News from the CHAIR

Michael W. Mutek, CHAIR

Are protests evidence of a healthy procurement system or a symptom of a sick one? With the recent attention being given to what seems to be a spate of protests in high-value procurements, this is a valid question. It may be that a protest system that provides remedies and is trusted is vital to a healthy procurement system, but a spike in the number of protests, particularly in sustained protests, may be a symptom of a system that requires examination.

I truly believe that government procurement offices respect and want to comply with the rules. They want to run fair competitions. I know that contractors want to win fair and square and start to work without the delays, costs, and uncertainties of a protest. No prudent business model would rely on protests to win business. That said, protests can reveal matters that require attention. A spike in protests could reflect in a lack of trust in source selections. The publicity recently given to protests and procurement system problems could lead to a shareholder belief that losses must be reviewed through the protest process. That “must protest” scenario is something that all stakeholders in the procurement process want to avoid. Instead, the desired scenario is one where there is trust in the effective implementation of a known and transparent procurement process, with complete and informative debriefings and a strong belief that the protest system is a last but effective remedy to ensure the integrity of the source selection process. The value of a complete debriefing in helping to eliminate the perceived need to file a protest should not be underestimated. Contractors are seeking information and the “lessons” from the source selection process. After all, the costs of pursuing a large contract can be substantial.

Over the past year, I have collected a number of articles on protests that talk about the “protest glut” and ask whether “contractors protest too much.” This attention to protests has resulted not only in public awareness of protests, but also a congressional focus, including a request by the House Armed Services Committee that the Government Accountability Office (GAO) conduct a review of cases filed there to determine whether “frivolous and improper” protests are increasing. Earlier this year, an article on an upcoming large contract selection quoted a senior military officer who said that the loser probably had a protest drafted already, and that statement was a springboard to discuss frivolous protests. A protest was filed against the agency’s source selection, and it was sustained. Perhaps this shows that “frivolous,” like “beauty,” often is in the eye of the beholder.
the eye of the beholder. It would be inaccurate to deem all protests frivolous, just as it would be inaccurate to assume that all contract awards to competitors must be protested.

The publicity appears to have created a public perception that protests are on the rise. Is this the case? The GAO bid protest statistics for fiscal years 2003–2007, as reported to Congress, are available on the GAO's Web site. The statistics do indicate a 6 percent rise in FY 2007, but that followed two years of declines. In fact the noticeable rise occurred during FY 2003 and FY 2004:

Although not mentioned by the press, an important statistic to those of us practicing public contract law and one that warrants our consideration is the decline in the use of alternative dispute resolution (ADR):

Table 2

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<tbody>
<tr>
<td>Cases Using ADR</td>
<td>62</td>
<td>91</td>
<td>103</td>
<td>123</td>
<td>120</td>
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<tr>
<td>ADR Success Rate</td>
<td>85%</td>
<td>96%</td>
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The public and private sectors have shared interests in the discussion of protests and how to avoid them, as well as in the accurate dissemination of facts and statistics on the subject.

**Section Outreach**

Among the several organizations and groups involved in public contract law, the ABA's Section of Public Contract Law is well recognized for its expertise, knowledge, and objectivity on issues of acquisition policy and procurement law. This is because the Section is a diverse community of attorneys and procurement professionals from the government, private practice, industry, and academia. Our membership represents all stakeholders in public contract law, and when the Section examines an issue, it rightfully looks upon the acquisition system as the client.

The Section has increased its efforts that reach out to other organizations in the public contracting community, and I want to highlight some of our efforts. The Information Technology Association of America (ITAA) plays an important role in the IT world. Karen Walker is the Section's liaison to the ITAA and reports to the Section on relevant initiatives of the ITAA. Karen also facilitates cooperation and joint programs between the Section and the ITAA. For example, the ITAA is an important cosponsor of the Section's annual State and Local Procurement Symposium. The National Association of State Procurement Officials (NASPO) is an active organization in the area of state and local procurement and a cosponsor of the State and Local Procurement Symposium. C. Richard Pennington, a former Colorado state procurement official, is the Section's liaison to NASPO. The National Institute for Government Purchasing (NIGP) is a national organization with a mission to develop and promote the public procurement profession through educational and research programs, professional support, and advocacy initiatives. The Section's liaison to NIGP is Maggie McConnell. NIGP also cosponsors the Annual State and Local Procurement Symposium. Finally, the National Contract Management Association (NCMA) represents the contract management profession and seeks to improve buyer-seller relationships. The NCMA has been a cosponsor of the Section's annual Federal Procurement Institute for several years. I serve as liaison to the NCMA, and I am also a member of the NCMA's board of advisors.

The purpose of these outreach efforts goes beyond cosponsorship of educational programs. We have developed these alliances with other organizations in order to share knowledge. In doing so, the parties in the alliance seek to provide greater value to their members. This is not much different from the fundamental reason for alliance formation in the business world. I thank our liaisons for their willingness to work with other organizations as part of the Section's outreach efforts.