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Note from Editor: Letters, articles, or announcements for publication in the NAEP Bulletin are due on the 5th day of the month preceding publication. E-Mail to nmarkee@naepnet.org

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From the Editor, August 2006

By Neil Markee, Editor-in-Chief

Although satisfaction clauses have been around forever and the concept sounds reasonable enough, Lloyd points out that reasonability may not decide the issue. From a buyer's perspective, satisfaction clauses offer useful protection—but I wonder—if those contractors who are likely to bid see them as open-ended, unpredictable, potential cost-generators, might these clauses become expensive insurance?

Among the major benefits of the NAEP Annual Meeting are the informal, simultaneous, sidebar discussions that take place. No one person can be part of all these (so bring your assistant with you to San Jose in March.) and I always wonder what I have missed. But this year, two important topics caught my attention.

Last month, I wrote about signing bonuses. In this issue, with the help of four contributors, I hope to convince you that taking a good look at Living Wage issues would be time well spent. The impact extends well beyond purchasing.

That was the other hot topic for me. Given their potential scope and power to influence the institution's ability to achieve its basic goals one way or another, I think understanding what is involved and the potential in both cases must be part of any focus on strategic purchasing.

This month, in For What It’s Worth, Steve Mack talks about "Defining the Future," asking us to make sure that we identify common definitions for new business terms such as “strategic alliances”—so that, as our purchasing jargon continues to evolve we will continue to communicate efficiently.
Commentary, August 2006

Living Wage

By Neil Markee, Editor-in-Chief

One of the potentially hot topics raised during lively sidebar discussions at the 2006 NAEP Annual Meeting was the call for institutions to require that their service providers, and perhaps other contractors, pay their workers a “living wage.” Obviously, institutions that take on this responsibility would be expected to commit themselves to paying all their employees a living wage as well.

Paying a living wage sounds reasonable enough. But listening to the discussion, I knew reality wasn’t as simple as the sound byte. What’s it all about? I’m not sure. We didn’t have time in Baltimore to develop a consensus or even to really understand what is involved. After listening to the comments and issues raised, I went back to my room and keyboarded questions that came to mind. Because I had many questions and few answers when I got home, I sent an early draft to a short list of regular contributors who I know are willing to tackle a tough topic.

What constitutes a living wage? One view was that it is whatever it takes to keep a family of four at a certain income level above some established poverty level in the geographic area involved. Are we talking about just salary or total compensation? Day care, medical coverage, sick leave, paid vacations, group life-insurance, retirement plans, educational benefits, tuition remission, severance pay, and even uniforms all are measurable costs and of measurable value to employees. The value of job security, safe working conditions, training and opportunity are not as easily measured but are of some substantial value to employees as well.

How large should the geographic area considered be? Is it the neighborhood, town, city, county, or state? Maybe the reasonable or customary commuting radius in the area would be a better measure. Is it where the employees are likely to live or where the work is accomplished?

Who can and should determine what the “local” poverty level is? Should we use federal data or is that too broad to be meaningful at the local level? Are there other more accurate or more acceptable sources?

How deep into the system should we attempt to reach? Should we focus on major suppliers? Is this just about suppliers working on campus? Where should the cut off be in terms of FTE or dollars? How about subcontractors?

Almost certainly, substantial additional costs will be involved. If these are to be passed through to those who benefit from the service, should they have a voice in implementing this program? Are they willing to pay more? How much more?
Where public institutions are involved, wages may be tied to some sort of statewide civil service pay scale that, perhaps, has been established via collective bargaining. Within many states, the working definition of a living wage could vary widely with location. What is a living wage in one region might not be in another. How would we work out large differences in local costs of living? Would government employees have a voice in how the tax dollars involved would be allocated?

There could be implications beyond the campus fence. A local, small business, food-service provider might have contracts covering two kiosks on campus, the snack bar in the local private hospital, the coffee shop at the airport and offer catering services to private individuals—all from a central warehouse and food preparation facility. Employees would likely be shifted around seasonally, weekly, or hourly, as required. Adjusting their compensation package change with each shift in assignment would be an administrative nightmare.

This seems to be about fairness. If some employees were being paid well above the living wage level by a contractor, would fairness require the institution and other contractors to increase the rate of compensation of their other employees doing the same work? Would it be fair to restrain the rate of compensation increases of the higher-paid employees to provide funds to level pay rates within the classification campus-wide?

Maybe all this is really a political problem. Maybe this is the sort of problem not likely to be amenable to a business process solution. Maybe what those advocating this are really trying to accomplish is a significant boost in the minimum wage via an end-run around the normal political process?

How much might all this cost? Some participants in this discussion estimated that to bring the likely target employment groups up to the standard would require a 20-40% compensation increase. How should the money be allocated? The cost of extending the usual campus fringe-benefit package to employees of contractors could amount to 40-50% of take-home pay in some pay grades. What is the likely bottom-line cost? Could a substantial increase in minimum cost of employment result in more automation, more outsourcing, and fewer employment opportunities?

By the way, does all this apply to student employees?

Who decides? Who would manage the program? Would you be comfortable with shifting the responsibility for determining appropriate minimum-pay levels and measuring compliance to any outside public or private agency? Can a viable plan be put in place? Where would your institution get the added money to fund these new costs?

As I said, more questions than answers.

Here in Long Island’s prototypically suburban Suffolk County, we seem to have taken a step that might be seen as part of this overall approach. Apparently, against a background of frustration within organized labor over its inability to organize Wal-Mart workers, the county has established a requirement that certain large companies spend a formula-derived amount of money on employee health care. From what I gather, the law is so tightly drawn that, although not named, only Wal-Mart is covered. According to an article in the New York Times [May 28, 2006], something similar is brewing in Chicago.

Wal-Mart is as good a target as any for local politicians because they (probably correctly) figure that although many of their constituents shop there, few of them love a store, and the giant retailer is probably seen by many voters as a Goliath in comparison to its individual workers. The temptation to play David seems irresistible to elected officials.
"Old State U" or "Famous Private Research U" or even a small private college in a rural county are relatively large employers and could become a similarly attractive target. If county legislators can step in and establish terms of employment and maybe compensation levels for local businesses, your institution might be the next target of opportunity. Is this an issue of immediate concern in your world? A brief scan of the Internet suggests it might be, in some parts of the country. If so, how big an issue is it and who is coordinating your institution’s response? You might want to check the Internet.

I don’t know how living wage issues will fare in the courts. Maybe this is a state or federal issue and counties will be enjoined from putting their oar in the water. Maybe not! If not, given the thousands of counties in the U.S., it might be safe to assume that other counties will take action. What action they might take is impossible to predict.

From Kerry Kahl

Senior Director, Strategic Sourcing, University of Washington Business Services

The State of Washington is one of those that has considered, but not passed, legislation that would require "living wages" in contracts awarded by state agencies and institutions. Here's the preamble from one of the recent bills:

"The legislature finds that the state annually awards service contracts to private contractors and vendors to provide services on behalf of the state, and that such expenditures should be spent in a manner that promotes the creation of jobs that allow residents to support themselves and their families with dignity. The legislature further finds that the present federal and state minimum wages generate income at a level below the amount required to support a family at a basic level and that jobs that do not pay living wages result in families who have greater need of social services provided by the state and paid for by state taxpayers. The payment of adequate wages to workers for those hours performing services on behalf of the state will promote stability and reduced turnover, resulting in a higher quality of service. [HOUSE BILL 1527, State of Washington, 59th Legislature, 2005 Regular Session]

You have a good list of questions. Without addressing each of them, here are a few of my thoughts about living wages.

The proposed Washington state bill does not define what constitutes a living wage. In the bill analysis report, one of the midsized cities in Washington is identified as having adopted the same living wage as proposed in HB 1527: $10 per hour if health benefits are provided, or $11.50 per hour if no health benefits provided. State of Washington's current minimum wage is $7.63 per hour. And there are prevailing wage requirements on public work and public building service maintenance contracts.

This bill defines in some detail—two and a half pages—who is counted as an employee for purposes of the living wage. That definition excludes coverage for "any individual employed by an employer subject to a bona fide collective bargaining agreement."

Effectively, the bill is intended for state contracts (other than those subject to prevailing wages, or with suppliers whose employees are covered by collective bargaining, since both of these presumably pay more than the proposed living wage) and is intended to require all other suppliers to pay their employees at least the statutory living wage.

Could these higher labor-costs result in more automation or other ways of obtaining the goods
and services? Over the long-term, yes. This is related to another question you ask: Where will institutions get the money to fund the new/higher costs of contracts that require living wages? We have to pay for it out of existing resources. That means scaling back on the scope of work, if there is a fixed amount of funding for a contract. Or not doing some other acquisition, or leaving some staff positions vacant to use those dollars to cover higher costs. It means looking at alternatives to what we do and how we do it, including substituting automation or other ways of providing services for service contracts that have become more expensive.

Is this a good idea? Is it viable? In Washington State, it appears from the proposed legislation that the public policy goal of living wages is to provide individuals with resources for health benefits. Either their employer, a state contract-supplier, provides those benefits plus a wage that is above the minimum wage; or the employer pays more per hour so that the employee has some (and limited) additional resources for health care. Given the extreme disparity in salaries between some of the top corporate officers versus the majority of their low-paid employees—and given the high costs of healthcare for everyone—it should not be surprising that legislative bodies are trying to address this.

It is important for our society to ensure, as our legislature stated in the preamble above, that employees be able to "support themselves and their families with dignity" and that they earn enough to at least "support a family at a basic level" so that they have less need for social services. How to accomplish that has been debated at all levels of government, all over the country, for a long time. It would be interesting to hear from locales that have adopted something like the living wage, and see how effective it is over time.

From John F. Riley, C.P.M.
Director of Purchasing and Business Services, Arizona State University

Another fascinating subject!

As it turns out, we recently formed an ASU Task Force on Service Provider Working Conditions to formulate principles that we will attempt to contractually impose on firms providing services on campus. Here are my thoughts per your questions (in italics).

1. What constitutes a living wage? One view was that it was whatever it takes to keep a family of four at a certain level above the poverty level in the area involved.

One proposal in front of our Task Force defines a living wage as a wage that meets the basic human needs for a family of four in the city in which the position is located. Basic human needs shall mean wages and benefits sufficient to meet needs for security in regards to nutrition, clothing, shelter, health care, transportation, children's education, and energy. This is currently estimated to be $10.46 per hour for Tempe.

2. Are we talking about just salary or total compensation? Day care, medical coverage, sick leave, paid vacations, group life insurance, retirement plans, educational benefits, tuition remission, severance pay and even uniforms all are measurable costs and of real measurable value to employees. The value of job security, safe working conditions, training and opportunity are not as easily measured but are of some substantial value to employees as well.
There would be an attempt to quantify the value of total compensation, to especially include benefits like health care, even if provided through a government program.

3. How large should the geographic area considered be?

In our case, we are only addressing on-campus service providers. This is, of course, problematic for a local service provider who might be expected to pay one wage on campus and another off campus for the same work.

4. Who should determine what the “local” poverty level is? Should we use federal data or is that too broad to be accurate? Are there other more accurate or more acceptable sources?

Nobody knows. Whoever does this would be subject to criticism. Also, it would be possible to increase hourly wage for a position and therefore cause the incumbent to lose some state-provided benefit, thereby placing the person in a worse condition. This could happen with food stamps or state health care.

5. How deep into the system should we attempt to reach? Should we focus on major suppliers? Where should the cut off be? How about subcontractors?

The current concept is to extend this to contracts in which 30 or more full-time equivalent people work on campus on a long-term basis. The contractor would have to extend this to subcontractors, but only for those positions working on campus. Naturally, if this becomes the standard, we will probably find that some contractors reduce staff to 29 FTE.

6. Almost certainly, substantial additional costs will be involved. If these are to be passed through to those who benefit from the service, should they have a voice in implementing this program?

In the case of our food-service contract, the contractor would have to pass the cost to the mandatory meal-plan, and not to the walk up, pay-as-you-go food service activities. The reason is that students have to buy the meal plan but do not have to buy the optional food, and so if that price exceeds off-campus prices, volume will decline. Our current guess is that the cost of a meal plan would have to increase by 25 to 35%. There is no current plan to ask students to vote on any principles to be adopted, or on any of their consequences. Students will be involved in the evaluation of potential service providers.

7. When public institutions are involved, wages may be tied to some sort of statewide scale. However, in many states, the definition of a living wage could vary widely with location within the state. How would this be worked out? Would government employees have voice in how the tax dollars involved would be allocated?

In Arizona, the legislature passed a law that prohibits government entities from imposing a minimum wage higher than the federal minimum wage. This statute may prevent the establishment of a mandatory living wage. Stakeholders would certainly have an opinion on any costs incurred by a living wage. The legislature certainly would not appropriate money for a living wage; students may not want to pay higher prices or an increased tuition to pay a living wage; and taxpayers would not want their taxes to be used for a living wage. This is especially true, as there is no evidence that a higher-than-market wage provides any benefits.

8. There could be implications outside the campus fence. A local small business food service provider might service two food kiosks on campus, the snack bar in the local private hospital, the coffee shop at the airport and offer catering services to private individuals—all from a central food preparation facility. Employees would likely be shifted around seasonally or as otherwise required.
There certainly would be the implications you mention, and also opportunities for student employment, especially foreign students, may decrease; some contractors may no longer respond to solicitations for on-campus work, small and diversity businesses may claim that only larger firms can absorb a living wage, thereby precluding them for competing for University work, and service providers may reduce service levels in order to absorb increased wage costs.

9. This seems to be about fairness. In the unlikely event that we find that some employees doing identical work on campus are being paid well above the living wage level to be fair would we have to increase the rate of compensation of others. Would it be fair to check the rate of compensation increases of the higher-paid employee?

There would have to be an increase in the entire wage scale, not just an increase in the floor wage. This is why there would have to be significant price increases for the services to be provided.

10. Maybe all this is really a political problem. Maybe this is the sort of problem not likely to be amenable to a business process solution. Maybe what those advocating this are really trying to accomplish is a significant boost in the minimum wage?

It is a multi-faceted problem. If we implemented a program of including as one of our evaluation factors the prospective contractor's wage and benefits program, environmental responsibility programs, equal employment programs, health and safety programs, and grievance programs, without mandating minimum standards for any of these areas, we would gradually improve the working conditions of employees working in service contracts on campus. If we mandate any of these, we run into difficulties, not the least of which is that it would no longer be clear that the firm is an independent contractor.

11. How much might this cost? Some estimated that to bring the likely target employment groups up to the standard would require a 20-40% compensation increase. How much of this would be in wages and how much in fringes? For example, providing health insurance for a family of four would be very expensive. Given the usual campus fringe benefit package, the cost could amount to 40-50% of take-home pay in some pay grades.

Best guess, without any good data, is an increase in the magnitude of 25 to 35%. It depends, of course, on how labor-intensive the service is. In our food service contract, labor is about 35% of the total costs in the program. So, a general wage increase from a starting wage of $6.59 to $10.46, would significantly increase the contractor's labor costs. Some of our students think that because we have a large food-service contract, the contractor can simply absorb these increases. Not going to happen.

12. By the way, does all this apply to student employees?

We do not propose to pay student employees a living wage.

13. Are you comfortable with shifting the responsibility for determining appropriate minimum pay levels to any outside agency?

Not comfortable with allowing outside entities to establish the living wage, and also not comfortable with letting inside entities do it.

14. Could a substantial increase in minimum employment cost result in more automation, more outsourcing and fewer employment opportunities?
We guess that a requirement to pay a living wage would result in fewer jobs and the attempt to use technology to reduce labor costs. For example, rather than walking up to a person who takes your order in a fast-food outlet, you may have to use a touch-screen order kiosk to place your order, and be encouraged to use your credit card to pay for it.

15. Is this whole thing a good idea? Can a viable plan be put in place?

The economists on our Task Force believe this is a bad idea. The key to improving the situation of service workers is to offer them education rather than higher wages. An increase in minimum wages causes a general inflation in the cost of things the employee consumes, and therefore leaves the employee in the same situation as before the wage increase. The students on our Task Force believe that the higher wages alone will improve workers condition.

16. Where would your institution get the added money to fund these new costs?

This is the key question. The costs would be passed to whomever is paying for the services now. A custodial contract paid for with State funds would be paid for with additional State funds. Since no additional money would be appropriated, some other use of this State money would be precluded. The most likely use to be precluded is hiring into vacant State lines. Custodial service in residence halls would result in increased room rates, as residence halls are self-supporting. Other services that are paid by consumers would pass these costs on to consumers.

Bottom line is: what seems like a good idea may not be. Further research is needed.

What do you think about all this?

End

Comments on Living Wage Issue

Nancy S. Brooks, Director of Purchasing, Iowa State University

This is definitely a public policy issue and interest in it will vary across the country. A new twist is that our Board of Regents is looking at requiring all construction contractors that work on our campus to provide health-care benefits to all their employees. This is even difficult to address. The same questions present themselves; how do you define employee and the level of benefits, how do you administer, how do you enforce compliance, and how do you fund the additional costs?

I truly believe that public procurement is directly affected by and affects public policy, politics and business practices. But what is the appropriate or effective level of involvement? What is the balance between being a good steward of public money and being a good steward of public interest? And by whose definition?

This issue also has more questions than answers. In reading your list of questions, I have had a similar list after hearing those discussions at this year’s NAEP Annual Meeting. Often, what sounds like a good policy may create more problems in the long run. Often, public policy or legislation (zoning or your example of the health-care requirement) may not be as much about living wage or benefits but rather economic development/community planning.
These issues are complex. I'm not sure something this complex should be left to politicians! Massachusetts passed legislation that every post-secondary student in the state must have health insurance. The health providers in the state were loosing too much money on bad debt and were passing the losses on to those who could pay, so health-care costs were rising and health-insurance premiums were escalating to cover the cost of these higher costs. This is not only a public policy issue but also an economic business issue. Are they right? I have been studying a hard-waiver program for our student health-insurance for the same reasons. There are some who say that higher ed should not be involved, as these are personal decisions. But are they? When do personal decisions or business decisions become public policy issues? And I believe that public procurement (particularly higher education) is right in the middle of the fray.

Brian Yeoman, Director of Education, NAEP

Well, first and foremost, this is classic Markee at his best, analyzing an issue from multiple perspectives and doing so with panache and grace. You are correct. I see this as social responsibility (an equity) issue—the third leg of the big plan. The big plan can be seen as a ven diagram with environment, equity and economics intersecting in harmony. This is really tough to achieve, but a great model for all of us to use as a lens to view the world around us.

People get here from all of the angles you explored. Mostly the right criticizes the movement as some form of socialism or worse communism. Other people that arrive at this juncture think of it as a form of recognition that when people are hungry they do dumb things. They reason that people that have a little food in their belly are not nearly as likely to present those kinds of bigger social issues.

All of that definitional stuff in the end is great argument territory. When we did this in 1995, the living wage determined by the body politic was set at 20K, which was about 8K, or more than 60% greater than the federal definition. I am working, quite a bit lately, on an Indian reservation and I can see that the Federal annual-income poverty-level is wholly inadequate. People can’t subsist on it for six months.

We are dealing with the poor, and this issue has religious, moral and political overtones. It is an issue that will polarize a community. But, you know what? In my experience, it is a really valuable step in the process and people who get into this discussion will be glad they did.
During our most recent Annual Meeting in Baltimore I had the opportunity to participate in a roundtable discussion about our profession and its future. There were a number of topics discussed during this session but among them was a significant amount of attention paid to Strategic Alliances. This seems to be evolving into a new buzzword within our group and has been around in the private sector for quite sometime— but it occurred to me that sometimes we start using terms such as this without really defining what we mean when we use them. I got the impression through some of my networking that the term “Strategic Alliance” meant different things to different members, so I thought it might be a useful exercise for this writer to at least define what I mean when I use this term.

This matter became an issue to me in recent months as I reflected upon several strategic alliances that we have created, and assessing in my own mind whether I believed we had really created something new or had just changed the name of what we used to call university-wide commodity contracts. In the latter, we would use an RFP process to determine the best source for obtaining a good or service and made our decisions on who made the best offer around providing for those needs. In theory, when we went about creating a strategic alliance, there were things we were trying to do that went significantly beyond a contract for goods or services. This reflection process resulted in solidifying in my own mind what this term Strategic Alliance means to me and how I would know if we were actually able to achieve one. It is one thing to create the structure that allows such a thing to exist, and quite another to really make it happen.

With that as a background, let me describe what I believe the definition of a Strategic Alliance is and how I will know if we really develop one. Each of our institutions has many, varied, and unique values that we bring to market. Creating a Strategic Alliance brings the competencies of our institution into harmony with those unique competencies of a supplier in creating synergies for both. The acquisition of products should essentially be a byproduct of the alliance, rather than the essence of it. The true value of the relationship comes in ways that move both supplier and institution closer to their broader respective goals.

When both parties sit on the same side of the table, communicating their goals and vision, and then—together—define measurable goals for the relationship that further the objectives of each, a strategic alliance will exist.

Reality is that suppliers and institutions talk a good game but few really achieve alliance status. Far too often, suppliers continue to meet independently from the institution when laying out their goals and objectives for the account, including strategies for increasing
marketshare, managing expectations, and creating more profit within contract constraints. At the same time, institutions reconnoiter to figure out how they can extract another grant, or get a better deal, or add to the value being offered without including the supplier in the conversations. The result is increased likelihood of goals being created that are juxtaposed to either party’s goals and vision, creating increased likelihood of conflicts.

For What It’s Worth, it seems to me that as a profession, we should make sure that we identify common definitions for new terms—so that, as we network and discuss new strategies, we increase the likelihood that we will be communicating effectively.
The Satisfaction Clause

By Lloyd Rain, Purchasing Link Contributing Editor

Beware the Satisfaction Clause,
The jaws that bite, the claws that catch!
Beware the regal expert quoth,
Your dollars doth he snatch! (1)

Judgments

Almost everything we do in life is judged by someone else—whether the baking of a pie for a mother-in-law, the tackling of a runner in a football game, or the writing of a paper in a biology class. Everything we do—the quality of a hairdo, the handling of a forklift, the identification of a pheasant or the processing of a purchase order—is subject to the approval of others.

In almost all cases, these activities are not graded (usually your mother-in-law doesn’t grade the quality of your key lime pie). Their acceptance is dependent upon a much more elusive standard—satisfaction.

In almost all life’s activities, the adjudicators are either satisfied or dissatisfied with our performance. If our arbiters are satisfied, we can brim with pleasure or, at a minimum, go on with our lives. If they are dissatisfied, we can revisit the source of the displeasure, try to improve, or simply walk away and accept the consequences—which are usually nothing more than glances of disdain.

Except, of course, if the judgment is contractual. Then it’s an entirely different matter. When satisfaction becomes contractual, there’s no opportunity to "simply walk away" or bear some glances of disdain.

Contractual Satisfaction

Many contracts contain “satisfaction clauses.” They usually look like this:
The completion of all inspections to the Owner's satisfaction shall be within 21 days of closing.

Employment is entirely at the pleasure of the company; the company retains the right to terminate employment if the employee’s performance is not completely to the satisfaction of the company.

All work shall be completed to the satisfaction of the Architect.

Such clauses are especially evident in construction contracts.

Ascertaining the quality of construction involves the use of professional skill and judgment in deciding whether or not work has achieved a particular standard. In many cases, technical compliance is not an adequate standard. Judgment of quality, aesthetics and/or operational function may be necessary in order to ensure a high level of performance. The onus for making such judgments is usually placed upon the shoulders of an “expert” but it may be upon a party to the contract as well. Contractually, the opinion, satisfaction or approval of the Employer, Owner, Architect or Engineer defines the standard for acceptance or rejection of the work. Such statements of opinion, satisfaction or approval are binding on all parties to the contract when such clauses are integrated within the contract with express and clear language.

“Satisfaction clauses” can be very dangerous for those whose work is being judged because there is no other standard of acceptance than the subjective opinion of the adjudicator.

Rarely do contractors and vendors pay any attention to these clauses because it’s always assumed that approvers will be reasonable and that rational negotiations will resolve any deficiencies in the work.

Those who believe this are dead wrong. The standard of “reasonableness” is not necessarily applied when someone with professional credentials, an architect, engineer, interior designer or project manager, is making the judgment. In fact, with few exceptions, the “expert adjudicator” has absolute power and there are no avenues of appeal. In some cases, work must be repeated several times at great cost to the contractor until satisfaction of the adjudicator is achieved.

Consider this case. (2)

**A Case in Point**

At a hotel being built in Austin, Texas, a concrete subcontractor proceeded with his forms and completed the concrete foundations. The subcontract stated that the concrete framework was "subject to the formal approval of the Architect." The Architect rejected the subcontractor's work because of irregularities in the concrete surfaces. The subcontractor obtained summary judgment for payment from a lower court, successfully contending that the work had fully complied with all the technical obligations of the specifications and the contract. The ruling was appealed.

The Court of Appeals discussed the satisfaction clause under which the subcontractor agreed to perform—all work subject to the "formal approval" of the architect. The court’s comments are enlightening (I have omitted all the intermediary case references).
“It is well established that a contract may require performance by one party to be subject to the satisfaction of the other party, or a designated third party such as an architect or engineer. Construction contracts commonly contain satisfaction clauses. Generally, a satisfaction clause will be upheld unless it is shown that the arbiter of performance under the contract decided the matter due to fraud, misconduct, or such "gross mistake" that it implied bad faith or the failure to exercise honest judgment. However, it must appear from the express terms of the contract that the parties intended determination by a third party to be final; such a provision may not be implied {but must be clearly stated in the contract}."

The court reversed the initial judgment essentially saying that, regardless of compliance with all technical requirements, the approval was not granted and the work was, therefore, unacceptable.

The concrete subcontractor had to demolish his foundations and repeat the entire work at his own expense hoping to obtain the architect’s approval (although I do not know the exact resolution of this particular case). I have personally witnessed other cases where walls have had to be torn out and re-done and where brickwork had to be removed and re-done in order to satisfy the architect.

**Experts And Parties—Different Breeds**

"Satisfaction" clauses are commonly used in both government and commercial construction contracts. The court said the decision of the "arbiter of performance" will be upheld unless it was decided due to *fraud, misconduct, or such gross mistake that it implied bad faith or the failure to exercise honest judgment*.

The court went on, however, to clarify that this standard would only be applicable where the "satisfaction" requirement is given to a **third-party expert** (such as an architect or engineer)—not to a party to the contract itself (such as a owner or agent). A different standard is used when it is **one of the parties to the contract** who must be satisfied. The Supreme Court of Texas stated that if the "arbiter of performance" is not a third-party expert, the standard of judgment is "objective reasonableness" in order to avoid making acceptance of the work vulnerable to that party's whim or bad-faith withholding of approval.

Although "satisfaction clauses" are more common in construction contracts, there is no reason to preclude their use in contracts for supplies or services. All such contracts can pose significant risks to sellers, particularly if the contract has a performance-type specification or statement of work. When satisfaction clauses are included in purchase or service contracts, they are generally called "buyer satisfaction" clauses. In these cases, the buyer usually represents the Owner as the Owner’s agent and the lower standard of **objective reasonableness** would apply unless the buyer was actually a recognized expert in the work itself.

**Beware the Risk**

Although satisfaction clauses give the buyer a certain degree of liberty in accepting goods and services, they also place the seller or performer of the work in greater jeopardy than if the contractor had only to comply with technical specifications. In some cases, such clauses can be a red flag for additional risk. Performance of a computer software or janitorial service contract to the satisfaction and approval of the buyer could require appreciably more work than the seller anticipated.

Thus, my somewhat inelegant admonition to the contractor:

*Beware the Satisfaction Clause,*
*The jaws that bite, the claws that catch!*
Beware the regal expert quoth,
Your dollars doth he snatch! (1)

End

(1) Based on a stanza from JABBERWOCKY by Lewis Carroll from “Through the Looking-Glass and What Alice Found There,” 1872


Lloyd Rain retired as Purchasing Director of Lane Community College in October 2003 and is now the principal of Lloyd Rain Associates, a firm that provides solicitations for public agencies (www.rainassoc.com).
August 2006

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Note from Editor: Letters, articles, or announcements for publication in the NAEP Bulletin are due on the 5th day of the month preceding publication. E-Mail to nmarkee@naepnet.org

From the President

A Few Thoughts on Our Scholarship Funds

Did you know that NAEP has two scholarship funds? One named for Bill Haas and a new fund,
established within the last year, named in honor of Nancy Tregoe.

The William E. Haas Scholarship fund is the one most of us are familiar with. The members of our Association support the fund in three ways: our annual golf classic, our silent auctions at the Annual Meeting, and donations that are made by our Regions. Helping the fund to grow is an ongoing project for many of our members—and I’d like to express a big “thank you” to those who make contributions of time, effort and merchandise to support the scholarship fund.

Thanks also to the four Regions who made a financial contribution of at least $500 in the past year: Indiana, TAGM, TOAL and DC-MD-VA. Financial support from any and all Regions would be most welcomed. Please consider this.

The objective of the fund is to support the professional development of our members. Procurement professionals who are awarded a scholarship can elect to use the scholarship to attend one of the NAEP Professional Development Institutes or to attend the Annual Meeting.

Who gets a scholarship? The way it works is that the NAEP Board determines the number of awards that can be supported by the annual earnings of the fund endowment. Last year, the Board was able to raise the number of annual awards from 6 to 9. So this year, 9 of our Regions will make an award to an individual they select. Next year, 9 other Regions will have that opportunity. As you can see, the scholarship fund is gaining traction and is supporting more NAEP members.

What about the future? I’ve asked John Klopp to chair a group to evaluate the scholarship program and to make recommendations to the NAEP Board for its future. It is very likely that we can do more and build upon the solid base that we have created. You will hear more once the recommendations have come forward and have been considered. If you have input about the future direction of the scholarship fund, please send John a note: john-klopp@uiowa.edu. Any and all suggestions and comments will be appreciated.

Thanks again to those many members who care about and support this effort to provide professional education assistance to our own.

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**Calendar of Events**

**September 28, 2006**

**Educational Webcast**

**Spaces Matter: Aligning Your Campus Environments & Your Strategic Plan**

Faculty: Deb Moore, Executive Editor of College Planning & Management Magazine; and Ed Roy, National Workplace Consultant for Higher Education, Steelcase Inc.

Time: 11:00 a.m. Pacific; 12:00 p.m. Mountain; 1:00 p.m. Central; 2:00 p.m. Eastern

Length: 60 min.

Fee: NAEP member $99; nonmember: $199

[Online registration](#)

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**September 27-29, 2006**
Procurement Academy Tier I: Foundation
(co-located with the TOAL Regional Meeting)
Renaissance Tulsa Hotel
Tulsa, Oklahoma
Rate: $79/night plus tax
Rate cut-off: September 1, 2006
Use group name NAEP and group code EDBEDBA to receive discount.
Online registration

October 4-6, 2006
Procurement Academy Tier II: Professional
(co-located with the DISTRICT VI Regional Meeting)
Renaissance Montura
Los Angeles, California
Rate: $111/night plus tax
Rate cut-off: September 1, 2006
Use group name NAEP to receive discount.
Online registration

February 4-7, 2007
Procurement Academy Tier III: Senior Professional
Hotel Monteleone
New Orleans, Louisiana
Rate: $149/night plus tax
Online registration

2006 REGIONAL MEETINGS
TOAL September 24-27 Tulsa, Oklahoma
Carolinas October 1–4 Wilmington, North Carolina
District VI October 1–4 Los Angeles, California
MINK October 1–4 Omaha, Nebraska
District II October 4–6 Hampton, Virginia
IWAG & Indiana October 4–6 St. Charles, Illinois
Michigan October 4–6 Lansing, Michigan
MN/DK October 8–11 Minneapolis, Minnesota
Upstate NY October 10-13 Buffalo, New York
Ohio October 25-27 Columbus, Ohio
Florida February 2007 Tampa, Florida

86th ANNUAL MEETING & EXPOSITION
San Jose, California

Spaces Matter: Aligning Your Campus Environments &
NAEP Bulletin August 2006

Your Strategic Plan
Educational Webcast—September 28

NAEP
National Association of Educational Procurement
Web-Based Learning

Faculty

Deb Moore, Executive Editor of College Planning & Management Magazine;

Date Thursday, September 28, 2006
Time 11:00 a.m. Pacific; 12:00 p.m. Mountain; 1:00 p.m. Central; 2:00 p.m. Eastern
Length 60 min.
Fee NAEP member $99; nonmember: $199

2005 will be remembered as the year of cataclysmic natural events that took a toll on the nation's infrastructure. Construction inflation, which had been rising at a manageable 3–4 % a year, rose more than that in the last 3 months of 2005. Even with increasing inflation, completed 2005 college construction came in at a whopping $14.5 billion dollars—the highest one-year total in our nation's history.

Higher-than-ever expectations from today’s students and their parents, increased competition for faculty and dollars, rapid changes in technology, diverse learning and teaching styles, more pressure to measure results—these are just some of the critical issues colleges and universities are facing and what they are hoping that this mammoth expenditure in construction will deliver. Institutions of all types and sizes are looking for new ways to be closer to the cutting edge, and facilities are a bigger-than-ever part of the solution.

- Who Should Attend
- Academic
- Administration
- Admissions
- Business
- Campus Planning
- Design
- Development
- Facilities
- Faculty
- Human Resources
- Procurement
- Student Services

What You Will Learn

- The kinds of spaces that appeal most to today’s students and faculty.
- How to transform underused spaces.
- Ideas for increasing the strategic value of your classrooms, offices and the often-overlooked areas between them.
- How institutions such as Northern Arizona University, Tarrant County College, and the University of Connecticut are leveraging their facilities in unique ways to get the results they’re after.

About the Faculty
Deborah P. Moore is the executive editor/publisher of College Planning & Management and School Planning & Management magazines. Prior to joining the magazines, Deb spent 20 years as Director of Operations for the Council of Educational Facility Planners International. Deb has written many articles and presented to many groups on the impact of facilities on education.

Ed Roy, National Workplace Consultant for Higher Education at Steelcase, Inc. is part of a team that conducts observational research into teaching styles and learning behaviors at colleges and universities throughout the United States and Canada. He is a presenter in programs administered by the Interior Design Continuing Education Council and the American Institute of Architects Continuing Education System.

This Webcast is produced in cooperation with

CALL FOR PROGRAMS

San Jose, California

Proposal Deadline: October 2, 2006

2007 Theme: Ambient Leadership

Ambient Leadership is the integration of harmonious influences stemming from a combination of traditional and new approaches. Akin to ambient light, ambient leadership can appear to come from anywhere—and procurement, the one function that crosses all constituencies on campus, is uniquely positioned to contribute in a leadership capacity with expertise and value.

Most attendees will be purchasing professionals from two- and four-year institutions, representing
public, private, research, and healthcare areas. Also attending will be K-12 school district representatives and registrants from other disciplines such as facilities, food services, auxiliary services, HR, telecommunications, and information technologies.

Conference sessions are 60 or 75 minutes in length. Mini-Institutes are 2 hours, 45 minutes in length.

The 2007 NAEP Annual Meeting will have 4 main tracks.

1. Administration / Management / Leadership.
2. Procurement
3. Commodity Specific
4. Business Diversity

For full details and to submit a proposal, see our Website.

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**News and Views from District II**

**DC/MD/VA:** Washington DC, Maryland, Virginia  
**DE/PA/WVA:** Delaware, Pennsylvania, West Virginia  
**Metro NY/NJ**

By Tom Kaloupek, Director of Materials Management, Virginia Polytechnic Institute & State University; District II NAEP Board Representative

> [Editor’s note: We are pleased to introduce to our readers a new column, **News and Views from District** ____, in which our district leaders will have an opportunity to introduce themselves and fill you in on issues and activities in their area. Tom Kaloupek launches the column with District II news. Next month, look for Starlene Jackson’s column on the Carolinas District.]

NAEP District II is comprised of members from three regions: DC-MD-VA (Washington DC, Maryland, Virginia); DE-PA-WVA (Delaware, Pennsylvania, West Virginia), and NJ-Metro NY (New Jersey and New York). Middle Atlantic states: not too cold and not too hot—just right! There are a large number of private schools in our District as well as many public institutions that are long-standing and active members of the Association. We are also very proud to have the current NAEP President, Bill Hardiman, of George Mason University, among our District members.

In the year 2000, the three Regions embraced the new District concept and agreed to hold a joint regional meeting in Philadelphia. We found having more schools and a larger participant base to be valuable and to make for a better meeting as compared to having individual regional meetings. We decided to keep our regional leadership and treasuries separate and we continue to function in that manner today. However, we established a practice of rotating the fall regional meeting between the DC-MD-VA and the DE-PA-WVA Regions. Members from all Regions serve on the planning committee, but it is the responsibility of the Host Region to do the heavy lifting and back the meeting financially. This practice helps keep our volunteer leadership from burning out and provides leverage, in that, we are a meeting of 100 people instead of 40.

This year, our fall meeting will be held in Hampton, Virginia in October and will be hosted by the DC-MD-VA Region. Karen Downs, of the Colleges of Southern Maryland, is the current Regional President and is leading the effort to organize the meeting. Karen anticipates turning over the Regional Presidency to Claire McCardell, of Loyola College in Maryland. Tom Fogerty, of Harrisburg Area
Community College, and President of the DE-PA-WVA Region, is scouting locations for the 2007 meeting. One of our ongoing objectives is to rotate the location of the meeting through different areas of our District so that local members can participate. We have tough choices to make: beach? mountains? Big city lights? District II has it all and knows how to have some fun. Just ask someone about the Pittsburgh Riverboat where we were first introduced to Don Krech's famous band.

We are thankful for the strong Regions in our District and the many leaders who have come forward over the years to volunteer their time to support their colleagues and the Association. One of the values of NAEP is providing the opportunity to meet professional people whom you might otherwise not know.

Why Pay Your NAEP Dues?

Neil Markee

I had lunch with Barbara Torre the other day. We both work for NAEP from home and meet now and then here on Long Island to catch up on what is going on within the Association's Baltimore national office. She is in the midst of the annual dues collection process and, as this is a dues increase year, she has been discussing with more than the usual number of members who have not yet paid their annual dues, the many benefits of NAEP membership. Over typical diner fare we recalled the sort of questions these members have been asking for decades.

By higher education professional association standards, NAEP dues have always been low. However, virtually all of the people served by NAEP are purchasing professionals and they are interested in the cost benefit ratio delivered by Association membership and anything else they buy. Fair enough.

The Association’s core purpose has always been to facilitate the exchange of information within the wing of the purchasing profession serving higher education. That exchange is especially important because the most valuable information you must have is sensitive, perishable and unlikely to be available in a timely fashion from other than your peers around the country. NAEP is the best source of the specialized information you need.

One really good idea picked up from another member and applied on your campus would pay your NAEP annual dues for a long time. For example, what do you know about the six and seven figure signing bonuses that some members are receiving and we discussed in Purchasing Link last month?

But benefits come in smaller packages as well. How much of an increase in overall effectiveness resulting from NAEP interaction would it take to justify the cost of membership? Suppose your annual dues are $500 and your department spends something like $75,000,000 annually. My pocket calculator suggests that $500 ÷ $75,000,000 = .000667%. In other words, if through NAEP membership you can increase the overall effectiveness of your department by a tiny fraction of a percent, your annual dues will be more than repaid. You might want to insert your own numbers and hit the equal key.

And there are other very good reasons to be a NAEP member. Your personal informational network within the profession is of great value to both your institution and to you professionally as well. Only people who know and trust each other are likely to be willing to candidly share the details of even sensitive information they may have painfully acquired the hard way. That's human nature. NAEP is the best way to build your confidential network within the profession.

And increasingly there is a good bit of mobility within the profession. Reputation matters. The best positions are offered to people who are known within the profession and activity within NAEP is one of
the most effective ways to build a reputation among your peers. Similarly if you are looking to fill a key position, knowing the reputations of others in the field who might be interested can save a lot of time and effort.

Well we finished lunch and Barbara grabbed the check and wished me a happy birthday. I had watched the New York Yankees take a beating the previous night and, as we were leaving the diner, I told Barbara Torre that Joe Torre needed starters who could go past the sixth inning and better middle relievers. She reminded me that she was not married to that Joe Torre.

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**Member News**

**Certifications**

Congratulations to the following members who have earned certifications recently:

Rebecca Dunlavy, Senior Procurement Agent, University of Michigan, received her C.P.M. on June 13, 2006.

Daphyne Sesco, Director, Purchasing & Auxiliary Services, at Santa Fe Community College in Gainesville, Florida, received her Lifetime C.P.M. in mid-June.

Jim Boyd, Berklee College of Music, Massachusetts, has received his Lifetime C.P.M.

**Promotions, Job News, Comings and Goings**

Good luck and best wishes to the following members who have been promoted, changed jobs, or retired:

Vikki Ross left the University of Texas Medical Branch, Galveston to accept a position as Director at University of Texas Health Science Center San Antonio, effective July 1.

Kimberly Brinkley has been officially promoted to Director of Procurement Services at the University of Indianapolis.

Beckie Beard has been named Interim Director, Financial Services/Chief Financial Officer at Lansing Community College, Michigan. Her previous position of Director, Purchasing & Materials Management, is vacant until the CFO position is filled. In the meantime, Caroline Duda, Purchasing Coordinator, is heading up the department.

Guy De Stefano and Patrick L. Smith have both officially retired from Indiana University, as of June 30.

Sylvia Stemmons just celebrated her 26th year at Lincoln Land Community College, Springfield, Illinois this past June. She has been Director of Purchasing there for 14 of those years.
Stacey Wikar has been promoted from Director of Purchasing and Office Services to Director of Purchasing & Auxiliary Services at Bay Path College in Longmeadow, Massachusetts.

Jacque Allbright, Head Purchasing Clerk, Texas State University-San Marcos, has accepted a position in the university’s Office of Sponsored Programs-Post Award.

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**The Top 10 Differences Between a Manager and a Leader**

2. A manager is a copy. A leader is an original.
4. A manager focuses on systems and structure. A leader focuses on people.
5. A manager relies on control. A leader inspires trust.
6. A manager has a short-range view. A leader has a long-range perspective.
8. A manager has his eye on the bottom line. A leader has his eye on the horizon.
10. A manager is the classic good soldier—does things right. A leader is his or her own person—does the right things.

_Copryr. 2003 by Susan Dunn, sdunn@susandunn & Coach University_

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**Quote of the Month**

"We don't see things as they are, we see things as we are."

—Anais Nin