change for change’s sake is seldom advisable. I sense that there are more changes being proposed than usual, and some of them are intended to show the proponent to be a leader in aggressively solving problems with the government’s procurement system, real or imagined. “Doing something now” is perceived as superior to a more methodical approach. The Section, by way of its comments, seeks to work with the drafters of regulations and laws to ensure their proposals represent a rational contribution to the government procurement process.

The Section recently commented on changes proposed by the National Reconnaissance Office (NRO) to its Subcontract Reporting, Monitoring, and Consent clause found in its Acquisition Manual. Although the Section’s comments addressed a number of issues, the most troubling aspects of the proposed changes are that they go substantially beyond the requirements found in the FAR and, instead of smoothing and clarifying the procurement process, would be disruptive. The changes seek to insert the NRO between the prime contractor and its subcontractors in the procurement process, and create significant new quarterly reporting requirements that would be unique for the NRO.

The FAR provides the government the methodology to review the rules for the acquisition process—unbiased in the sense of not being captive to an interest group, or personal interests. The Section’s hallmark is providing consensus statements reflecting the procurement process as it is and as it should be. We are not against change in the procurement process, but change for change’s sake is seldom advisable. I sense that there are more changes being proposed than usual, and some of them are intended to show the proponent to be a leader in aggressively solving problems with the government’s procurement system, real or imagined. “Doing something now” is perceived as superior to a more methodical approach. The Section, by way of its comments, seeks to work with the drafters of regulations and laws to ensure their proposals represent a rational contribution to the government procurement process.

The FAR provides the government the methodology to monitor the subcontracting process through the prime contractor. When the government has sought to directly intervene in the subcontracting process, it seldom gets the benefit it seeks. Intervention inures to the benefit of the prime contractor, that disclaims responsibility for the subcontractor’s performance because of government interference, and the subcontractor complains of government direction and interference with its contractual relationship with the prime. Some of the proposed reporting requirements require information that may be held as proprietary between the prime and sub, and the possibility of public disclosure could impact the free flow of their discussions.

The point here is not to unduly highlight the NRO’s proposed rules, as others have traveled this road before them, but it is not infrequent that proposed regulatory or statutory changes may have unintended consequences, by running afoul of long-standing, well-founded government procurement practices and rules. My concern is that we are seeing changes or reforms to the procurement system that create instability and unpredictability in the procurement process, demonstrating a lack of appreciation of how the changes fit into existing rules and law. Change must be the progeny of reflective study, taking into consideration the perspective of the many stakeholders in the public procurement process, and bringing to light an understanding of the probable result (continued on page 22)

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when inserted into the existing procurement system.

I encourage all of our members to be active participants in the committee comment process on regulatory and statutory changes and to support the work of our task forces and working groups. You will be performing a public service of the highest order.

On another front, I am concerned that the public procurement process, and the litigation that arises out of it, is under stress for lack of civility between contracting parties, as well as between their litigators. Civility includes more than showing respect for the other party. It includes ethical conduct and adherence to the rules of practice in all phases of the procurement process. It is necessary that representations by a party as to facts can be relied upon and that counsel meet their obligation to advise clients not to abuse the litigation process. Use of litigation or economic leverage to bully parties with lesser resources is an unacceptable, widespread practice between contractors and between the government and its contractors. One of the panels at the Federal Procurement Institute, moderated by Peter Bach, discussed the proposed Code of Professionalism in Public Procurement, which was drafted by Section members. Our Section Council discussed the code, now referred to as Principles of Professionalism in Public Procurement, in the Council meeting on March 4. If these principles are adopted by the Council, my goal is to present them to the ABA House of Delegates to be adopted as an ABA procurement principle, joining the ABA Procurement Principles of Allocation of Risk in the Formation of Procurement Documents, Resolution of Controversies, and Competition.

Stu Nibley is leading the BCA Practice Working Group. The working group was created to address the issues presented during the negotiation and passage of the legislation that has created what is essentially a two-board system. Although not included in the bill as passed, there was an ill-conceived provision that would have required that BCA judges be evaluated and rated. The working group will study how BCA practice might be improved to meet the needs of the users, the contracting agencies, and contractors. We have invited the ABA Judicial Division, the BCA Bar Association, and other interested groups, including BCA judges and practitioners from the government and private bar, to join us in this effort. The working group has attracted a wide range of expertise and experience and is addressing its charter with enthusiasm and a sense of purpose.

If you are interested in writing an article for our highly acclaimed Public Contract Law Journal, the editorial staff has issued a call for papers. See the Web site at http://www.abanet.org/dch/committee.cfm?com=PC704800 for an explanation of appropriate subjects and formats.

The First Annual State and Local Procurement Symposium and Spring Council Meeting will be held in San Diego on May 19 and 20. The panels and discussions will be of great interest to those engaged in state and local procurement. Many of the topics will also be of interest to federal procurement practitioners as the interface between federal and state issues is explored, as in grant law. This is a program you don’t want to miss. See the program brochure on the Section Web site at www.abanet.org/contract/home.html.

We had a wildly successful Federal Procurement Institute, with the highest attendance in the nine years we have been in Annapolis, and I want to thank our program sponsors: gold—Moss Adams LLP; silver—Crowell and Moring LLP; FTI Consulting, McKenna Long and Aldridge LLP, Navigant Consulting, Inc., and PricewaterhouseCoopers LLP; luncheon—Rimkus Consulting Group, Inc.; and the construction program luncheon, “After the Storm: Rebuilding in the Gulf States”—Navigant Consulting, Inc.

Sponsors for the May 19 First Annual State and Local Procurement Symposium, “Navigating the Federal Influence on State and Local Procurements,” are: gold—Rimkus Consulting Group, Inc.; silver—Moss Adams LLP and Navigant Consulting, Inc.; and bronze—FTI Consulting and Shotts & Bowen LLP. The Section thanks our program sponsors for their support and their interest in improving the public procurement process.

The Annual Meeting in Honolulu, Hawaii, is rapidly approaching. The Annual Meeting Program Committee has a great program assembled. See the Section Web site for an agenda. May 31 is the deadline for early registration discounts, and June 29 is the deadline for advance housing, registration, and ticket sales. Neckties are neither expected nor encouraged, but may be tolerated in deference to your right of free speech.

Endnotes

1. See the text of the Section’s Regulatory Committee’s comments at http://www.abanet.org/dch/committee.cfm?com=PC407500.

2. See ABA J. E-REPORT, David L. Hudson, Jr., “Frivolous Suit” Bill Returns, available at http://www.abanet.org/journal/ereport/j27tort.html. Whether or not FRCP Rule 11, signing of pleadings, motions, and other papers; representations to court; sanctions, requires revision, Rule 11 is not being applied with appropriate vigor. All too often defendants are named in lawsuits without facts to support liability and no sanctions are levied against offending counsel.

3. For example, there is considerable experience with the government insisting that the privilege be waived in exchange for favorable charging decisions in criminal cases and reasonable treatment in civil disputes. The ABA has established a Task Force on the Attorney Client Privilege to understand to what extent the privilege is under siege. Jack Boese is the Section’s liaison on this task force.