Karen L. Manos, Chair

It’s hard to believe the 2009-2010 program year is almost over. The past few months have been productive ones for the Section.

The 16th Annual Federal Procurement Institute—Shifting the Plates of the Acquisition System: Investigations, Oversight, and Transparency—A Seismic Event or Just Another Tremor?—was a huge success, thanks to the hard work of program cochairs, Marcia Madsen and Jim McCullough. The FPI included informative and entertaining panels on the respective roles of the contracting officer, the Defense Contract Management Agency, and the Defense Contract Audit Agency; acquisition initiatives from the Hill and the Obama administration; the American Recovery and Reinvestment Act; the Commission on Wartime Contracting; the False Claims Act Amendments of 2009; cybersecurity challenges; and ethical issues for government, corporate, and outside counsel involved in employee interviews, fraud investigations, and mandatory disclosures. Shay D. Assad, director of Defense Procurement and Acquisition Policy and designated assistant secretary of defense for acquisition, was the keynote speaker for Friday’s luncheon, and the annual construction luncheon on Thursday featured a seminar on small business and other set-asides in federal construction contracting. Last, but not least, the winner of the Public Contract Law Journal Division I writing competition, George Washington University Law School student David R. Frenkil, presented his paper, “Energy Savings Performance Contracts: Assessing Whether to ‘Retrofit’ an Effective Contracting Vehicle for Improving Energy Efficiency in Federal Government Facilities.” Donovan Bezer, an associate in the Newark, New Jersey, firm Stryker, Tams & Dill LLP, won first place in Division II (young lawyers), with his article, “The Inadequacy of Surety Bid Bonds in Public Construction Contracting.”

Those who stayed for the open Council meeting on Saturday enjoyed a wide-ranging discussion on comment letters prepared by the Accounting, Cost & Pricing Committee on Contractor Business Systems, the Strategic Alliances Committee on the Department of Defense class deviation implementing the Franken Amendment, and the Battle Space and Contingency Procurement Committee on DoD’s class deviation, “Additional Contractor Requirements and Responsibilities Relating to Alleged Crimes by or against Contractor Personnel in Iraq and Afghanistan.” Special thanks go to committee cochairs and drafters, Jay Weitzel, Michael Mutek, David Dowd, David Stoughton, (continued on page 15)
Mike Love, Jim McCullough, Mike Navarre, Bill Speros, and Jerry Miles.

Over the holidays, the Ethics and Professional Responsibility Committee prepared two comment letters to be filed by the Section. On December 31, 2009, the Section submitted comments on the preliminary issues outlined circulated by the ABA Commission on Ethics 20/20. ABA President Carolyn B. Lamm created the commission to review and assess the Model Rules of Professional Conduct and other sources of lawyer regulation in the context of the accelerating pace of technological innovation and the increase in globalized law practice. The Section’s comments pointed out that public contract law raises issues the commission may not hear about from other ABA sections because the procurement laws and regulations impose requirements on government contracts that are generally not applicable to commercial contracts. Our comments focused on two areas of particular interest to Section members: (1) the question whether there should be different standards applicable to providing advice on law that is uniform nationwide, such as federal or international law; and (2) the issues that arise in light of current and future advances in technology that enhance virtual cross-border access. Regarding the former, the Section commented that, “focusing solely on federal procurement law (as opposed to state or local procurement law), the Section does not believe that different standards should apply to providing advice on this body of law, or that maintaining an office in other states or countries should impact such advice.” Regarding the latter, the Section stated that it “does not believe it is necessary or appropriate at this time to take a position on the general issue concerning whether lawyers should, as an ethical matter, keep abreast of changes in technology,” but noted that “the protection of certain types of information can play an important role in seeking or performing a public contract.” Many thanks to Roland L. Trope and committee cochairs Agnes P. Dover and Cameron S. Hamrick for preparing the comment letter. Thank you, too, to the Council for taking time during the holidays to review, electronically debate and vote on the comment letter.

On January 12, 2010, the Section submitted comments on the Federal Acquisition Regulation (FAR) proposed rule on Preventing Personal Conflicts of Interest, 74 Fed. Reg. 58584 (Nov. 13, 2009). Section 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 directed the Office of Federal Procurement Policy (OFPP) to develop policy to prevent personal conflicts of interest (PCIs) by contractor employees performing acquisition functions for or on behalf of a federal agency or department. Congress also directed OFPP to develop a PCI clause for inclusion in solicitations, contracts, task orders, and delivery orders. The proposed rule would add a new FAR Subpart 3.11, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, which would set forth policies and procedures for identifying and preventing PCIs. The proposed rule would also create a new FAR contract clause 52.203-16, Preventing Personal Conflicts of Interest. The Section’s comments made clear that while “the Section strongly believes that contractor employees should act impartially in performing their work for the Government, as well as for any customer or other client,” the Section does not necessarily believe the same approach for Government employees, mandated by statute in many cases, necessarily should apply to contractor employees to ensure impartial contract performance.” The Section offered seven specific comments, which are summarized below, to help improve the proposed rule:

- the Civilian Agency Acquisition and Defense Acquisition Regulations Council should revise the proposed rule to clarify the definition of “acquisition function closely associated with inherently governmental functions”;
- the councils should revise the proposed rule to clarify the financial interests that create PCIs;
- the councils should reconsider whether it is in the best interests of the Government to mandate financial disclosure for all “covered employees”;  
- the councils should revise the proposed rule to clarify the requirements related to non-public government information;
- the councils should revise the proposed rule to allow a contractor reasonable time to investigate before disclosing PCI violations;
- the councils should revise the proposed rule to clarify the application of the PCI requirements to subcontractor employees and subcontractor flow-down obligations; and
- the councils should revise the proposed rule to allow waivers by the contracting officer.

Special thanks to Agnes Dover, Mike McGill, and Cameron Hamrick for preparing the comment letter on this important subject.

I look forward to seeing you all in Seattle for the 5th Annual State and Local Procurement Symposium and open Council meeting. PL