News from the CHAIR

Carol N. Park-Conroy, Chair

This column is being written the day after my return from the Annual Meeting in Toronto. Despite concerns expressed by some about the "international" location and the need to remember a passport, nearly 200 Public Contract Law Section members registered for the meeting and educational program. By all accounts, our members were not disappointed.

Special thanks go to Dave Ehrlhart and Stu Nibley for serving as Annual Meeting Program cochairs and to Gail Zirkelbach, David Bodenheimer, Gerry Stobo, Andy Irwin, John Vento, Stan Soya, and Rob Vogel for the exceptional quality of the educational programs they moderated. The first two programs explored the challenges faced by in-house and government agency counsel in these times of limited resources and the regulatory impact of escalating cybersecurity threats. In keeping with our Toronto venue, the focus of the programs then turned to more international themes, exploring Canadian contracting practices, developments in Canadian, Chinese, and European procurements and construction, and the Foreign Corrupt Practices Act. The final program examined the changing landscape of the False Claims Act.

We were so fortunate to have Daniel I. Gordon, Administrator, Office of Federal Procurement Policy, as our speaker at the Section's Luncheon and Annual Alan E. Peterson Lecture. Dan summarized the major concerns OFPP is addressing and made a special point of complimenting the Section for the quality of the July 27, 2011, Comment Letter on Organizational Conflicts of Interest prepared by the task force led by Marcia Madsen and Ty Hughes. I am committed to continuing the Section's fine working relationship with OFPP in the coming year.

The Annual Meeting is also the time of transition for the Section's leadership. As chair-elect, I had the privilege of working closely with outgoing chair, Don Featherston. We have benefited greatly as a Section from Don's energy, enthusiasm, and strong leadership, especially in the area of state and local procurement, where, among many other things, he significantly expanded our alliances with the National Association of State Procurement Officials and the National Institute for Governmental Purchasing, Inc. Thank you, Don.

Thanks also to the departing members of the Council for their valuable service to the Section: Missy Copeland, David Kasanow, Herman D. Levy, Christopher R. Yukins, and Reba A. Page.

(continued on page 22)
against it and it can defend by showing the government’s breach or constructive change? Take a termination setting: If a contractor is terminated for convenience and wants to minimize or avoid application of a loss ratio, must it first bring an affirmative claim for breach or constructive changes against the government and get a final decision on that claim? Why is that necessary when the CO will provide a final decision on the contractor’s entire termination claim, including the contractor’s claimed loss ratio? At the end of the day, doesn’t it turn the CDA on its head to require a contractor to file a claim? Did Congress really intend to force a contractor to file a claim even if it doesn’t want to do so?

One must also wonder: when a contractor is hamstrung in this way in presenting its defenses, why is it that the government may defend a board case by alleging fraud by the contractor? The boards have no jurisdiction to hear a government claim of fraud under the CDA, 10 but they want to do so?

Isn’t freedom of choice involved here, too? What if a contractor doesn’t want to pick a fight? What if it doesn’t want to file a claim against its government customer for, say, breach of contract or constructive changes? But, having said that, what if it does want to defend itself when the government customer picks the fight, when the government makes a claim and it can defend by showing the government’s breach or constructive change? Take a termination setting: If a contractor is terminated for convenience and wants to minimize or avoid application of a loss ratio, must it first bring an affirmative claim for breach or constructive changes against the government and get a final decision on that claim? Why is that necessary when the CO will provide a final decision on the contractor’s entire termination claim, including the contractor’s claimed loss ratio? At the end of the day, doesn’t it turn the CDA on its head to require a contractor to file a claim? Did Congress really intend to force a contractor to file a claim even if it doesn’t want to do so?

One must also wonder: when a contractor is hamstrung in this way in presenting its defenses, why is it that the government may defend a board case by alleging fraud by the contractor? The boards have no jurisdiction to hear a government claim of fraud under the CDA, 10 but they have consistently found jurisdiction to hear a defense of fraud raised by the government in relation to an affirmative claim by a contractor. 11 If the government is allowed to use this blockbuster defense when it has no jurisdiction under the CDA to raise it affirmatively, then why is this different from the contractor raising a defense of improper government performance when the government makes a demand against it that is properly appealed by the contractor?

I suppose a challenger could voluntarily be rash enough to tie one hand behind its back before getting into a fistfight with the champ, but doesn’t the Maropakis decision seem like the referee is tying the challenger’s other hand behind its back before calling the fight? I wonder. PL

Endnotes
1. 609 F.3d 1323 (Fed. Cir. 2010).
2. M. Maropakis Carpentry, Inc. v. United States, 84 Fed. Cl. 182, 184, 194 (2008), aff’d, 609 F.3d 1323 (Fed. Cir. 2010).
3. 609 F.3d at 1328–29.
4. Id. at 1329–31.
5. See 41 U.S.C. § 7103 (Supp. 2011). One must wonder, though, why, when the contracting officer has already decided in a final decision that the contractor, not the government, is responsible for the delay and so will deny the claim on entitlement grounds without having to reach the damages claimed.

CHAIR’S COLUMN
(continued from page 2)

and Young Lawyer Council member Kathryn E. Swisher. This is the perfect place to give special recognition to Missy for her leadership in the preparation of our latest publication: Guide to State Procurement: A 50-State Primer on Purchasing Laws, Processes and Procedures. I continue to be amazed and gratified by the depth of the commitment and professionalism represented by the Council’s members.

Turning to the Section’s new leadership, we welcome Stuart B. Nibley as incoming secretary and four new Council members, Alison L. Doyle, Daniel P. Graham, Steven L. Schooner, and Candida Steele, along with Young Lawyer Council member, Daniel E. Chudd. We are grateful for the continued service of David G. Ehrhart as budget and finance officer, and Allan J. Joseph, our first Section delegate. Completing the 2011–2012 officers roster are Chair-Elect Mark Colley and Vice Chair Sharon Larkin.

New committee chair and vice chair appointments have been completed and I look forward to working with the Section’s many committees. This is the perfect time to go to the Section’s website, decide which committees are of interest to you, and become active in the work of the Section. The resulting personal and professional rewards will make your participation very worthwhile.

And, remember to save November 4–5, 2011, for our Fall Program and Council Meeting in Albuquerque, New Mexico. Cochairs Anne Donohue, Kevin Mullen, and Al Purdue are planning a strong program titled: “Emerging Federal Markets: Initiatives in Collaboration and Innovation.” It is shaping up to be a program you definitely won’t want to miss.

Finally, I welcome your thoughts, comments, ideas and suggestions. You can reach me at (703) 282-3392 or carolparkconroy@gmail.com. PL