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June 22, 2006

Ms. Laura Auletta
Executive Director
1423 Panel
General Services Administration
1800 F Street, N.W., Room 4006
Washington, DC 20405

Re: Comments to the 1423 Panel Regarding the Presumption of Good Faith that Some Judicial Decisions Have Applied to Government Employee Conduct in a Contractual Environment

Dear Ms. Auletta and Members of the 1423 Panel,

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments relative to the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees have members representing these three segments to ensure that all points of view are considered.[1] By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

[1] The Honorable Mary Ellen Coster Williams and the Honorable Jeri K. Somers, Council Members of the Section of Public Contract Law, did not participate in the Section's consideration of these comments, and they abstained from voting to approve and send this letter.

I. INTRODUCTION

The Section has for several months been considering a proposal from certain members and its Contract Claims and Disputes Resolution Committee that would effectively extinguish the presumption of good faith that some judicial decisions have applied to the conduct of Government employees as they administer Government contracts.

During the Section's quarterly Council meeting conducted in connection with the Federal Procurement Institute in Annapolis on March 4, 2006, the Council discussed issues relating to recent judicial application of the presumption of good faith to Government employees acting in the contractual arena. After the discussions, the Council voted to send the subject back to the Committee for further consideration. Prior to doing so, the Council approved a motion that provided, in general, that a contractor and the Government should receive equal treatment under a Government contract. The Council asked the Committee to provide it with a further refinement of the motion that would reflect the specific issues that relate to the presumption of good faith as it has been applied in the contractual arena and the heightened evidentiary standard that a number of recent judicial decisions have applied to contractor attempts to rebut this presumption ("clear and convincing evidence, well-nigh irrefragable evidence of bad faith, or *animus* towards the contractor").

At its quarterly meeting on May 20, 2006, the Section's Council passed a resolution 1) to send the Comments below to the 1423 Panel for its consideration as it prepares its report; and 2) to pursue approval within the American Bar Association to permit the Section to adopt the language proposed at the conclusion of these Comments as a Principle of the Section of Public Contract Law. The Section is not at this time advocating specific legislation or regulatory change. It offers the language and comments contained herein for the Panel's consideration as it prepares its proposals. The specific language that might be employed by the Panel consists of a single sentence immediately before the Conclusion of these Comments, which we repeat here:

> The contractor and the Government shall enjoy the same legal presumptions, if any, in discharging their duties and in exercising their rights in connection with the performance of any Government contract, and either party's attempt to rebut any legal presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.

The remainder of the Comments provide a very basic explanation of the reasoning that led to the preparation of the proposed language, which we respectfully submit for your consideration.[2]

II. COMMENTS

Background

For many years the U.S. Supreme Court has recognized a number of presumptions that apply to the conduct of Government employees acting in a sovereign capacity. Over time, the forums that address Government contract disputes applied some of the presumptions to the conduct of Government employees acting in the contractual arena, not merely the sovereign arena. This appears to have led to substantial confusion in some of the case law, and, some argue, inequities for contractors.

Much of the confusion in the court decisions comes from the mingling of a) the duty of good faith and fair dealing (as recognized by Section 205 of the Restatement 2nd of Contracts) that is implied into every contract, including Government contracts, and imposed upon every party to a contract, including contractors and the Government, with b) the presumption of good faith that attaches to Government employees acting in a sovereign capacity. The two principles involve distinct legal concepts. The former (the duty of good faith and fair dealing) is properly applied in the same way as the presumption of regularity, which looks backwards in time to determine via an objective standard if a Government employee acting in a sovereign capacity performed a specific action (sometimes called "the predicate act doctrine"). This predicate act doctrine has nothing to do with the Government actor's state of mind. Similarly, when a court or board examines whether or not a contractor has met its implied contractual duty of good faith and fair dealing, a forum employing the proper principles simply examines the objective evidence to determine if the contractor met its duty. The contractor's state of mind is rarely, if ever, an issue.

The second principle (the presumption of good faith), in contrast, reflects the subjective standard that examines the state of mind of a Government actor (e.g., bad faith/*animus* or good faith) and has been applied by the Supreme Court to the conduct of Government employees acting in the sovereign arena, not the contractual arena.

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[2] It is not the purpose of this memorandum to provide full legal citations and support for the principles that are listed. That has been done elsewhere. This memorandum repeats the substance of the key points that the Committee Co-Chairs presented at the Council meeting.

As Judge Wolski of the Court of Federal Claims noted in his decision issued on June 27, 2005, "This area of jurisprudence has persisted in its elusiveness."[3] Although the issues in the area are far from settled, some clarity has been brought to the area by recent decisions of the Court of Federal Claims, including most notably Judge Wolski's decision as well as those of a number of other judges, and through decisions of the Court of Appeals for the Federal Circuit, which decisions are relevant but not, however, squarely on point. The problem is that several other recent decisions, including some issued within the past several months, have perpetuated the confusion by applying the presumption of good faith to contractual actions.

The unequal treatment of the contracting parties by misapplication of the doctrine to government acts in the contracting arena has been compounded by some judges who have imposed a higher standard of proof on the contractor in order to overcome that presumption. In other words, the heightened evidentiary standard that the Supreme Court has required to overcome the presumption of good faith in the sovereign arena has been imposed by some decisions in the contractual arena. This evidentiary standard provides that a contractor may overcome the presumption of good faith that attaches to the conduct of Government employees, even in the contractual arena, only through the presentation of clear and convincing evidence.

The mingling of the presumptions and principles and the application of a heightened evidentiary standard to efforts to rebut the presumptions run counter to both long-standing and recent decisions of the U.S. Supreme Court. These decisions provide that when the Government exercises its sovereign authority to enter a contract, thereby exiting the sovereign arena and entering the contractual arena, it places itself in a position of complete equality with its contracting counterpart, consistent with Section 205 of the Restatement 2nd of Contracts. Of course, this principle of equality does not apply when the law or a FAR clause gives to the Government official discretion to make a determination. In such cases, the well-understood administrative law standard of arbitrary and capricious is applicable, and has no counterpart in the evaluation of contractor actions.

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[3] *Tecom v. United States*, 66 Fed Claim 736, at 768 (2005).

Proposed Language

The Section offers the following language to address the issues discussed in these Comments:

> The contractor and the Government shall enjoy the same legal presumptions, if any, in discharging their duties and in exercising their rights in connection with the performance of any Government contract, and either party's attempt to rebut any legal presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.

III. CONCLUSION

The Section appreciates the opportunity to provide these Comments and is available to provide additional information or assistance as you may require.

Sincerely,

Robert L. Schaefer
Chair

cc: Michael A. Hordell
Patricia A. Meagher
Michael W. Mutek
Carol N. Park-Conroy
Patricia H. Wittie
Hubert J. Bell, Jr.
Mary Ellen Coster Williams
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Council Members
Co-Chairs and Vice-Chairs of the
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David Kasanow