Q & A with Joseph Award Winner John Pachter

John S. Pachter

As the first recipient of the Allan J. Joseph Excellence in Leadership Award, longtime Section member John Pachter was recognized during the 2012 Annual Meeting for "exceptional effort and accomplishments" and "extraordinary contributions" to the Section. At the ceremony, 2011–12 Chair Carol Park-Conroy noted that John has been active in the Section since the 1970s with a Section profile that dates back to 1982 (when records first began) and runs for 11 pages, with more than 220 entries.

In a letter to Park-Conroy, John expressed his appreciation to Section officers for selecting him for this award. "To be honored in this way is especially humbling," he stated, "as Allan has been a powerful force for good in the Section and in the broader American Bar Association. It has been a thrill to witness at close hand Allan's ability to bring his formidable legal, negotiating and diplomatic skills to bear in achieving results within the ABA. The benefits of his leadership have been showered upon all of us."

The *Procurement Lawyer* asked John to share observations about his involvement in the Section, including the changes he's observed.

PL: When did you join the ABA and the Section of Public Contract Law?

JSP: I joined the ABA in the fall of 1966, more than 46 years ago. The Commandant of the Army JAG School encouraged all of the Basic Class officers to join, so I did. When the Army assigned me to work in government contracts in the Pentagon, the Section was less than two years old. This was an exciting development, and it seemed like a good idea to become a member of the Section as well.

PL: When did you become active in the Section, and what was your motivation?

JSP: When I entered private practice in 1971, my senior partner, Trow vom Baur, encouraged me to get involved in bar association committee work. He had a saying that bar association work provides an opportunity to combine public service with private practice. I volunteered for what was then called the Administrative Boards Committee of the Section, chaired by Robert Sheriffs Moss. Bob was a fine attorney with a correct bearing and precise manner, but he also had a sense of humor. He held meetings of a small group of members. Since I was the junior, I was given research and writing assignments to distribute in preparation for the next meeting. In 1977–78, I was appointed to a vice-chair position, and in 1978–79 I became cochair, along with Bob Moss, of the more descriptively titled Administrative Claims and Remedies Committee.

I should add that our stalwart ABA Staff Director Marilyn Neforas was first assigned to the Section of Public Contract Law in September 1976, so she was already on board when I received my first committee officer position!

PL: How would you summarize the differences between the Section then and today?

JSP: First, a fair number of people complained that the Section in its early days was run by an elite group of private practitioners who used the Section to advance the interests of their clients. In fact, the Section was not nearly as democratic nor as diverse as it has come to be. When I started, committee chair positions were fiefdoms, claimed by incumbents as their prerogative, regardless of the amount of work they did, or whether in some cases they did any work at all. No one wanted to hurt good old so-and-so's feelings by suggesting it was time to step down. It was also difficult to attract government attorneys as members. This was particularly true of the Navy, where the general counsel's office actively discouraged membership. This sad state of affairs was largely due to the influence of Admiral Hyman G. Rickover, one of the most powerful people in government for decades. He was brilliant, but "diplomatic" is not a term anyone used to describe Rickover. He spared no one from his caustic outbursts. He had little use for lawyers in general, or bar associations in particular, and he detested attorneys who represented government contractors. He howled when Dick Solibakke, after a distinguished career in government, including some years as chair of the ASBCA, retired and went into private practice with Sellers, Conner and Cuneo. Rickover thought that was unpatriotic, and he said so.

Second, the "undemocratic" and "elitist" charge came to a head when the Section obtained ABA authority to file an amicus brief in the *S&E Contractors*[1] case in the US Supreme Court. The question was whether the government had the right to seek judicial review of an agency decision in favor of a contractor on a contractor claim. At the time, the Atomic Energy Commission, the agency in question, did not have a board of contract appeals, so it referred the matter to a hearing examiner. But the ultimate issue related to the ability of the government to challenge a board of contract appeals decision. The Section's amicus brief argued that a board of contract appeals decision was a "settlement" between

the government and the contractor and was subject to appeal only by the contractor if unsuccessful. The Court, in its 1972 decision, adopted this view.

The problem was that the Wunderlich Act[2] provided for judicial review of a decision that "is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."[3] Moreover, the same Act provided that "[n]o government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."[4] Finally, the agency disputes clause stated the agency's decision was "final and conclusive" unless "a court of competent jurisdiction" decided otherwise for the enumerated reasons.[5] This language on its face left no room to exclude court challenges by the government when it lost a case at the agency level.

Justice Brennan, in his dissent, stated:

> Congress alone can restore the former balance between Government and contractor, for today's decision not only holds that the Act's expanded scope of judicial review is available solely for contractors, but also holds that the Act, in some unspecified way, prohibits the contracting parties from agreeing to a disputes clause that affords the Government that same scope of review. Congress must therefore make more explicit what is already explicit in the Wunderlich Act, but this time in terms so plain that even this Court will be unable to thwart the congressional will.[6]

Congress did so, in the Contract Disputes Act of 1978,[7] when it conferred on the government a limited right of judicial review of board of contract appeals decisions. This was coupled with a right of direct access for contractors, giving them the option to bypass the board of contract appeals and proceed directly into court. In the meantime, the position advanced in the ABA's amicus brief alienated government members of the Section, and resulted in resignations by a number of them.

PL: Talk about your first appointment as a committee chair.

JSP: That came in 1980, when Sparks Hiestand was Section chair. Sparks's given name was Orris, but no one called him that. He was a native of Oklahoma and had a jovial personality. He was an inveterate pipe smoker, and he always had a twinkle in his eye and a bemused look about him, as he looked at you over the top of his spectacles. He called everyone "friend." The definition of "avuncular" is "kind and friendly toward a younger or less experienced person." That was Sparks. He served in the Infantry in WWII and said how lucky he was to survive, as soldiers were killed on all sides of him as the Army advanced across Europe.

After a distinguished career in the Department of Energy, Sparks was for many years a partner at Morgan, Lewis & Bockius. He was a revered figure. I had worked with his wife Emily when she was executive director of the National Contract Management Association. She called him "Sparky." Emily was a refined Southern lady from Montgomery, Alabama, a lover of literature and poetry, and an excellent writer and editor. The two of them made a delightful and charming couple.

I continue to have the greatest respect for Sparks, and you should not take what I'm about to say in any way as criticism of him. He simply reflected the attitude of the day. He said to me: "Friend, you have done a good job in the Administrative Claims and Remedies Committee. Bob Moss is stepping down. I want you to head up the committee. Just pick a small group of people you are comfortable with, and do the committee work. You will get a list of committee members and their addresses. Keep them informed of what you are doing. They will be happy with that." Those were his words, and I can hear him saying them as though it were yesterday. There was no need to invite the general committee membership to open meetings. That was unheard of. I followed his suggestion. The committee changed names again, becoming the Federal Contract Claims and Remedies Committee.

PL: Did you play a role in the Section with regard to implementation of the Federal Acquisition Regulation?

JSP: Yes. The development of the FAR System was a requirement of the Office of Federal Procurement Policy Act of 1974.[8] The initial drafting process was a monumental task extending over five years at a cost to the government of some $15 million. The FAR, although incomplete at 695 pages, was promulgated on April 1, 1984.

Ruth Burg, then a sitting judge on the ASBCA, became Section chair in August of that year. Ruth met with me and had two requests. First, she was familiar with my committee work and suggested it was now time to become a member of the Section Council. Second, she said just being on the Council would not be enough. She also wanted me to chair the FAR Coordinating Council, which would expose me more broadly to the substantive work of all of the Section's committees. The FAR Coordinating Council supervised the activities of some 20 standing committees of the Section in reviewing and preparing comments on a massive outpouring of amendments to the FAR and drafts of agency supplements. The work of the FAR Coordinating Council was set to go into overdrive.

At the August 1984 Council meeting we were confronted with an emergency in the form of a proposed OFPP policy letter[9] on the FAR System, published in the *Federal Register* on July 6, 1984.[10] That document suggested that OFPP intended to play a passive role rather than fulfill its obligations under the statute. The proposed policy letter raised serious concerns that (1) the objective of a single, simplified, government-wide acquisition regulation was not being accomplished, (2) there was no mechanism to ensure against proliferation of inconsistent, duplicative, or unnecessary agency supplements to the FAR, (3) the public was being substantially

excluded from the regulation writing process, and (4) there was no plan to include the public in OFPP's resolution of differences in the resolution of a FAR case when designated agency officials could not agree.

We recognized that if OFPP did not assume vigorous leadership, the long-awaited FAR system would never materialize. Thus, there was an immediate need for a comment letter to go to OFPP under the signature of the Section chair. I was tasked with drafting that letter. Since this was my first writing assignment for Ruth as chair, I assumed that as a judge she would favor a detached, judicial style, something above the fray so to speak. I dutifully prepared such a lofty statement. Ruth rejected my draft in no uncertain terms, telling me: "I may be a judge but I agreed to serve as Section chair and I intend to exercise that responsibility." I then produced another draft, with this helpful guidance in mind, and Ruth signed it on August 17, 1984.

I chaired the FAR Coordinating Council for two years, and was fortunate to have the late Austin Roe as my vice chair. Austin, a flinty New Englander, had served in a similar capacity with Paul Dembling. Austin doggedly tracked all *Federal Register* releases so we could make sure the relevant committees were summoned to action. The *Federal Register*, it seemed, was Austin's natural habitat. At the end we prepared a monograph called "The FAR System: Its Critical Formative Years, 1984–1986."[11] It consisted of a compilation of ABA comments and analyses, with elaborate cross references. There was no other comparable study.

PL: What happened when you became chair of the Bid Protest Committee?

JSP: I became chair of the Bid Protest Committee in 1986. This was an exciting time for bid protests, and the beginning of the practice as we now know it. For years, GAO had based its bid protest authority on the Budget and Accounting Act of 1922, which conferred the power on GAO to "settle and adjust" accounts of the executive agencies. The theory was that since GAO could question ultimate contract expenditures, it could also examine the propriety and legal sufficiency of contract awards. This claim of authority was not embraced by the Department of Justice, which was no doubt jealous of GAO's power grab, nor the agencies, whose contract awards were being reviewed.

In addition, since GAO had no provision for protective orders, the record before GAO consisted of

documents the agency elected to provide, and the protester's counsel could not have access to source selection sensitive information. Because of the tenuous nature of its claimed statutory authority, GAO was fearful of being put out of the bid protest business. All these factors combined to make GAO a "toothless tiger." As a result, GAO was timid about taking on federal agencies, and agencies were relaxed about finding a way to circumvent any GAO ruling they didn't like.

The Competition in Contracting Act of 1984 (CICA)[12] ushered in two changes that turned this world upside down. First, it conferred direct statutory authority on GAO for the first time to adjudicate bid protests. Second, it established authority in the GSBCA for an experimental period (initially three, later extended to a total of 10 years) beginning in 1985 to adjudicate bid protests involving what were then called automated data processing (ADP) procurements—now known as IT procurements. This authority, usually referred to as part of CICA, was an amendment to the Brooks Act. Congressman Jack Brooks of Texas had complained for some time that ITT had garnered the lion's share of ADP procurements from GSA, and he wanted strong oversight of that activity.

So GAO not only obtained explicit authority to decide bid protests, it also had a competitor forum because the statute allowed protesters to go to the GSBCA with their ADP protests as an option to the GAO route. The GSBCA proved to be a formidable competitor, thus convincing GAO to upgrade its procedures, including the use of protective orders. Even though the GSBCA bid protest authority expired in 1995 when it was not renewed, the enhancements to GAO's procedures remained in place, and GAO today remains a viable forum for bid protests.

In any event, by 1986, the bid protest field had begun to attract greater attention. All of a sudden the Bid Protest Committee's work came alive.

To stimulate interest in the committee's work, I decided to experiment with meetings in which we invited all committee members. This was unprecedented. We also arranged to have sandwiches brought in. We discovered that attorneys are social and like to gather, like animals at the watering hole, so to speak. I chaired the Bid Protest Committee for two years. From that modest beginning, we now have a number of committees that meet once a month, with large attendance, sophisticated presentations with speakers and panels, and to top it off, a more abundant buffet lunch than we would ever have imagined.

PL: What was the next event in your work for the Section?

JSP: I was about to complete my three-year stint on the Council. Ruth Burg called me again to meet with her. She said now that I had broad exposure to Section activities, I should think about going on "the ladder" as an officer of the Section. This is a six-year commitment, the fourth year of which is serving as chair of the Section. My term as Section secretary would begin in August 1988. My law firm had commenced activity only in October 1986, so we were still fairly new. I was gratified when my partners enthusiastically endorsed the idea of my going on "the ladder," and said I would have their full support.

I'm indebted to Ruth for giving me a gentle shove at times when I most needed it. She is one of the few people in my life who suggested at the right time that I was capable of stretching myself into something bigger. Ruth is a pioneer who endured and overcame many slights and insults that boiled down to the following: "Accept your fate, you are only a woman." Yet she has carried herself with dignity throughout and with a sense of humor and no trace of bitterness.

PL: What would you say was the highlight of your experience in the Section?

JSP: Working with Norm Roberts, who unfortunately passed away last year. I followed Norm, so I was chair-elect the year he was chair in 1990–91. It was an opportunity to study at the feet of the master. No one I have known ran a meeting as capably as Norm. He was senior vice president and general counsel of Litton Industries, and was a hands-on executive. He was courteous and polite, but no one doubted who was in charge. With the force of his character and his persuasive ability, Norm brought about two changes. First, he observed how the Council conducted its meetings, and commented that it was too inefficient. Meetings would continue after the lunch break on Saturdays, and we would lose most of our audience after lunch.

In the 1970s, when I first became active, the Council would debate the text of committee reports openly, sometimes informed on the subject, but just as vigorously if not. Often the Council would remand the draft to the committee for further study, or for revisions with guidance. Off the committee chair would go, to return later with the presumably better work product. That situation had improved somewhat by the late 1980s, but still had a way to go.

Norm thought the Council ought to function more on the lines of a corporate board of directors. He objected to the Council's wordsmithing of committee reports, saying that since the expertise lay with the committees, the Council should pay more deference to them. He said if this word went out to the committees, it would increase their intensity and result in more refined products. It would also mean more efficiently run Council meetings. Thanks to Norm's influence, committee reports are more polished and Council meetings now routinely adjourn at noon.

Second, Norm insisted that the Section take pains to ensure that every committee paper included the views of government attorneys. This had not always been the case, and it is not inaccurate to say this was a seismic event. The pattern Norm set has also become

established practice. I suspect we are more indebted to Norm than many people realize.

PL: After Norm, you became Section chair in 1991–92?

JSP: Yes. The chair's most important work takes place during the approximately six months before assuming the gavel. That's when the chair-elect appoints program chairs and committee chairs. Everything has to be in place, with plans made, before the year begins at the Annual Meeting in August. It is impossible to play catch-up once the year gets underway.

My year as understudy for Norm Roberts made me more qualified to lead Section meetings than would have otherwise been the case. It is a great thrill to lead the Section and to marvel at all of its moving parts.

PL: Did you have a committee leadership assignment after serving as Section chair?

JSP: Yes. John Kuelbs, when he was Section chair, asked me to head up the FAR 15 Rewrite Working Group. FAR Part 15 contains the rules governing negotiated procurements. This was not a formal committee so it does not appear in my Section profile. However, it involved as much or more work for me personally as any other committee responsibility. The Office of Federal Procurement Policy under President Clinton pushed for dramatic changes, and these concepts were reflected in the first published draft of the FAR Part 15 Rewrite in September 1996. That's when our work began in earnest. There were two public meetings and 1,541 comments from 100 respondents. A revised proposed rule on May 14, 1997, retreated from some of the more drastic changes and generated another 841 comments from 80 respondents. The final version appeared in the *Federal Register* on September 30, 1997.

During the comment period, I made detailed reports at Section Council meetings. The Section's comments and participation were influential in shaping the outcome of the rule. In a nutshell, the OFPP administrator pressed hard the notion that negotiated government procurements should not be much different from commercial sector contracting. This meant relaxing the rules, giving much more discretion to government officials, and vastly increasing the significance of past performance evaluation. The administrator gave a number of speeches in which he stressed the value of rewarding successful performance. He said even his three-year-old daughter understood this, as she preferred McDonald's because they had good food and gave her a free gift.

The problem is that if you adopt this model for government contracts, you would immediately be confronted with a bribe and an improper sole source award. In other words, no matter how much you may favor commercial contracting, government contracts will always be different. The reason is you are spending taxpayer money and there must be accountability.

The high-water mark occurred when some agencies issued solicitations in which the only evaluation criteria were price and past performance. I coauthored a couple of published articles on the FAR 15 Rewrite subject, and one on the subject of past performance, and I venture there is enough information there to satisfy the curious.[13]

PL: Describe the Section's contributions to "big ABA" leadership.

JSP: I began by noting changes in the Section since I have been active. There is one area, however, in which our Section has been consistent through the years, and that has been our contribution to ABA leadership. I'm referring to our two superstars, Allan Joseph and Marshall Doke. Both of them chaired our Section early in their careers. Allan has served in the House of Delegates and the Board of Governors, and in 2002, he was elected for a three-year term as treasurer of the ABA.

Marshall was our Section delegate for 30 consecutive years, ending in 2003. He has served on the Board of Governors and is now chair of the ABA Audit Committee, a position of high responsibility. Like Allan Joseph, Marshall is a legendary figure who has also brought much honor on our Section. Among many other contributions, Marshall founded the Conference of Section and Division Delegates, which gathers on Sunday, the day before the House meets, to discuss pending resolutions sponsored by Sections or of special interest to them. This conference provides a needed forum for Section delegates, allowing them to find common ground and iron out differences, paving the way for smoother deliberations on the floor of the House.

The other members of the House represent state and local bar associations and territories, along with delegates-at-large and others.

PL: How would you sum up your decades of activity in the Section?

JSP: Above all, I value the opportunity to know and work with so many wonderful and talented people. In particular, I am grateful for the support of those who encouraged me to take on increasing responsibility in the Section—in particular, Trow vom Baur, Sparks Hiestand, Ruth Burg, Marshall Doke, and of course Allan Joseph.

I should also mention Paul Dembling, another chair of our Section, who was so modest and unassuming about his astonishing lifetime of achievement. Paul had the unique distinction of being general counsel of three government agencies. He was general counsel of the National Committee for Aeronautics (NACA), where he drafted the enabling legislation for the National Aeronautics and Space Administration (NASA). He became general counsel of NASA and also served as the first chair of the NASA Board of Contract Appeals.

After retiring from NASA, Paul became general counsel of what is now the Government Accountability Office (GAO). After 35 years of federal service, Paul

entered private practice for approximately another 20 years. GAO conducted an extensive oral history session with Paul, and it is available on the Internet. I would encourage everyone to read it.

Among my treasured possessions is a copy of Paul's *Essentials of Grant Law Practice*,[14] which he gave me with the inscription "To John Pachter, with admiration, respect and affection. Paul Dembling." At the Council meeting in Toronto in August 2011, I gave a memorial to Paul, in which I recounted how surprised and delighted I was that a person of Paul's accomplishment would write such an inscription for me. I said that upon reflection, there was nothing unusual about it, because that is the way Paul felt about all of us. And the sentiment sums up my feelings about the many people who have worked hard to make the Section the fine organization it is today: admiration, respect, and affection. PL

Endnotes

1. S & E Contractors, Inc. v. United States, 406 U.S. 1, 90 (1972) (Brennan, J., dissenting).
2. Wunderlich Act, ch. 199, 68 Stat. 81 (1954) (codified as amended at 41 U.S.C. § 321, 322 (2006 & Supp. V 2011)).
3. *Id.* § 321
4. *Id.* § 322
5. *Id.*
6. S & E Contractors, Inc. v. United States, 406 U.S. 1, 31 (1972) (Brennan, J., dissenting).
7. Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2382 (codified as amended at 41 U.S.C. §§ 7101–7109 (2006 & Supp. IV 2010)).
8. Office of Federal Procurement Policy Act of 1974, Pub. L. No.93-400, § 2510, 88 Stat. 796 (1974) (amended 1988).
9. Proposed Policy Letter on the Federal Acquisition Regulations System, 49 Fed. Reg. 27863-02 (July 6, 1984).
10. OFPP Policy Letter 85-1 "Federal Acquisition Regulation System," rescinded by Federal Register Notice March 30, 2000.
11. Federal Acquisition Regulation Coordinating Council, Status Report on the FAR System (1984), *reprinted in* The Far System Its Critical Formative Years 1984-1986 A Compilation of ABA Comments and Analyses A-1.1., H-1.6 (ABA Public Contract Law Section ed., 1988).
12. Competition in Contracting Act of 1984, 41 USC § 3301 (2011).
13. *See* John S. Pachter, Jonathan D. Shaffer & Christina M. Pirrello, *Feature Comment: Source Selection Provisions of the FAR Part 15 Rewrite—A Train Wreck Avoided,* 39 Gov't Contractor ¶578 (1997); *see also* John S. Pachter, Jonathan D. Shaffer & Christina M. Pirrello, *The FAR Part 15 Rewrite*, 98-05 Briefing Papers 1 (1998); John S. Pachter, Jonathan D. Shaffer & Christina M. Pirrello, *Feature Comment: Past Performance as an Evaluation Factor-Opening Pandora's Box,* 38 Gov't Contractor ¶280 (1996).
14. Paul G. Dembling & Malcolm M. Mason, Essentials of Grant Law Practice (American Law Institute-ABA, 1991).