



PACA Pulse

SUMMER 2017

PROFESSIONAL AEROSPACE CONTRACTORS ASSOCIATION OF NEW MEXICO

PO Box 9178
Albuquerque, NM 87119
www.pacanm.org

BOARD OF DIRECTORS

Mark Menicucci
President
923.9925

Malini Hoover
Vice President
250.1685

Burke Nelson
Secretary
269.3416

Lee Brinckerhoff
Treasurer
843.6492

Michael Emerson
Immediate Past President
350.9621

Stuart Purviance
Program Officer
328.8399

Lenny Bean
Small Business Officer
553.0825

Ron Unruh
BFI Officer
206.1033

PULSE EDITOR

Ross Crown
764.5402
RCrown@lrrc.com

EDITORIAL SUPPORT & DESIGN

Ro Saavedra
830.2345
RoSaavedra@msn.com

UNDERWRITER

Lewis Roca
ROTHGERBER CHRISTIE

Expanded 31st BFI Breaks Attendance Record

by Ron Unruh, BFI Officer

PACA's 31st consecutive Briefing for Industry (BFI) was once again a resounding success. The unique aspects of the BFI have catapulted it to being one of the premier events of its kind in the nation. Due to the continued high interest from government agencies in participating in the annual conference, the BFI Committee made the decision to expand BFI 2017 to three full days, up from the previous two and a half days. Attended by both government and contractor personnel from across the country, it was one of PACA's most successful events in recent history. The venue was Hotel Albuquerque Old Town with some attendees upgrading to the new luxury Hotel Chaco on the same grounds.

The BFI was kicked off on the afternoon of Monday, August 14 with early registration and exhibit setup. Day one of the program on the 15th opened with the posting of the colors by the Kirtland AFB Honor Guard and the national anthem sung by the attendees, followed by a warm and hearty welcome address from **Major General David Eichhorn** (USAF retired and member of the BFI Committee).

To provide the opportunity for increased competition for government procurements as well as to broaden the national technology base, PACA set the stage for the acquisition presentations by arranging for top-level presentations from a number of Commanding Generals. These included: **Major General Matthew Molloy**, AF Operational Test and Evaluation Center, Kirtland AFB, NM; **Lieutenant General John Thompson**, Space and Missile Systems Center, Los Angeles AFB, CA; **Major General**

Scott Jansson, AF Nuclear Weapons Center, Program Executive Officer for Strategic Systems, Kirtland AFB, NM; **Major General William Cooley**, AF Research Laboratory, AFMC, Wright-Patterson AFB, OH; and **Brigadier General C. McCauley von Hoffman**, Mobilization Assistant to the Commander, Ogden Air Logistics Center, Hill AFB, UT. The opening day morning was topped off with an enthusiastic and informative speech by **General Ellen Pawlikowski**, AFMC Commander.

The acquisition opportunities for BFI 2017 covered the spectrum from Small Business Innovative Research to Broad Agency Announcements through full and open competitions. There were 38 presentations with over 450 projected acquisition opportunities briefed with a total acquisition value of \$20.2 billion. Other key elements of the BFI included a recent historical high attendance with over 500 attendees from over 20 states. In addition, there were 39 exhibitors ranging from SBIR success stories to PACA sponsors and government agencies.

The BFI Committee has already started planning the 2018 BFI, August 13-16, 2018, again to be held at Hotel Albuquerque Old Town. It is not too early to mark your calendars and start passing the word to your friends and associates.

PACA is a non-profit all-volunteer organization which was stood up in 1984. Over the years PACA has established four self-sustaining scholarship endowment programs at New Mexico universities with combined funding over \$265,000. To date, 80 engineering-related scholarships have been provided to some of the brightest and sharpest New Mexico college students. We hope to add to these funds before year's end.

We look forward to seeing each of you at next year's BFI! •



Major General M. Molloy

President's Corner

by Mark Menicucci



I am writing this in the middle of our 2017 Briefing for Industry conference which has been a great success, thanks to the BFI committee — an 800 pound gorilla of hard working volunteers who plan and execute like nothing I have ever seen before!

In 1982, I took a few years off from insurance and worked with a large

general contractor that built the tank frame for the PBFA-II (Particle Beam Fusion Accelerator) at Sandia National Laboratories. We heard of an opportunity to provide a design-build-finance-leaseback project for Hughes Aircraft planned for Las Cruces. We put a development team together to compete against many other developers around the country, and were awarded the contract. A new building provided the needed 30,000 square feet of space that enabled Hughes to upgrade the "tracking" system fitted into the nose of Patriot missiles. Our building was a small part of Hughes Aircraft's \$400 million 10-year contract that had with the Army.

The reason I am sharing this with you is because PACA leadership is looking into several possible options and are seeking your input and participation.

1. Should PACA continue to be an organization that promotes and maintains professional relations between contractors and aerospace and national security agencies, such as by hosting and promoting the annual BFI conference as stated in our by-laws? Don't hesitate to ask for a copy of PACA's by-laws and standing rules as all members have a right to see them. They can be amended and changed; they are not set in stone.

2. Should PACA's agenda continue as it has for the last 35 years but also start to get involved in prospecting and developing contracts/opportunities related to government/defense entities and the aerospace industry?

3. Should PACA hire a part- or full-time Executive Director to manage all of this (and more) with knowledge and experience in government contracting/procurement to help grow New Mexico's defense industry? What I did with Hughes Aircraft, I believe PACA could do many times over in partnering with its members and New Mexico's existing resources of prolific federal defense laboratories and Air Force bases.

Back to the BFI, Lieutenant General John F. Thompson and General Ellen M. Pawlikowski reiterated many achievements, but they both had a common theme: what the Air Force has accomplished in the past is fine, but it is not enough for today. Today, we need to be able to move with speed and innovation and be ahead of other nations, allies and adversaries alike. I

personally believe there are far too many bright, experienced, and knowledgeable men and women involved with PACA to merely stay the course of the last 35 years. I believe we need to become something different, something *more*. If you agree, please let me know. •

PACA Welcomes Seven New Sponsors!

PACA launched an opportunity for businesses to financially support the organization in the summer of 2012 and by the fall of that year had secured its first Gold level sponsor, ATK, (currently Orbital ATK and still a PACA sponsor) and SAIC, a Silver level sponsor. Many businesses have jumped on board as sponsors since then in providing revenue to support the success of PACA, promoting their member companies to an applicable audience, and contributing to scholarships awarded to students pursuing engineering, science, or business disciplines at New Mexico universities.

Currently, PACA has 14 sponsors representing every level from Diamond to Premier Small Business. Recently, seven new PACA member businesses have signed up and include Diamond sponsor **Raytheon Missile Systems**; Gold sponsors **Peraton** and **Engility**; and Silver sponsors **Colsa**, **Riverside Research**, **Schaffer Belcan**, and **Parsons**. See a complete listing of PACA sponsors on pages 6-7 and sponsorship benefits on page 5.

Thank you to all former and current sponsors for your valued support! •

Join PACA!

PACA membership annual dues are \$150*. The fiscal year runs from April 1 to March 31. Mid-year applications will be pro-rated. You may apply and pay dues at www.pacanm.org.

For more information, contact our Membership Chair, **Terel Anyaibe**, at tanyaibe@aerotek.com or **342-5007**.

* Dues are subject to change.

Spread the News

If you know a potential member or anyone else who would like to receive the *PACA Pulse*, please forward their e-mail address to RoSaavedra@msn.com.

This is your newsletter. If you would like to contribute an article, make announcements (promotion, job change, or a new product or service), please submit your newsletter contribution to the editor, Ross Crown, at RCrown@lrrc.com or call him at 764-5402.

Contributions are welcome! •

Legal Insights: Government May Invoke Prior Breach of Contract to Trigger Dismissal of Contractor Claim

By Ross Crown

In July of last year, the U.S. Court of Appeals for the Federal Circuit handed the government an important new weapon for defeating contractor claims. In *Laguna Construction Company Inc. v. Carter*, 828 F.3d 1364 (Fed. Cir. 2016), the Federal Circuit ruled that a contractor's prior material breach of the contract excused the government from any further payment obligations under the contract.

Facts of the Case

Laguna Construction Company was awarded by the Air Force one of 27 contracts for Worldwide Environmental Remediation and Construction in November 2003. The company received 16 cost-reimbursable task orders to perform work in Iraq and awarded subcontracts. Physical work under the contract was completed by 2010.

In 2009, the Defense Contract Audit Agency began an audit of Laguna's incurred costs for fiscal year 2006. In 2011, the DCAA disapproved approximately \$17.8 million of subcontract costs due to insufficient proof that the government paid a fair and reasonable price for the subcontracted services. Laguna submitted a claim to recover approximately \$2.9 million of these costs. After the contracting officer failed to issue a decision, Laguna filed a notice of appeal with the ASBCA.

Meanwhile, in October 2010, Laguna's Project Manager pled guilty to conspiracy to pay or receive kickbacks, including violations of the Anti-Kickback Act. In addition, in 2013, Laguna's Executive Vice President and Chief Operating Officer pled guilty to participating in a kickback scheme. After this second guilty plea, the government moved to amend its answer in the Board appeal to include the affirmative defense of fraud. Thereafter, the government filed a motion for summary judgment arguing that Laguna's claim should be denied because even if the government breached the contract by not paying all reimbursable costs, Laguna committed an earlier breach of the contract by violating the Allowable Cost and Payment clause through the fraud of its employees. The Board granted summary judgment to the government. Laguna appealed to the Federal Circuit.

Court Ruling

In analyzing the government's defense of prior material breach of the contract, the Federal Circuit noted that this defense has already been recognized by the federal courts when the government breaches a contract after the other party had already breached the same contract. This rule is applicable even if the government's later-occurring breach happened without knowledge of the first breach. Laguna pointed out, however, that these earlier federal cases applying the prior breach rule did not arise pursuant to the Contract Disputes Act. Laguna contended that the CDA displaced the prior breach rule. Unfortunately, the Federal Circuit disagreed, observing that nothing in the CDA suggested that Congress intended to supersede earlier federal case law and not finding any sound reason for the Court to do so.

According to the Court, the purpose of the CDA is to streamline the procedural aspects of government contract disputes, not to displace existing government defenses and remedies. While the CDA was intended to be comprehensive, the Court said it did not foreclose the applicability of previously established legal precedent.

The Federal Circuit justified its application of the prior breach rule in CDA proceedings as consistent with *United States v. Acme Process Equip. Co.*, 385 U.S. 138 (1966). In that case, the U.S. Supreme Court ruled that the government must be able to "rid itself" of contracts that are "tainted" by fraud, including kickbacks and violations of conflict of interest statutes. The Federal Circuit relied on the Supreme Court's comment that even if the government could isolate and recover the cost increase attributable to a kickback, it would still be saddled with a subcontractor who, having obtained the job other than on merit, is perhaps entirely unreliable in other ways. This unreliability in turn undermines the security of the prime contractor's performance. Such a result the public cannot tolerate, especially where important defense contracts are involved.

Laguna contended that the government's prior breach allegation should properly have been addressed under the termination and Anti-Kickback clauses of the contract. The Federal Circuit agreed that these clauses provided alternative methods of dealing with Laguna's fraud, but they are not exclusive remedies. In other words, the government could have chosen to terminate the contract for default or sought relief under the Anti-Kickback Act instead of seeking to dismiss Laguna's claim, but it was not required to do so.

Laguna further argued that any alleged breach due to fraud is not material because even if the government's payments to the contractor included compensation for illegal kickbacks, the government may audit and reconcile costs, thereby assuring that the government will incur no damages. The Federal Circuit rejected this contention, again referring to the Supreme Court's observation that government contracts tainted by kickbacks are hurtful because the government is saddled with an unreliable subcontractor. Thus, there are resulting harms that go beyond recovering overpayments made to the contractor.

Implications

Laguna Construction is a significant case because the Federal Circuit has recognized for the first time in a CDA proceeding that the government may force the dismissal of an otherwise valid contractor claim due to the contractor's prior material breach of the contract. This new weapon is powerful for a number of reasons. For one thing, a claim can be deemed forfeited by a prior breach even if the breach had nothing to do with the subject matter of the contractor's claim.

In addition, a contractor's claim will be dismissed under the prior breach rule regardless of the merits of that claim. That is, there may be no doubt that the contractor is entitled to the relief

continued on following page



Legal Insights *continued*

sought, but that is irrelevant if the government can prove the contractor breached the contract first.

Further, any disparity between the amount of damages resulting from a prior breach of the contract and the size of the contractor's claim makes no difference. In *Laguna Construction*, the statutory damages and penalties under the Anti-Kickback Act and False Claims Act resulting from the subcontractor kickbacks would have totaled only a small fraction of the \$2.9 million Laguna sought in its claim. Nevertheless, Laguna's claim was dismissed in its entirety. Since the Federal Circuit gives the government a choice between pursuing statutory remedies and seeking a forfeiture of the contractor's claim, the government can be expected to seek the latter where the amount of the claim is greater.

Now that the Federal Circuit has given the government a potent new defense, agencies can be expected to increasingly apply this defense to future claims, especially where fraud is alleged. How should contractors respond to this unfavorable development? An obvious action is for contractors to ensure that they have adopted effective internal compliance programs. These programs must be focused on preventing contract breaches.

If, notwithstanding a contractor's best efforts, it breaches a contract, the contractor needs to be aware of the breach as soon as it occurs and immediately do what it can to remedy the breach before the contractor needs to assert a contract claim. By proactively addressing such a breach, the contractor may be able to negotiate a prompt remedy. This remedy may end-up being much cheaper than allowing the government to later ambush the contractor with a prior contract breach and thereby obtain the dismissal of a much larger claim alleged by the contractor. •

Ross is a partner in the Albuquerque office of Lewis Roca Rothgerber Christie LLP where his practice emphasizes government contracts. This article is intended for general information only and should not be construed as legal advice or opinion. Any questions concerning your legal rights or obligations in any particular circumstance should be directed to your lawyer.

Upcoming Luncheon Speaker

■ **September 17 – James L. Eanes, Senior Manager, Prime Contract and International Export/Trade Compliance, Sandia National Laboratories**



James Eanes grew up in Moriarty and earned a Bachelor's degree in operations management as well as an M.B.A. from New Mexico State University. He also holds a Master's in national security from the University of New Haven.

Mr. Eanes joined Sandia National Laboratories in October 1993 and spent 12 years in various organizations within the Procurement Center before transitioning to a line organization role in finance. After three years in finance, in 2008, Mr. Eanes was appointed Manager for Corporate Contract Management, a position he held for two years before being promoted to Senior Manager of Corporate Contract Management. In October 2013, he became Senior Manager of the Prime Contract and International Export/Trade Compliance organizations.

A member of the National Contract Management Association, he also holds a professional certification with the Association for Operations Management.

Mr. Eanes will discuss the management transition of Sandia after 20 years under Lockheed Martin to Honeywell International.

We meet the third Tuesday of each month at **Tanoan Country Club** (Rolling Hills entrance east of Eubank off Academy). Registration begins at 11:30 a.m. followed by lunch at noon. Members are admitted free and our guest fee is \$20.



To RSVP, register online at **www.pacanm.org**. Include your name, guest's name, and menu selection. Please RSVP by the Wednesday before the week of the meeting. •

Lee Brinckerhoff Joins PACA Board as New Treasurer



Lee Brinckerhoff has graciously agreed to fill the vacant PACA Treasurer position. A tax CPA with Atkinson & Co. Ltd., a local accounting and consulting firm founded in 1970, Lee is originally from the San Francisco Bay Area. He has called Albuquerque his home since 2002. He holds a B.A. in math with a minor in history from Colorado College.

Lee is also a new PACA member with a fervent interest in technology, so he expects to assimilate with the membership quite well. He recently attended a TEDx event (spin off of TED Talks) regarding high powered electromagnetic weapons research and development programs currently in progress at Kirtland Air Force Base. In addition, his accounting experience includes preparing Incurred Cost Electronic reports (submitting

audit reports electronically) for clients to submit to the Defense Contract Audit Agency. Lee also serves a local high tech defense contractor client that focuses on pulsed power research and related fields.

Previously he worked in remodel construction as well as for a number of climbing gyms. An avid rock climber and photographer, he spent time in Costa Rica earlier this year and South Africa last year to revel in doing both with his wife Linda Wong, also a climber, and their nine year old son Dylan who Lee describes as a climbing dabbler. Both adventures provided an abundance of opportunities to photograph majestic landscapes and wildlife as well as rock climb. A "free climber," Lee uses equipment such as ropes and other protection only to protect against injury during falls with the goal of not needing to use it. •

WELCOME New Members!

Lee Brinckerhoff
Atkinson and Company, Ltd.

Elizabeth Driggers
KPC

John R. Dodd
American Systems

Richard Engstrom
RIEtech Global, LLC

Brett Loubert
Deloitte Consulting, LLP

Rusty Marin
Sierra Nevada Corporation

Charles O'Donnell
Teknicare, Inc.

Carl Palko
The Aerospace Corporation

Hardy Schreiber
Radiance Technologies, Inc.

Brad Steward
Pulakos CPAs, PC

Stephen Wurst
Belcan, LLC

Joseph Zino
Ball Aerospace & Technologies Corp.



PACA Sponsorship Opportunities

Support to PACA in the form of sponsorships helps make the organization a success while promoting your business. The Board has recently added another sponsorship choice, the Premier Small Business sponsorship for \$1,000.

Please contact **Dar Johnson** if you have questions about sponsorships at **505-400-1639** or **d_r_johnson@comcast.net**.

ANNUAL SPONSORSHIPS of \$1,000 - \$7,500: *One time each year space is provided for a tabletop display at a membership luncheon and the opportunity for a five minute corporate overview presentation. The table will be either in the lobby or in the banquet room, depending on the size of the room. Also, depending on room arrangement and speaker presentation, special rules may apply per event.*

DIAMOND \$7,500

- Sponsor level (Diamond) recognition on PACA website.
- Corporate logo on PACA signage at luncheons and events.
- Three registrations for the PACA annual Briefing for Industry.
- Recognition included in the quarterly newsletter, PACA Pulse.
- Advance electronic list of BFI attendees.
- Special reserved seating at BFI.
- Addition of company literature or giveaways in BFI Goody Bag.

GOLD \$5,000

- Sponsor level (Gold) recognition on PACA website.
- Corporate logo on PACA signage at luncheons and events.
- Two registrations for the PACA annual Briefing for Industry.
- Recognition included in the quarterly newsletter, PACA Pulse.
- Advance electronic list of conference attendees for the BFI.
- Addition of company literature or giveaways in BFI Goody Bag.

SILVER \$3,000

- Sponsor level (Silver) recognition on PACA website.
- Corporate logo on PACA signage at luncheons and events.
- Recognition included in the quarterly newsletter, PACA Pulse.
- One registration for the PACA annual Briefing for Industry.
- Special reserved seating at BFI.
- Advance electronic list of BFI attendees.
- Addition of company literature or giveaways in BFI Goody Bag.

PREMIER SMALL BUSINESS \$1,000

The requesting sponsor must demonstrate the company is classified as a small business.

- Sponsor level (Premier Small Bus) recognition on PACA website.
- Corporate logo on PACA signage at luncheons and events.
- Recognition included in the quarterly newsletter, PACA Pulse.
- One registration for the PACA annual Briefing for Industry.
- Special reserved seating at BFI.
- Addition of company literature or giveaways in BFI Goody Bag.

SMALL BUSINESS QUARTERLY LUNCHEON \$400: (One sponsor per quarter for January, April, July, and October meetings and the December holiday party).

- Company logo on the PACA website.
- Booth at BFI.
- Two guests for the sponsored lunch.
- Corporate logo displayed on signage for the sponsored luncheon.
- Introduction as the luncheon sponsor and be allowed to present a 5-10 minute overview of company. Corporate brochures may be placed on the luncheon tables. A small business sponsor may not sponsor another luncheon for twelve months. •

Thank You PACA Sponsors!

Welcome NEW **DIAMOND** Sponsor!



Raytheon Missile Systems provides expertise in high power electromagnetics; pulsed power engineering, diagnostics, and effects testing; radio frequency and particle code simulation; airborne flight test and satellite systems support and tracking; large facility operations, maintenance, and engineering; sensor development and diagnostics; control and data acquisition systems; software and automation; materials fabrication, assembly, processing, and coating; quality engineering; and document production, imaging, and management. www.raytheon.com



As a leader in aerospace and defense technologies, **Orbital ATK** designs, builds, and delivers space, defense, and aviation-related systems to customers around the world. Main products include launch vehicles and related propulsion systems; satellites and associated components and services; composite aerospace structures; tactical missiles, subsystems, and defense electronics; and precision weapons, armament systems, and ammunition. ATK employs more than 12,000 people in 20 U.S. states and several international locations. www.orbitalatk.com

Welcome NEW **GOLD** Sponsors!

GOLD



Peraton, formerly Harris Corporation, is headquartered in Herndon, Virginia and employs proximately 3,500 employees across the U.S. and Canada. Peraton provides highly differentiated secure communications, space, and technology solutions to key customers, and has become a trusted partner on missions that are critical to the security priorities of the United States. Capabilities include complex software and technology services and solutions, as well as end-to-end mission operations abilities, including software systems development, cyber, modeling and simulation, mission operations, signal intelligence, and quick reaction capabilities / research and development. www.peraton.com



Engility (formerly known as TASC, Inc.) is a premier provider of integrated services for the U.S. Department of Defense and other federal agencies, the intelligence sector, space communities, federal civilian agencies, and international customers. Engility's professionals include peacekeepers and security consultants; and technical experts in water, energy, agriculture, natural resources, disaster response and political transition. Services include but are not limited to cyber security, data analytics, engineering and technology life cycle support, high performance computing, and enterprise modernization. Engility is headquartered in Chantilly, Virginia. www.engilitycorp.com

SILVER



American Systems is a government solutions provider and one of the top 100 employee-owned companies in the U.S. with approximately 1,400 employees nationwide. Based in the Washington, D.C. suburb of Chantilly, Virginia, the company provides test and evaluation, training solutions, enterprise IT services, identity operations, and mission-focused engineering services to DoD, Intel, and civilian government customers. www.AmericanSystems.com



Moss Adams is a nationwide accounting and business consulting firm serving public, private, non-profits, and individuals through specialized industry and service teams. A leader in assurance, tax, consulting, risk management, transaction, and investment management, Moss Adams has a staff of over 2,200 that includes more than 260 partners working from 30 U.S. locations. www.mossadams.com

Silver and Premier Small Business Sponsors continued on following page

Welcome **NEW SILVER** Sponsors!

SILVER



Belcan, LLC is a global supplier of engineering, technical recruiting, and information technology services supporting the aerospace, industrial and government services markets. <https://belcan.com>



COLSA Corporation is a technology services and solutions company with significant experience providing the latest and most sophisticated engineering, information technology, and programmatic solutions for government and commercial customers. www.colsa.com



Riverside Research is a not-for-profit scientific research company primarily serving the U.S. Department of Defense and the intelligence community. www.riversideresearch.org



Parsons Corporation is a technology-driven engineering services firm headquartered in Pasadena, California, with more than 70 years of experience in the engineering, construction, technical, and professional services industries. www.parsons.com



ATA is a precision measurement, sensing and controls company providing services and products to government and commercial customers. www.atacorp.com



Metis Technology Solutions, Inc. provides science and engineering services to NASA and other federal agencies. Capabilities include aviation and space systems development; modeling and simulation in support of aviation and aerospace research; aviation safety analysis; and computing systems development and sustaining engineering. www.metis-tech.com



MSI employs a multi-disciplinary team that collaborates to design, analyze, and build airborne technical packages; aerospace test systems; laboratory apparatus for government and private sector customers; data acquisition systems; scientific instruments; iron bird test systems; and more. www.msiabq.com



UTC is a nationally recognized engineering, strategic planning, meetings management, and audiovisual services organization providing support to a variety of programs in the areas of academic research collaboration; aerospace systems; materials and manufacturing; space vehicles; and directed energy. www.utcdayton.com



Torch Technologies, Inc., an employee-owned small business, provides research, development, and engineering services to the Department of Defense in the areas of weapon system performance analysis; modeling and simulation; information technology; manned and unmanned aviation; test and evaluation; and advanced technology research and development. www.torchtechnologies.com

PREMIER SMALL BUSINESS