

## May 2009 ACSM Government Affairs Update

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**Preservation of Railroad Monumentation Update.** We are still in the process of working our proposed preservation of railroad monumentation legislation around Congress. Although it has not yet been introduced, we had many meetings and received many good responses to the issue. The one point that has come out of every meeting has been the question of how the issue affects each Member of Congress' District or State. To answer that question more accurately and completely, we need stories and letters of support from ACSM members. If this issue affects you, let us know about it. The legislation won't get introduced unless Congress sees a real need for it. Below, is a list of Members of Congress on the House Railroad Subcommittee. If your personal Representative is on the list, we especially need to hear from you. If this issue is important to you, let us know.

#### **Democrats**

Corrine Brown, Florida, Chairwoman  
Dina Titus, Nevada  
Harry Teague, New Mexico  
Nick J. Rahall, II, West Virginia  
Jerrold Nadler, New York  
Elijah E. Cummings, Maryland  
Grace F. Napolitano, California  
Jason Altmire, Pennsylvania  
Timothy J. Walz, Minnesota  
Michael A. Arcuri, New York  
Christopher P. Carney, Pennsylvania  
Albio Sires, New Jersey  
Mark H. Schauer, Michigan  
Betsy Markey, Colorado  
Michael E. McMahon, New York  
Thomas S. P. Perriello, Virginia  
Peter A. DeFazio, Oregon  
Jerry F. Costello, Illinois  
Bob Filner, California  
Eddie Bernice Johnson, Texas  
Leonard L. Boswell, Iowa  
Rick Larsen, Washington  
Michael H. Michaud, Maine  
Daniel Lipinski, Illinois

#### **Republicans**

*Bill Shuster, Pennsylvania, Ranking Member*  
*Thomas E. Petri, Wisconsin*  
*Jerry Moran, Kansas*  
*Gary G. Miller, California*  
*Henry E. Brown, South Carolina*  
*Timothy V. Johnson, Illinois*  
*Sam Graves, Missouri*  
*Jim Gerlach, Pennsylvania*  
*Charles W. Dent, Pennsylvania*  
*Lynn A. Westmoreland, Georgia*  
*Jean Schmidt, Ohio*  
*Candice S. Miller, Michigan*  
*Vern Buchanan, Florida*  
*Robert E. Latta, Ohio*  
*Brett Guthrie, Kentucky*  
*Aaron Schock, Illinois*  
*Anh "Joseph" Cao, Louisiana*  
*Pete Olson, Texas*

Steve Cohen, Tennessee  
Laura A. Richardson, California  
James L. Oberstar, Minnesota (ex officio)

**COFPAES Delegate Meeting.** COFPAES recently held its Spring Meeting for all delegates and staff. In the morning session, along with federal agency representatives, we heard from Bruce Ware, USACE who spoke of the USACE Prospect Training program. We also heard from James Harper, Jr. FTA Office of Federal Procurement. He spoke about the FTA grant program, which issues grants to state and local governments for transportation projects. Mr. Harper noted that the FTA received quite a bit of stimulus funding from the federal government and that there is now a competition for that money. We also heard from Dean Smith of GSA who spoke of the ways the GSA is using its share of the stimulus funding. Finally, we heard from Major Clark, Office of Advocacy for the SBA. He spoke about the recently released Federal Register Notice relating to the 10% retainage on A/E contracts (more on this topic later in this Update).

In the afternoon delegate session, we discussed a number of important issues. We heard about several bills in Congress that contain Qualification Based Selection language relating to the procurement of A/E services, including: H.R. 1262, the Water Quality Financing Act, H.R. 1770/S. 732, the Dam Rehabilitation and Repair Act, H.R. 1520, the Federal Land Asset Inventory Reform Act and H.R. 915 FAA Reauthorization. COFPAES supports the QBS language in all of these bills.

We also discussed the Federal Register Notice and proposed FAR rule on retainage on A/E contract and the proposed Freedom from Government Competition Act. At a previous COFPAES meeting, AIA raised a concern about a standard clause provision in part 52 of the FAR that authorizes contracting officers to impose retainage of fees on A/E contracts. Not only is this burdensome to A/E firms, but there appears to be no statutory or regulatory authorization for the clause. In 2007, the SBA solicited troublesome regulations under its “Regulatory Review and Reform” (3R) Program. COFPAES submitted the retainage issue and it made the SBA top 10 list. The Federal Register Notice was initiated because of COFPAES’ action on this issue. The Delegates discussed language that will be used in COFPAES’ comments on the Notice.

We learned about a proposed bill that will be introduced by Rep. Duncan of Tennessee and Senator Thune of South Dakota called the “Freedom from Government Competition Act.” Similar bills have been proposed in the past, which COFPAES endorsed. The bill does not mandate contracting out, but establishes a process by which agencies review in-house commercial activities for potential private sector performance. The bill, by definition, preserves QBS. ACSM Delegate Joe Dolan noted that ACSM would support this proposed bill.

The last issue of the day was a discussion about a concept that COFPAES would like to propose legislation that would benefit the A/E community. The concept for this legislation is for A/E professionals, including surveying and mapping professionals, to

help America's cities and towns to transform into low carbon producing, reduced and renewable energy consuming and environmentally sensitive places to live and work while ensuring economic viability. A white paper was proposed and the COFPAES delegates and staff had a brainstorming session to develop a logical path to proceed with this issue. You'll hear more about this concept as we move forward.

**Coastal Barrier Mapping.** On April 7, 2009 the U.S. Fish and Wildlife Service released to the public its report to Congress: *John H. Chafee Coastal Barrier Resources System Digital Mapping Pilot Project* and announced the start of a 90 day public comment period. The report, which was directed by the Coastal Barrier Resources Reauthorization Act of 2000 (P.L. 106-514), highlights the benefits of updating Coastal Barrier Resources System (CBRS) maps with more accurate and precise digital maps to better protect people, coastal areas and natural resources.

The link below will direct you to the U.S. Fish and Wildlife Service website where you can review the Report to Congress as well as the Draft Maps. Comments are due by July 6, 2009. [http://www.fws.gov/habitatconservation/coastal\\_barrier.html](http://www.fws.gov/habitatconservation/coastal_barrier.html)

**Federal Register Notice on Presidential Memorandum on Government Contracting.**

On May 29, a Notice appeared in the Federal Register relating to the Presidential Memorandum on Government Contracting. The Presidential Memorandum on Government Contracting, issued on March 4, 2009, establishes a framework for improving critical components of the federal acquisition system and management of the Federal Government's "multi-sector" workforce of federal employees and private sector contractors. The Memorandum directs the Office of Management and Budget (OMB), in consultation with federal agency leadership, to improve and strengthen federal contracting practices and to seek input from the public on the most effective ways to achieve this goal. Section 321 of the National Defense Authorization Act (NDAA) for Fiscal Year 2009 further directs OMB to clarify the definition of an inherently governmental function and to develop criteria to be used by agency heads to identify other functions that should only be performed by Federal employees. The Presidential Memorandum is available at

[http://www.whitehouse.gov/briefing\\_room/PresidentialActions/pg2/](http://www.whitehouse.gov/briefing_room/PresidentialActions/pg2/). Section 321 may be found at [http://www.rules.house.gov/110/text/110\\_hr5658.pdf](http://www.rules.house.gov/110/text/110_hr5658.pdf).

In furtherance of the President's Memorandum and section 321 of the FY 2009 NDAA, OMB invites interested parties from both the public and private sectors to provide comments on: (1) Maximizing the use of competition; (2) improving practices for selecting contract types; (3) strengthening the acquisition workforce; and (4) clarifying when functions should be performed by federal employees and when contractors may be appropriately considered.

Interested parties may offer oral and/or written comments at a public meeting to be held on June 18, 2009. Parties are also encouraged to provide all written comments directly to <http://www.regulations.gov>.

### **Federal Register Notice on the 10% Retainage on A/E Contracts**

The Federal Acquisition Regulation (FAR) 52.232-10, Payments under Fixed-Price Architecture-Engineer Contracts, currently requires the contracting officer to withhold 10% of the amounts due on each voucher; however, payment may be made in full during any month in which the contracting officer determines the performance to be satisfactory. The Government retains the withhold amount until the contracting officer determines that the work has been satisfactorily completed. The contracting officer may release excess withhold amounts to the contractor when it is determined that work is substantially complete and when the contracting officer determines that the amount retained is in excess of the amount adequate for the protection of the Government's interests.

This rule proposes to revise FAR 52.232-10 to permit contracting officers to use their judgment regarding the amount of payment withhold to apply under fixed-price architecture-engineer contracts (based on an assessment of the contractor's performance under the contract) so that the withhold amount will be applied at the level necessary to protect the Government's interests. This is in contrast to the current requirement that contracting officers withhold 10 percent on all payments. Thus, the rule proposes to revise paragraphs (b) and (c) of the contract clause at FAR 52.232-10 to state that the contracting officer may (rather than shall) withhold up to 10 percent of the payment amount due and that the amount of withhold shall be determined based upon the contractor's performance record. The rule also makes several related editorial changes including one that clarifies that the contractor will be paid any unpaid balance due to include withhold amounts at the successful completion of the design work.

This case originated from a recommendation in the Small Business Administration's Regulatory Review and Reform (r3) initiative. The current withholding provisions negatively impact the cash flow of architect-engineer contractors and may, in some instances, result in the withholding of amounts that exceed reasonable amounts to protect the Government's interests.

ACSM is currently reviewing the Notice and Proposed Rule and will make timely comments.