



PACA Pulse

SUMMER 2016

PROFESSIONAL AEROSPACE CONTRACTORS ASSOCIATION OF NEW MEXICO

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

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PULSE EDITOR

Ross Crown
764.5402
RCrown@lrrc.com

EDITORIAL SUPPORT & DESIGN

Ro Saavedra
830.2345
RoSaavedra@msn.com

UNDERWRITER

Lewis Roca
ROTHGERBER CHRISTIE

30th Briefing for Industry Recap

PACA's Briefing for Industry has been successful for many years and is one of the preeminent events of its kind in the country. The government offices that have supported the BFI since its inception regard it as an excellent opportunity to increase competition for government procurements and broaden the national technology base. PACA's 30th consecutive annual BFI, attended by both government representatives and contractors, was highly successful. This year's expanded two and a half day program was kicked off on Monday, August 15 at 1:30 PM and ran through Wednesday afternoon, August 17.

Monday evening was topped off with a networking social held at the Casa Ensencia in the southwest corner of the Hotel Albuquerque Old Town's property and attended by over 200 conference participants. Tuesday evening's dinner celebrated PACA's 30th BFI anniversary. **Major General David Eichhorn** (USAF retired) provided a rousing and very interesting speech regarding new technology thrusts.



The BFI is truly national in scope. If you were unable to make this year's event, here's what you missed:

- 430 plus attendees representing 24 states
- 28 large businesses and 81 small businesses were represented
- 30 presentations were delivered by 28 federal government agencies offering well over 400 acquisition opportunities.

Acquisition opportunities covered the spectrum ranging from SBIRs to BAAs to set-asides and to full and open opportunities with a total estimated value of over \$15.3 billion. Technical point of contact information was

provided for each procurement opportunity. The 26 breakout sessions provided the chance for attendees to meet and chat with the government presenters and staff members. There was abundant opportunity to meet General Officer and Senior Service Executive decision makers. The format of the conference also provided sufficient time for interacting and expanding business-to-business relationships for potential teaming.

In addition to Major General Eichhorn, BFI 2016 featured keynote speakers included **Major General Robert McMurry**, U.S. AFRL Commander; **Major General Mathew Molloy**, U.S. Air Force Operational Test and Evaluation Center Commander; and **Colonel Mark Niece** (USAF retired), Executive Director for Directed Energy Professional Society.

It's not too early to mark your calendars for next year's BFI to be held August 14-17, 2017. It promises to again provide a comprehensive summary of Department of Defense, Department of Energy, and other government new business opportunities, plus local and national perspectives on government strategies and future directions. We have had so many requests to present at the next BFI that we expanded the 2017 program to three full days. We are reserving a number of rooms at Hotel Chaco, a new luxury hotel adjacent to Hotel Albuquerque Old Town (conference site) on a strict first come, first served basis.

As PACA is a non-profit all-volunteer organization, all excess BFI revenues are donated to college scholarship programs. PACA has established four self-sustaining scholarship programs at New Mexico universities with combined funding of approximately \$250,000. To date, 75 engineering related scholarships to some of the brightest young talent within the state have been awarded.

We hope to see each of you at next year's event! •

President's Corner

by Michael Emerson



That familiar smell in the air of green chile roasting signals summer is coming to an end. I hope your summer was a memorable one filled with relaxing vacations and time spent with family and friends.

PACA's summer season has been exciting with great news all around. Membership is up significantly over last year and sponsorships have

grown considerably with both large and small businesses contributing generously to PACA.

The 30th BFI was a big success with over 400 attendees, more speakers, new exhibitors, and an extra half day of proceedings. The net income from BFI will once again go to sponsor scholarships at UNM, NM Tech, and NMSU.

Members continue to enjoy the benefit of networking with industry peers and government representatives at the monthly luncheons. And, of course, everyone is looking forward to another great Holiday Luncheon on Friday, December 2 — save the date!

Everything you enjoy with your PACA membership (including this newsletter) is made possible by a group of dedicated volunteers, most of whom have been helping out for many years. As we grow we need more volunteers to assure our continued success. Volunteering not only helps PACA and our members, but you'll also find it to be personally rewarding. It's an opportunity to establish vital connections in your industry as well as make new friends.

PACA's volunteers serve in a variety of roles including directors, committee chairs, and committee members. BFI is the biggest committee and can always use more volunteers. Other committees include membership, education, finance, sponsorships, web site, luncheon programs, Air Force liaison, NM Space Authority, small business, legislative, and legal. There is no shortage of areas to help out; the choice is yours.

Are you good at organizing? We have a job for you. Do you like accounting? Our treasurer would love some help. Do you like doing marketing or publicity? There's a position for that. Do you know a lot of folks in the USAF or DOE? We could use your help in recruiting speakers. Want to be President of PACA someday? Volunteer to be the next Vice President.

If anything I've mentioned interests you or if you have questions, feel free to contact me or one of the other board members listed on the first page of this newsletter. We would welcome your knowledge and help. •

Congratulations Stuart Purviance!

Longtime PACA member **Stuart Purviance** retired after 19 years as Executive Director of the Kirtland Partnership Committee (KPC), the nonprofit organization of civic leaders who saved Kirtland AFB from closure during the BRAC process. The Air Force estimates Kirtland's economic annual impact to be in excess of \$7.5 billion.

Stu's leadership of KPC followed a 29½ year career in the Air Force which included two tours of Vietnam as a helicopter pilot and serving as the protocol officer for five consecutive Secretaries of Defense: Melvin Laird, Elliott Richardson, James Schlesinger, Donald Rumsfeld, and Harold Brown.

Prior to joining the KPC, Stuart served as the director of bureau services for the Albuquerque Convention and Visitors Bureau for five years in the early 1990s.

He was born Charles Stuart Purviance in Sao Paulo, Brazil where his father was employed by the Firestone Tire and Rubber Company. The family remained in Brazil, living for a time in Rio de Janeiro.

When Stuart was nine years old, the family returned to the U.S. settling in New York City. Following high school, the family relocated again, this time to Akron Ohio where his father accepted a position with General Tire.

Stuart remained in Ohio for college attending Ohio Wesleyan University where he was enrolled in the AFROTC program and commissioned as a second lieutenant in 1960.

In May, Stuart was honored with the Greater Albuquerque Chamber of Commerce's 2016 Steve Schiff Kirtland Air Force Base Advocacy award at the organization's annual Armed Forces Banquet.

Over the years PACA has greatly benefited from Stuart's wisdom, connections, and good cheer. Congratulations Stu, on a job well done and thank you for your continued contributions to PACA and esteemed service to our country! •



Legal Insights: Government Right to Extend Warranty Period by Demonstrating Latent Defects

By Ross Crown

Federal government contracts for the delivery of goods and certain services generally require the contractor to provide the government with a warranty. Typically, a warranty clause grants the government a defined period of time after acceptance of the goods or services to assert a warranty claim against the contractor. See, e.g., FAR 52.246-18 & 52.246-21. If a timely warranty claim is not made on the contractor, then the government's acceptance is deemed final and conclusive.

There are at least a couple of exceptions to the general rule that the government's acceptance of goods or services is final and conclusive once the warranty period expires. These exceptions permit the warranty period to be extended. One exception is if the contractor engaged in fraudulent conduct in delivering the goods or services. Another exception is where the goods or services contain latent defects. See, e.g., FAR 52.246-2 & 52.246-12. See also, *United Technologies Corporation v. United States*, 31 Fed.Cl. 698 (1994), reciting that the general rule that acceptance of contract work is final and conclusive will not apply if latent defects exist.

Elements of a Claim for Latent Defects

In seeking to extend a warranty period by alleging latent defects, the government assumes a difficult burden. To prove a latent defect claim, the government must demonstrate four elements. *Herley Industries, Inc.*, ASBCA No. 13727, 71-1 BCA ¶ 8888; *M.A. Mortenson Co. v. United States*, 29 Fed.Cl. 82 (1993). First, it must show there was a defect in the work. There is a difference between a latent condition and a latent defect. A latent condition may be not be detected prior to acceptance and may cause a performance failure, but unless it is the result of a departure from a contract requirement, it is not a latent defect. *Jo-Bar Mfg. Corp.*, ASBCA No. 18292, 73-2 BCA ¶ 10,353.

Second, the government must show that the defect was present at the time of final acceptance of the work. *Santa Barbara Research Ctr.*, ASBCA No. 27831, 88-3 BCA ¶ 21,098. This element is often the most difficult to prove in construction cases, where intervening events or the passage of time may undermine the Government's ability to prove the condition of the construction at the time of acceptance.

Third, the government must show that the defect was latent. A latent defect is generally defined as a defect that is hidden from the knowledge, as well as from the sight, of the government and could not be discovered

before acceptance by ordinary and reasonable care. *Bart Associates Inc.*, EBCA No. C-9211144, 96-2 BCA ¶ 28, 479. A defect is patent if it is readily discoverable by an ordinary examination or test. The government's failure to conduct such an ordinary examination or test does not render a defect latent. *Dale Ingram, Inc.*, ASBCA No. 12152, 74-1 BCA ¶ 10,436. A defect is also not latent if the government had actual knowledge of the defect at the time of final acceptance. *United Technology v. United States*, 27 Fed.Cl. 393 (1992).

Contractors may respond to a latent defect claim by arguing that the defect is not latent because it could have been discovered had the government conducted certain tests or inspections. To prevail on this defense, however, the contractor must show the government's performance of such tests or inspections

would have been reasonable under the circumstances. See *Bart Associates, supra*.

Another defense sometimes raised by contractors opposing a latent defect claim is that the government did not conduct a reasonable inspection. The government is expected to perform a reasonable inspection. On the other hand, it is also recognized that the government needs to be able to rely on the experience and design knowledge of the contractor. *Morris Guralnick Associates, Inc.*, GSBCA No. 3460, 73-1 BCA ¶ 9980.

Fourth, the government must show that the defect caused the failure of the work to meet contract requirements. The simple fact that a post-acceptance failure occurred does not establish the existence of a latent defect. Proof of the defect resulting in the failure has to be direct and not left to inference. *Bart Associates, supra*.

There is a difference between a latent condition and a latent defect. A latent condition may be not be detected prior to acceptance and may cause a performance failure, but unless it is the result of a departure from a contract requirement, it is not a latent defect.

If all four elements of a claim for a latent defect are established, the government can revoke its acceptance of the work to recover any damages caused by such

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Legal Insights *continued*

defects. The right to revoke acceptance is, however, further dependent on the government taking action within a reasonable time after discovery of the defects. *Munson Hammerhead Boats*, ASBCA No. 51377, 00-2 BCA ¶ 31,143. No precise formula exists to determine if a delay is reasonable. Instead, that determination must be made on a case-by-case basis. *Lee Lewis Construction, Inc. v. United States*, 54 Fed.Cl 88 (2002). In deciding if the government acted with reasonable promptness, its efforts to determine conclusively that the work was defective or to work with the contractor to solve the problem will be taken into account by the boards or courts. *American Renovation and Construction Company*, ASBCA No. 53723, 09-2 BCA ¶ 34,199.

Defeating a Latent Defect Claim

To defeat a government claim for breach of warranty where latent defects are alleged, a contractor should not be complacent about the government's difficult burden of proof. Instead, the contractor ought to present evidence that no latent defects adequate to extend the warranty period exist. This evidence might include information about the precise nature of the work performed by the contractor, the condition of the product when delivered to the government by the contractor, the type of inspection performed by the government, whether the alleged defect was known to the government, or alternatively, if the government should have discovered the defect before acceptance or during the warranty period, and whether the defect resulted in any loss to the government.

To the extent a contractor is able to negotiate contract terms and conditions with the government, it should consider imposing on the government a strong inspection requirement. Of course, while forcing the government to undertake a thorough inspection may help protect the contractor from a later finding of a latent defect, such an enhanced inspection requirement has the potential to backfire on a contractor if it increases the chances that contract deliverables will be rejected at the outset.

Lastly, a contractor opposing an effort to extend the warranty period due to latent defects should explore an argument that the government did not take action within a reasonable time after discovering the alleged defect. The contractor will want to show that the time that elapsed between the government's discovery of the latent defect and its revocation of acceptance was longer than the government needed to conclusively deem the product was defective or work with the contractor to resolve the defect. •

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.

Don Nash Passes the Program Baton to Clarence Culbert

Clarence Culbert, Jr. has taken over the position of Program Officer from Don Nash who faithfully served in the role for five years. **Thank you Don, for your contribution of time and talents for the benefit of PACA members!**



Joining in the spring, Clarence is a relatively new member of PACA. A native of Alexandria, Louisiana, he retired from U.S. Army as a Colonel in 1992 and soon thereafter entered the Army Reserve. His impressive military career began in 1977 in Natchitoches, Louisiana and later included assignments in Fort Bliss, Texas; KAFB in Albuquerque, Falls Church, Virginia, Germany, and South Korea.

His numerous Army Reserve assignments started as Branch Chief at 310th TAACOM in Ft. Belvoir, Virginia and concluded as Director of Information Operations in Crystal City, Virginia.

Following his Army career, Clarence joined the corporate world working at Symbiont Inc., Lockheed Martin, and Intel Corporation until his second retirement in 1998. He is currently the owner and CEO of Global Technology Solutions with offices in Corrales and Rio Rancho. There is little doubt that Clarence is amply suited for obtaining interesting and relevant speakers for PACA's membership luncheons.

Clarence holds a B.S. in mathematics from Northwestern State University in Natchitoches, Louisiana in addition to an M.A. in computer resources management from Webster University in St. Louis, Missouri. And in December 2015, he graduated from Arizona State University's Thunderbird School of Global Management with a Global M.B.A. degree. His military education includes completing programs at the United States Army Command and General Staff College, the Defense Systems Management College, and the National Defense University, among others.

Clarence's military awards and decorations are numerous and diverse and in April 2005 he was inducted into the Northwestern State University Alumni's Army ROTC Hall of Fame for his outstanding achievements. •

The Illegal CPPC Contract: How to Spot It and What to Do About It

By Jennifer Yildiz

While the federal contracting community knows the basic types of legal contracting methods pretty well, lurking among them is a type the federal government expressly prohibits. Called the cost-plus-percentage-of-cost (CPPC) contracting method, participants often sign them without knowing it.

FAR 16.102(c) prohibits CPPC provisions within contracts, and it puts the onus on prime contractors to prohibit CPPC provisions in agreements with subcontractors. As regulators begin to penalize FAR violations more harshly, it is particularly important to watch out for provisions that fall into the CPPC contracting methods category now. Penalties could range from lawsuits to remedy the financial ramifications of such contracts to direct penalties from the federal government, such as withholding payment for contracted work.

Contractors who know what defines a CPPC contract and how to spot provisions that fall into this category will be best equipped to avoid the ramifications of being caught in violation of the CPPC prohibition. For guidance, let's look to the Defense Acquisition University's (DAU) definition of CPPC, the Government Accountability Office's (GAO) four criteria on what constitutes a CPPC violation, and previous government rulings.

What is a CPPC Contracting Method?

While the FAR isn't clear on what constitutes a CPPC contracting method, the DAU provides some helpful guidance. Its glossary defines a CPPC contract as: *A form of contract formerly used but now illegal for use by the Department of Defense (DoD) that provided a fee or profit as a specified percentage of the contractor's actual cost of accomplishing the work to be performed.*

During World War I, the government frequently used CPPC contracts as a way to encourage contractors to perform R&D work to support the war effort. These contracts compensate manufacturers for such work, making them a useful incentive. However, their downfall is they provide no incentive for contractors to control costs. As a result, the cost-plus-fixed-fee (CPFF) method was introduced as an alternative in 1940.

However, even contracts that fall under the CPFF category for time and materials can contain elements that meet the definition of CPPC; that's why it's important to know which types of contracting provisions place the contracts in this illegal category.

How to Spot a CPPC Provision

Simply stated, contract provisions fall into the CPPC category if a fixed payment rate is applied to actual costs. For example, a contract where a fixed "material handling" or "general and administrative" rate is applied to actual costs often constitutes a CPPC agreement. For further guidance on this, the GAO classifies contracts as CPPC if the follow-

ing conditions exist:

- Payment is at a predetermined rate.
- This rate is applied to actual performance costs.
- The contractor's entitlement is uncertain at the time of contracting.
- The rate increases commensurately with increased performance costs.

Based on government rulings, the provision that trips the alarm bell for regulators is when a predetermined fee is applied to actual costs. A classic example is the 1980 Comptroller General of the United States file B-196556 ruling which found a violation of the CPPC prohibition in two fixed-price contracts from the Agency for International Development (AID). The provisions found in violation of the CPPC provision allowed for a predetermined management fee to be recovered on a sliding scale of 6 to 13.5 percent, depending on costs incurred for the subcontract effort.

Another government ruling shows that if the contract contains provisions that violate the CPPC prohibition, a cost limitation provision does not negate the violation. In the 1979 file B-195173, the GAO said that portions of grants awarded to state and local governments by the Federal Aviation Administration (FAA) constituted CPPC violations. These portions authorized payment at a predetermined percentage of 15 percent of actual direct labor and overhead costs, and if the contract's "not to exceed" cost limitation didn't negate this violation.

Individual task orders are also subject to scrutiny under CPPC prohibition rules. One example is a GAO decision found in file B-211213, dated April 21, 1983. In it, the GAO found violation of the CPPC prohibition when three individual task orders awarded by the Department of Labor (DOL) included a provision for payment of predetermined percentages of 7.5 to 10 percent to "cover overhead and profit" on materials, subcontracts, travel, and other expense items.

Fortunately, having a predetermined percentage for additional payment that isn't subject to adjustment for actual costs isn't the same as billing a customer at provisional indirect rates and adjusting to actuals at the end of the billing period or end of the contract term. FAR 31 contains the provisions that allow recovery of indirect costs relative to final cost objectives.

What is the Impact to My Business?

Evaluating the financial impact is an important first step if you find a provision in your contract that meets the GAO's four criteria for a CPPC violation. Although we haven't found an example of financial penalties for being caught with a CPPC contract, the adjustments needed to remove provisions that violate the CPPC prohibition come with financial repercussions. These can range from overpayments to un-



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The Illegal CPPC Contract *continued*

derpayments as well as to payment delays.

The good news is that, in many cases, the contract can be adjusted to comply with the CPPC prohibition without any material change to the payment amounts resulting from the contract. For instance, in the AID case discussed above, the report states that although the GAO found the subject grant provisions were illegal, it also recognized that the government is obligated to pay for the services that provide benefits. As another example, in the FAA case, the contracting officer determined that although the price may have been calculated using an inappropriate method, the total costs in question were actually fair and reasonable.

Fortunately, having a predetermined percentage for additional payment that isn't subject to adjustment for actual costs isn't the same as billing a customer at provisional indirect rates and adjusting to actuals at the end of the billing period or end of the contract term.

Similarly, in the DOL case, the GAO applied the same logic and allowed the contracting officer to determine if the amounts already paid were fair and reasonable for services rendered. Because the contract was still in progress at the time of the ruling, the illegal provision of the contract was considered void. However, the department could delete the provision and negotiate a fixed fee instead.

Next Steps

Although illegal, contracts with CPPC provisions are often discovered. The good news is that the contracting officer can settle the matter with limited financial impact to the contractor, but this takes preparation. It's important for contractors to understand which provisions land contracts in the CPPC category.

The red flags to watch for are provisions stating a predetermined, fixed percentage or fee on actual costs incurred, as well as the GAO's four criteria for determining if a provision is in violation. If you think you may have a CPPC provision in a federal contract, contact a federal contracting consultant for assistance in identification of the provision and assessment of financial impact for presentation to your contracting officer. •

Jennifer has practiced public accounting since 2005 and is a Manager at Moss Adams LLP. She provides contract compliance services to federal contractors and financial statement and assurance services to government and tribal entities as well as health care and not-for-profit organizations. She can be reached at (505) 878-7260 or jennifer.yildiz@mossadams.com.

Upcoming Luncheon Speakers

■ **September 20 – “The Dos and Don'ts of Basic Public Speaking”** provided by the following members of Journal Center Toastmasters.

- **Derek Riewe**, Vice President of Public Relations for the organization, is employed by the Menicucci Insurance Agency.

- **Amanda White**, the Journal Center Toastmasters' Secretary/Treasurer, is an Engineer at Bohannon Houston, Inc.

■ **October 17 – Networking Luncheon**

Members are encouraged to invite industry representatives.



■ **November 15 – “Cyber Threats”** presented by **Michael Bickel**, Senior Vice President and Western Regional Manager of the Bank of Albuquerque.

■ **December 2 – Holiday Luncheon (Friday)**

Mark your calendars now for PACA's most popular annual event!

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. •



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PREMIER SMALL BUSINESS

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. •

WELCOME New Members!

Alan Chmiel, ZIN Technologies, Inc.

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Brashear

Simon Goldfine, Sierra Peaks Tibbetts

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Join PACA!

PACA membership annual dues are \$200.* 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.

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Contributions are welcome! •