We here in the nation’s capital are now deep into the bosom of winter, as are most of you elsewhere. Yesterday—on New Year’s Day—the home ice hockey team pulled off a spectacular outdoor “Winter Classic” extravaganza that brought crisp air and blazing sunshine to the city’s converted baseball stadium and a scintillating winning goal for the home team with 12 seconds left in regulation play! Can a reconstituted Congress bring similar results here in Washington? Probably not—but anticipation remains high. And so it does also within the public procurement bar. During the past year, the number of issues the Section addressed in comment letters was perhaps as high as it has ever been. Issues were popping and the Section’s committees stepped forward with incredible diligence to prepare meaningful substantive comments for the Section to submit.

As is typical, November and December brought the customary inertia that attends a lame duck Congress and acquisition workforce pining for winter break. This presented the Section with a brief respite from its regulation commenting duties. However, we expect the break will soon end. The Civilian and Defense Acquisition Regulations Councils have announced an ambitious schedule for promulgation of interim or final rules dealing with a host of topics that are of considerable interest to the government contracting community. Issues include:

- procedures for dealing with counterfeit parts and nonconforming parts,
- the long-awaited organizational conflicts-of-interest regulation,
- refinements in personal conflict-of-interest rules,
- further implementation of business systems rules,
- cybersecurity monitoring and reporting,
- advisory small business size determinations, and
- wage and hour issues for government contractors.

Other issues will undoubtedly emerge. And while ABA sections rarely get involved with submitting amicus curiae briefs, Section leaders and other members are heavily involved in dialogue involving the current cases in the federal courts that deal with protection of legal privileges for government contractors that conduct internal investigations. Our Regulatory Coordinating Committee, led by Kara Sacilotto and Craig Smith, has done a fantastic job not only from a logistical standpoint...
non-U.S. citizen workers temporarily hired to work by federal contractors for the U.S. government overseas.” Wyler, supra note 1, at 24 n.56.


25. Commission on Wartime Contracting in Iraq and Afghanistan, Transforming Wartime Contracting: Controlling Costs, Reducing Risks 92–94, 159 (August 2011), available at www.wartimecontracting.gov. According to the website, the commission was created by Congress as an independent, bipartisan body “to assess contingency contracting for reconstruction, logistics, and security functions; examine the extent of waste, fraud and abuse; and provide recommendations to Congress to improve the structures, policies, and resources for managing the contracting process and contractors.”


29. Id. §§ 1701–1708.

30. 22 U.S.C. § 7104(g).


32. 22 U.S.C. § 7104(b)(1). A compliance plan is only required for contracts (as well as grants or cooperative agreements) to be performed outside the United States if the required services exceed an estimated value of $500,000. Id. § 7104a(t).

33. Id. § 7104b(c)(1)(G). The NDAA contains similar requirements. NDAA, supra note 28 § 1704(c).

34. FAR 22.1704(b) (“remedies are in addition to any other remedies available to the Government”); see FAR 40.406-3(a) (“Agencies shall establish procedures for the prompt reporting, investigation, and referral to the debarring official of matters appropriate for the official’s consideration”).


36. Id.

37. EO 13627; § 2(1)(C).

38. Id.

39. FAR 4.02; 2 C.F.R. § 180.125.


42. FAR 4.001.


44. Id.


46. Special Inspector General for Afghanistan Reconstruction, Quarterly Report to the United States Congress 53 (April 30, 2014) [hereafter SIGAR]. Of the 433 total referrals, 406 were made beginning in the second quarter of 2011. Id. at 54.

47. SIGAR (Oct. 30, 2013), at 15 (“As has been the case for much of the time in Iraq and Afghanistan, contractors outnumber deployed military personnel”); SIGAR (July 30, 2012) at 106 (“Human trafficking continues to be a major problem”) & 107 (“Labor recruiting agencies have lured foreign workers from a number of countries in the region, under the pretext of high-paying jobs”).

48. SIGAR (April 30, 2014), at v.

49. Id. at 49.

50. Id.


52. DoDIG-2012-086, supra note 52, at 11. Ninety-five percent of DoD contracts reviewed contained the current version of FAR 52.222-50, “Combating Trafficking in Persons,” and 97% contained some version of the clause. Id. at i.

53. DoDIG-2012-086, supra note 13, at 11.


55. 2014 Trafficking in Persons Report, supra note 3, at 45.

56. Id. at 397.

57. Id.

58. Id. at 398.

59. Id.

60. Id.


63. Michael J. Davidson and Jennifer Longmeyer-Wood, The ICE Suspension and Debarment Program Heats Up, PROCUREMENT LAW. 1, 14 (Fall 2010).


65. Schwellenbach and Leonnig, supra note 22, at A4, SIGAR (Oct. 30, 2013), at 14 & 15 (“no jurisdiction over Afghan primary contractors or their subcontractors”).

66. Schwellenbach and Leonnig, supra note 22, at A4 (In 2010, the FBI had “35 to 40 agents in war zones, but they were focused on investigating fraud and corruption”) (Military investigators in Iraq, Kuwait, and Afghanistan were tasked with “handling all types of felony-level crimes”).


NEWS FROM THE CHAIR

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in terms of “keeping the trains running on time” (i.e., making sure the comments are timely prepared and submitted), but even more in helping to ensure that the Section’s comments project the highest quality in substance and tone. Nothing you do as a Section and committee member has more meaning to the Section than your participation in the regulatory commenting process. The Section remains the “gold standard” among legal and other government contracting associations with regard to presentation of meaningful substantive comments that reflect the views of a balanced constituency. Please plan to assist your committees where you can in this regard in the coming year.

The Section is also keeping its finger on the pulse of legislators as well. As you may know, the House and Senate Armed Services Committees last year launched yet another analysis of Defense Department acquisition practices. The Section submitted its comments to the House and Senate Armed Services Committees at the request of ABA Executive Director Jack Rives to take the lead on providing input to improve the DoD acquisition process. We are prepared to provide further input as the congressional committees pursue the issues.

As I entered my year as chair of the Section, I entertained some ideas regarding how we could expand our efforts to implement action items initiated by recent past
First – Committee Activities. The Section’s committees remain the lifeblood of the Section. Many committees meet monthly and enjoy robust attendance. Others, however, have been more sluggish, and less organized. Chair-elect Dave Ehrhart took the lead in drafting a set of “Expectations of Committee Chairs” that is designed to serve as both a statement of expectations and a best practices guide for committee officers. By the time you read this column, we and the Division chairs will have rolled out the new guidance to committee officers. While the form of the guidance is new, many of the best practices outlined, of course, are not—e.g., be collaborative, hold regular meetings with prepared agendas, keep officers informed, focus on membership initiatives (particularly diversity, younger lawyers, government, and new members)—prepare minutes and maintain a relevant website, establish appropriate liaisons, produce regulatory comment letters, and pursue succession planning.

Second – Mentoring. Section leadership and Council members have continued to focus on increasing membership and participation throughout the bar in Section activities. As we discussed our objectives, we repeatedly returned to the topic of mentoring younger attorneys and welcoming government attorneys. We have now appointed a new Mentoring Committee, headed by past Chairs Michael Hordell and Sharon Larkin, supported by younger attorneys, to develop a comprehensive mentoring program for the Section. We are extremely fortunate that our new Section co-director, Patty Brennan, has had extensive experience working with ABA law students and young lawyers and implementing mentoring initiatives, and she is serving as a member of our new committee. Section Vice Chair Ty Hughes is working with the Section’s Technology Committee and younger members in attempts to make substantive presentations more accessible and relevant to newer members.

Third – Enhanced Section Publications. We have followed the lead of other Sections by establishing a new Publications Board. The objectives are several: 1) to produce additional non-dues revenue; 2) to present members with a more robust offering of books and materials prepared by subject matter experts; and 3) to enhance the Section’s position within the government contracts legal community as the “go-to” location for expert commentary and instruction. Current publications in the works that are furthest along at this point include the Flow Down Guide for Fixed-Price Contracts and Annotations to the Section’s Model Procurement Code. You may also be interested in the most recent Section publication: State False Claims Acts: A Practitioner’s Guide to the False Claims Acts of the Various States.

Finally, we will soon be entering our most active period of Section programs, in the spring and summer. But first let me thank the Fall Program co-chairs, Oliya Zamaray and Stan Soya, and Annual & Quarterly Program co-chairs, Paul Khoury and Annejanette Pickens, for planning a superb November program in Miami, which proved an attractive and accommodating location for the Section’s fall meetings. But now—on to spring! All panels and speakers are now set for our Section’s premier educational event, the 21st Annual Federal Procurement Institute in Annapolis March 11–13 with the Section’s Council meeting on March 14. The FPI co-chairs selected a baseball theme for our program, Procurement Baseball – Covering All the Bases, and the schedule of panels and speakers does just that. The Section will again cosponsor the 10th Annual State and Local Symposium in Philadelphia April 23–24 with the ABA Section of State and Local Government Law and the National Association of State Procurement Officials. And you will want to start making your travel plans now for the Section’s educational program and festivities that will attend the ABA’s Annual Meeting July 30 to August 1 in Chicago. The Section will be celebrating its 50th anniversary with special presentations and historical remembrances, graced by the Queen of the Ball, Section Director Marilyn Neforas, now in her 38th year as leader of our flock! We look forward to seeing you at these events.

PENSIVE POSER
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not? Scalia and Garner certainly seem to think so:

The soundest, most defensible position is one that requires discipline and self-abnegation. If judges think no further ahead than achieving justice in the dispute now at hand, the law becomes subject to personal preferences and hence shrouded in doubt. It is age-old wisdom among mature, experienced legal thinkers that procedure matters most: how things should be done as opposed to what should be done. And for judges the “how” is fidelity to law. But it is a hard lesson to learn, and harder to follow.

Does this apply to trial judges as well as appellate judges? I wonder.

Endnotes

2. See id. at 15–28.
3. Id. at 57.
4. Id. at 10–11.
5. Id. at 348. Scalia and Garner quote Sir Thomas More with approval: “[I]f the parties at my hand call for justice, then, all were it my father stood on the one side, and the Devil on the other, his cause being good, the Devil should have right.” Id. at 18 (quoting R.W. CHAMBERS, THOMAS MORE 268 (1962)).