



2007-2008

**CHAIR**

Patricia A. Meagher  
582 Market St, Ste 301  
San Francisco, CA 94104  
(415) 362-6517

**CHAIR-ELECT**

Michael W. Mutek  
1200 S Jupiter Rd  
Garland, TX 75042  
(972) 205-5177

**VICE-CHAIR**

Karen L. Manos  
050 Connecticut Ave, NW, 2nd Flr  
Washington, DC 20036  
(202) 955-8536

**SECRETARY**

Donald G. Featherstun  
560 Mission St, Ste 3100  
San Francisco, CA 94105  
(415) 397-2823

**BUDGET AND FINANCE OFFICER**

Carol N. Park-Contoy  
7404 Rippon Rd  
Alexandria, VA 22307  
(703) 681-8507

**SECTION DELEGATES**

John S. Pachter  
8000 Towers Crescent Dr, Ste 900  
Vienna, VA 22182  
(703) 847-6260

Mary Ellen Coster Williams  
717 Madison Pl, NW, Ste 612  
Washington, DC 20005  
(202) 357-6660

**IMMEDIATE PAST CHAIR**

Michael A. Fjordell  
600 14th St, NW, 5th Flr  
Washington, DC 20005  
(202) 220-1232

**PREVIOUS PAST CHAIR**

Robert L. Schaefer  
1049 Camino Dos Rios  
Thousand Oaks, CA 91360  
(805) 373-4608

**COUNCIL MEMBERS**

Daniel F. Doogan  
Detroit, MI

Mark E. Hanson  
Vienna, VA

Annejanette Kloeb Heckman  
Herndon, VA

E. Sanderson Hoe  
Washington, DC

James A. Hughes, Jr.  
Arlington, VA

David F. Innis  
San Francisco, CA

Sharon L. Larkin  
Washington, DC

Rocco J. Maffei, Jr.  
Akron, OH

Linda T. Maramba  
McLean, VA

Stuart B. Nibley  
Washington, DC

Scott E. Pickens  
Washington, DC

Jeri K. Somers  
Washington, DC

Holly Enrick Svetz  
Tysons Corner, VA

**EDITOR, PUBLIC CONTRACT**

**LAW JOURNAL**  
Karen L. Manos  
Washington, DC

**EDITOR, THE PROCUREMENT LAWYER**

John A. Burkholder  
Los Angeles, CA

**BOARD OF GOVERNORS LIAISON**

Charles A. Weiss  
St. Louis, MO

**SECTION DIRECTOR**

Marilyn Neiforas  
321 N Clark St, M/S 19.1  
Chicago, IL 60610  
(312) 988-5596

March 18, 2008

**VIA EMAIL AND U.S. MAIL**

Office of Federal Procurement Policy  
Office of Management and Budget  
725 17th Street, N.W.  
Room 9013  
Washington, D.C. 20503

**Re: Proposed OFPP Policy Letter - Acquisition of Green Products  
and Services, 72 Fed. Reg. 73904 (Dec. 28, 2007).**

Dear Sir or Madam:

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

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. 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.<sup>2</sup>

**Comments**

On December 28, 2007, the Office of Federal Procurement Policy (the "OFPP") published in the Federal Register (72 Fed. Reg. 73904) a proposal to issue a policy letter on green procurement policies and strategies (the "Proposed Policy Letter" or "the Letter"). The Section has reviewed this Policy Letter and wishes to

<sup>1</sup> Mary Ellen Coster Williams, the Section of Public Contract Law's representative to the ABA House of Delegates, and Jeri K. Somers, a Council Member, did not participate in the consideration of these comments and abstained from voting to approve and send this letter.

<sup>2</sup> This letter is available in pdf format at <http://www.abanet.org/contract/federal/regscmm/home.html> under the topic "Emerging Areas."

compliment OFPP for proposing to address this important issue in a responsible and comprehensive way. However, the Section believes that the Proposed Policy Letter can be improved, and offers the following three substantive comments towards this end.

1. Agency Implementation and Coordination

The Proposed Policy Letter, if given full effect, will greatly impact many government contractors. In particular, each agency's "written affirmative procurement program" will address:

- Green or sustainable standards and performance indicators in statements of work, source-selection factors, and performance-based acquisitions.
- Past performance evaluation of contractors' adherence to green components/sustainable aspects of contracts.
- "Policies to automatically substitute functionally equivalent green products and services in place of non-green products and services."

The Proposed Policy Letter also requires the executive agencies to include requirements and preferences for the use of green products in all new service contracts and re-competed service contracts where green products may be substituted for equivalent non-green products in the performance of the contract. The Proposed Policy Letter mandates that where mandatory and preferred sources are unable to obtain green products and services that meet their performance needs, the agency must purchase green products and services elsewhere.

These requirements, and several others not mentioned here, stand to impact both agencies and their respective contractors greatly. The Section is concerned that executive agencies may lack the expertise or experience necessary to perform these evaluations and otherwise execute these requirements. Although there are various federal and private sector "green" programs currently in effect,<sup>3</sup> the Proposed Policy Letter does not appear to provide the specific standards on which agencies may rely in making these evaluations or to describe methods of applying these programs to the unique circumstances of a government contractor nor to provide guidance for identifying alternative green sources. Therefore, the Section suggests

---

<sup>3</sup> EPA's Energy Star Program, which provides an objective measure of energy efficiency, EPA's Green Building Program, The Leadership in Energy and Environmental Design Green Building Rating System™ ("LEED®"), and EPA's Environmentally Preferable Purchasing Program.

that the Proposed Policy Letter further identify how the Government intends to aid agencies and contractors in their implementation of and adherence to the policies and strategies set forth in the Letter. Such aid, possibly through assistance from an agency designated to provide guidance on “green” procurement, could include instruction on how to appropriately identify and differentiate between green contractor practices.

The Section is also concerned that agencies may enact and enforce the policies and strategies contained in the Proposed Policy Letter differently. In particular, some critical terms in the Proposed Policy Letter are undefined. For example, the meaning of terms such as “maximum extent practicable,” “life-cycle cost effective,” and “not reasonably available to meet the functional requirement” are not included in the letter. Each of these terms, among others, could result in different interpretations among agencies and, perhaps, even within a given agency.

Therefore, the Section suggests that the Letter identify processes that will be established to better ensure that the policies and strategies set forth therein are enacted in a uniform and consistent manner. The Section suggests this may include oversight and coordination by a common agency or other government body.

Further, since “green” products and services may cost more than standard products and services, the Proposed Policy Letter should explain the cost-impacts of its proposals. In particular, the letter should clarify that the imposition of “green” requirements on existing contracts is certain to require changes to an existing contract. Finally, the Section is also of the opinion that the Proposed Policy Letter would better serve agencies and contractors if it provided a process whereby its broad goals could be transformed into useful guidance for the practical application of the green procurement procedures. For example, establishing evaluation factors from the Proposed Policy Letter’s objectives would assist agencies and contractors in determining what actions they must take to comply with the Letter.

These processes may include involvement of government agencies, such as the EPA and DOE, along with the Civilian Agency Acquisition and Defense Acquisition Regulations Councils. The Section feels that the implementation of such processes will create a more informed procurement environment and better ensure that contractors and agencies are treated fairly and equitably as they transition into the new era of green procurement.

## 2. Agency Transparency and Responsiveness

In view of the impact that agency implementation of the Proposed Policy Letter will have on contractors and prospective contractors, the Section proposes

that OFPP provide a mechanism through which contractors and prospective contractors can be informed of the green purchasing plans, guidelines, evaluation factors, and other implementation of the Letter and have the opportunity to comment thereon. Such a mechanism could be provided through the Civilian Agency Acquisition and Defense Acquisition Regulations Councils or through notices of proposed rulemakings by the affected agencies.

3. Agency Accountability

The Section is concerned that the Proposed Policy Letter is not specific enough as to how the Government will ensure that executive agencies are meeting the proposed requirements. Although the Letter sets forth general reporting requirements, the Section believes that executive agencies need to be more thoroughly regulated in their implementation of these policies and strategies. The Section suggests clarifying how the Government intends to hold executive agencies accountable under the Proposed Policy Letter.

**Conclusion**

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

Sincerely,



Patricia A. Meagher  
Chair, Section of Public Contract Law

cc: Michael W. Mutek  
Karen L. Manos  
Donald G. Featherstun  
Carol N. Park Conroy  
Mary Ellen Coster Williams  
John S. Pachter  
Michael A. Hordell  
Robert L. Schaefer  
Council Members, Section of Public Contract Law  
Robert Huffman  
Scott M. McCaleb  
Kara M. Sacilotto