

# NASA Langley

## Office of Chief Counsel

### Newsletter



Volume 3, Issue II October 2012

It is election season, and I encourage you to get out and vote; however, please keep in mind that the Hatch Act prohibits political activity on duty or in the workplace. We have included some guidance addressing the on duty/in the workplace restrictions. We have also included articles on important topics such as the new Government credit card law, veterans preference, the new "first to file" patent rule, international agreements, and protests. Of course, we cannot resist including a little humor.

Over the past several months, OCC has experienced some personnel changes. We bid adieu to both Patrick McCaffery and Tom McBride. Patrick left NASA to take a job in the corporate world, and Tom decided to accept a position with the U.S. Patent and Trademark Office. We will miss them, and we wish them well. We are pleased to welcome two new attorneys to the LaRC OCC Team: Jennifer Riley and Eric Rissling. Jennifer comes to OCC after several years in private practice, where she specialized in handling patent law matters. Jennifer will serve as a member of our Intellectual Property Law Team. Eric joins OCC after a career in the Air Force Judge Advocate General's Corps and serving five years with the Navy General Counsel's Office in Norfolk, Virginia. Eric will work as a member of our Business Law Team. We have included a short bio for each of them.

I hope you enjoy this edition of the OCC Newsletter.

*Mike Madrid,  
LaRC Chief Counsel*

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# PERSONNEL POINTS

## **New Government Credit Card Law to Affect Purchase, Travel Card Holders**

On October 5, President Obama signed the “Government Charge Card Abuse Prevention Act of 2012” into law. The law amends Title 41 U.S. Code (covering purchase cards) and Title 5 (covering travel cards), and is a result of reports of misuse by federal employees and active duty military members over the last decade.

In 2002, a Congressional hearing discussing issues with government credit cards resulted in several negative news stories focusing on abuses in the Department of Defense. Witnesses told the committee that the Government Accountability Office (GAO) found that government credit cards had been used at casinos and strip clubs, used to make large cash withdrawals from ATM machines, and had been used to buy toys, luggage, home appliances, and electronics, which could not be located and were not in possession of the government. Senator Charles Grassley noted, “With no interest charges, obviously, abusers get a free ride.” The two juiciest details to emerge from the hearing were first, that a Navy civilian, Tanya Mays, used her purchase card for Christmas shopping in the amount of over \$11,000. After the matter was turned over to NCIS, and had been rejected for criminal prosecution, Mays was promoted to the Army’s top finance office in the Pentagon. The Senator testified that “Ms. Mays has not been asked to repay the money she allegedly stole.” The Associated Press reported the Mays matter in a news item titled “Thieving Pentagon employee promoted.” The second item, also widely reported in the press, was that an active duty sailor used his travel card “exclusively for personal expenses” and spent nearly \$35,000 over two years. Sailor Nick Fungcharoen paid for plastic surgery for his girlfriend. The Senator noted, “Had he used a standard commercial card, he would have incurred stiff interest charges and penalty...he got a free loan from the bank without asking.” The hearing resulted in leaders from the involved commands, who were called to account, promising increased oversight of employees and military members.

The oversight evidently has been insufficient to curb abuses. In 2009, the Congressional Research Service (CRS) issued a report on government travel card misuse, finding travel cards used for laser eye surgery (FAA), first-class travel to Hawaii (State Department employee), and reimbursements in the amount of \$10,000 for tickets never purchased (Pentagon employee.) The CRS report noted that the Pentagon had a delinquency rate of 20 percent, and NASA was right behind with a 16% delinquency rate.

The new law focuses on increased internal controls for government agencies as well as holding cardholders and those higher in the chain of supervision accountable. For both purchase and travel cards, agencies are required to create a policy regarding the number of cards issued, credit limits authorized, and categories of employees eligible to be issued purchase cards. Records must be maintained of all purchase cardholders and training provided. With regard to purchase cards, agencies must take steps to recover costs of any illegal, improper, or erroneous purchase through methods that will include salary offsets. Further, the law requires that each agency “shall provide for appropriate adverse personnel actions” for illegal, improper, or erroneous purchases and the penalty must include as an option dismissal of the employee. Additionally, discipline will be warranted for employees other than the cardholder if those employees “violate agency policies implementing the guidance” in the law, thus holding approving officials accountable. Agencies’ Inspector General will track violations and submit semiannually to the Office of Management and Budget (OMB) a report of violations and descriptions of adverse personnel actions taken for each violation. Additionally, they are required to periodically audit the program and create risk assessments (this is also true of the travel card program.)

The portion of the law concerned with travel cardholders requires agencies to conduct periodic reviews to determine whether cardholders have a need for the card, and to ensure through contracts that issuers of the cards perform a standard credit check on agency applicants, with the result that “no individual be issued a travel charge card if that individual is found not creditworthy as a result of the evaluation.” (Those individuals will receive a restricted-use, pre-paid card.) Refund payments are to be issued where appropriate directly to the bank. The same disciplinary provisions apply to the travel card as the purchase card. Again, discipline is not limited to cardholders, but includes “employees of the executive agency who fail to comply with applicable travel charge card terms and conditions or applicable agency regulations or commit fraud with respect to a travel charge card.” Removal from federal service must be an option.

Regulations are forthcoming implementing the law, but it’s probably a good time to start developing good habits regarding the use of government charge cards, in particular the travel card. It is to be used for official travel only. It should be safely stored when not traveling if there is a risk of confusing it with another card, which seems to be a recurring problem for Center employees. Finally, realize that increased documentation requirements from OCFO and other NASA organizations is required and not designed by them to punish employees. As federal employees, we are tasked to serve the public with integrity. “Charging it to Uncle Sam,” as CBS news characterized the misdeeds, falls far short of that standard.

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## Ethics Edicts

We are in the midst of election season. Political ads, signs, slogans, and commercials are impossible to avoid; but as Federal employees, we must shun engaging in political activity in the workplace or using government resources to engage in political activity. The Hatch Act is a Federal Law that restricts the political activity of Federal employees. It is important to engage in the electoral process by exercising our right to vote; and in our private capacity, there are many aspects of the election process in which we can permissibly engage; however, the Hatch Act significantly curtails activities of Federal employees while on official government duty or in the Federal workplace. The below is provided as guidance from the Office of Special Counsel (OSC), the Federal Government Agency with authority to enforce the Hatch Act and seek disciplinary action against Federal employees who violate the Act. Violation of the Hatch Act can result in removal from the federal service. If you have any questions regarding whether political activity is appropriate—either on-duty or in your private

**Political Activity  
and the Federal  
Workplace – Like  
Oil and Water**



capacity—you are encouraged to call the Office of Chief Counsel at 864-3221 for guidance. You may also contact the OSC at (800) 85-HATCH or (800) 854-2824 to get guidance straight from the agency charged with enforcing the Hatch Act.

**1. Can I display a picture of a candidate for partisan political office in my workspace?**

**Answer:** *Because section 7324 of the Hatch Act prohibits federal employees from engaging in political activity while on duty or in a federal building, the Act generally would prohibit employees from displaying pictures of candidates for partisan public office in the federal workplace. See 5 C.F.R. § 734.306, Example 16. However, we advise that an employee would not be prohibited from having a photograph of a candidate in his office if all of the following apply: the photograph was on display in advance of the election season; the employee is in the photograph with the candidate; and the photograph is a personal one (i.e., the employee has a personal relationship with the candidate and the photograph is taken at some kind of personal event or function, for example, a wedding, and not at a campaign event or some other type of partisan political event). Of course, an employee must not have a political purpose for displaying the photograph, namely, promoting or opposing a political party or a candidate for partisan political office.*

**2. If the current President is a candidate for reelection, may federal employees display his picture in their offices?**

**Answer:** *An employee covered by the Hatch Act may not engage in political activity while on duty, in a government room or building, while wearing an official uniform, or using a government vehicle. 5 U.S.C. § 7324. Political activity is defined as activity directed toward the success or failure of a political party, candidate for a partisan political office or partisan political group. 5 C.F.R. § 734.101.*

*Thus, the Hatch Act prohibits federal employees from, among other things, displaying pictures of candidates for partisan public office in the federal workplace. If a current President is a candidate for reelection, the Hatch Act prohibits an employee from displaying his photograph in the federal workplace, unless one of the two exceptions discussed below applies.*

*The first exception applies to official photographs of the President. The Hatch Act does not prohibit the continued display of official photographs of the President in the federal workplace, to include both public and employee work spaces. Official photographs include the traditional portrait photo of the President displayed in all federal buildings, as well as photographs of the President conducting official business (e.g., President meeting with heads of state). However, these official photographs must be displayed in a traditional size and manner and should not be altered in anyway (e.g., the addition of halos or horns). Pictures that are distributed by the President's campaign or a partisan organization, such as the Democratic National Committee or Organizing for America, are not official, even if they depict the President performing an official act. Similarly, pictures downloaded from the internet or clipped from magazines or newspapers, screens savers and life-size cutouts are not official photographs for purposes of this exception.*

*The second exception, which applies to all candidate photographs, including the current President, is set forth in response to Question 1, above.*

**3. Can I wear a partisan political button or t-shirt while I am at work or display such items in my office?**

**Answer:** *No. Covered employees may not engage in political activity while on duty, in a government office or building, in uniform, or in a government vehicle. Wearing or displaying candidate, political party or political group materials while on duty or in your workspace qualifies as political activity. This prohibition extends to wearing or displaying such items in, for example, the cafeteria, lobby or on-site gym of a federal building.*

**4. Can I have a screen saver on my computer or a picture in my office with a political message (e.g., a campaign sign, campaign logo, etc.)?**

**Answer:** No. Covered employees may not engage in political activity while on duty, in a government office or building, in uniform, or in a government vehicle. Displaying campaign material qualifies as political activity.

5. **If I have a bumper sticker on my personal car, am I allowed to park the car in a government lot or garage or in a private lot/garage if the government subsidizes my parking fees?**

**Answer:** Yes. An employee is allowed to park his or her privately owned vehicle with a bumper sticker in a government lot or garage. An employee may also park the car with a bumper sticker in a private lot or garage for which the employee receives a subsidy from his or her agency.

6. **Will I violate the Hatch Act if I listen to radio programs discussing partisan politics or candidates for partisan political office, or read a book about politics or political candidates while I am in the federal workplace?**

**Answer:** No. Some federal agencies allow employees to listen to the radio while they are at work. Merely listening to a radio program that is discussing politics while in the federal workplace, without more, is not a Hatch Act violation. Similarly, merely reading a book about politics or political candidates while in the federal workplace, without more, is not a Hatch Act violation. However, employees should make certain that the federal agency where they work does not have any internal policies prohibiting its employees from generally engaging in any of these activities while at work, (i.e., listening to the radio, reading).

7. **Can a federal employee display in his office a photograph of his spouse or child even if the spouse or child is a candidate in an election for partisan political office?**

**Answer:** Yes. The Hatch Act does not prohibit a federal employee from displaying photographs of a spouse or child even if the spouse or child is currently running for partisan political office, provided the photograph is not a campaign photograph.

#### **USE OF E-MAIL AS POLITICAL ACTIVITY**

1. **What is a partisan political e-mail?**

**Answer:** A partisan political e-mail is an e-mail that meets the definition of political activity. In other words, it is an e-mail that is directed toward the success or failure of a political party, candidate for partisan political office, or partisan political group.

2. **I received a partisan political e-mail in my government e-mail account while at work. Did I violate the Act?**

**Answer:** No. Simply receiving a partisan political e-mail while at work, without more, does not constitute prohibited political activity as defined under the Hatch Act or its regulations. However, federal employees must not send or forward the e-mail to others.

3. **Can I send or forward a partisan political e-mail from my work e-mail address to my non-government e-mail address while I am at work, i.e., on duty and in a federal room or building?**

**Answer:** Yes. If you received a partisan political e-mail in your work e-mail account you may send that e-mail to your non-government e-mail address while at work. Simply sending such an e-mail to your personal e-mail address, without more, does not constitute prohibited political activity as defined under the Hatch Act or its regulations. But please be aware that you would violate the Hatch Act if you sent the e-mail to your non-government e-mail address and then using your non-government e-mail account you sent the e-mail to other people while you were on duty and/or at work.

4. **If I am on duty and/or in my government workspace, can I login to my non-government e-mail account and from that account, send, or forward a partisan political e-mail?**

**Answer:** No. You cannot send a partisan political e-mail from your non-government e-mail address while you are on duty and/or at work.

# More Personnel Points

## VETERANS' PREFERENCE: NAVIGATING THE MAZE

Veterans' preference is one of the most technical areas of applied civilian personnel law. Managers should have a basic understanding of these laws and appreciate the steps that our human resources (HR) colleagues have to take to ensure compliance. The Veterans' Preference Act of 1944 (VPA), codified in 5 U.S.C. §§ 3309-3330, is the law that grants certain veterans preference in filling certain vacancies under certain methods. However, most litigation is brought under the Uniformed Service Employment and Reemployment Rights Act, 38 U.S.C. § 4301, (USERRA) and/or the Veterans Employment Opportunities Act, 5 U.S.C. § 3330a (VEOA). USERRA prevents discrimination in all employment actions including hiring against employees and applicants because of their service; the VEOA allows veterans to be considered for vacancies for which other applicants without federal service are not eligible to apply. While not a preference applied to other applicants, two authorities allow for direct hiring of veterans without even posting a vacancy announcement. The Veterans Recruitment Appointment (VRA) allows for direct hire of certain eligible veterans up to the GS-11 grade; 30% or more disabled veterans may also be directly hired without a vacancy announcement to any grade.

The VPA preference provision has been incorporated into hiring procedures under the Office of Personnel Management's (OPM) regulations and is carried out via a system of ranking in certain types of recruitments. Some types of ranking and rating award points, but in recent years "category rating" has freed agencies from strict application of points unless a register is created after an actual civil service test is given, usually for positions in firefighting, police, air traffic controller and for postal employees. Veterans' preference is still part of the process, but the technical application is a complex skill that is difficult to grasp for non-HR practitioners.

Veterans' preference is not an absolute preference in every case; litigation often results from misconception that an absolute preference is granted to any veteran over a non-veteran in any and all hiring in the federal government. There is also confusion regarding ranking of veterans amongst each other—there are ten-point and five-point categories. "Ten-point" veterans do not receive a preference over "five-point" veterans merely due to being placed in that category. (However, in a register process, if two applicants score 70, the one with ten points added would be placed ahead because of a final score of 80, vice 75 for a five-point vet.) There is also confusion over disability percentage ratings from the Department of Veterans Affairs. Disability rating percentages over 30% are only relevant to determine benefits. In hiring actions, a threshold level of 30% disability does garner a ten-point preference, but once that threshold of 30% is reached, there is no greater benefit at a higher disability rating—for example, a 40% disabled veteran is not ranked higher than a 30% disabled veteran. They are both ten-point preference eligible candidates.

Veterans' preference is applied only in certain selection processes. At NASA, these are called "delegated examining units" (DEU) and are the vacancies that are open to any U.S. citizen. The preference provision provides two important benefits. First, veterans only have to be minimally qualified to be considered for a job by being placed on a certificate of eligible candidates, but non-veteran candidates can be required to be well qualified. Second, regardless of the method used to rate applications, veterans "float to the top" of the certificate. "Passing over" a non-veteran below the veterans on a certificate requires OPM approval, which is rarely granted and requires notice to the veteran so that he or she can provide input. One important exception is that veterans do not "float" to the top of a certificate for scientific and professional positions at GS-9 and above. The statute provides that they will receive points, but will rank where they score with their points added—they may or may not outrank non-veterans depending on the assessment of their qualifications and the added points, and pass-over procedures do not apply. 5 U.S.C. § 3313. While the rule that some

veterans cannot be bypassed in most occupations may result in a lesser-qualified veteran being selected over a more-qualified non-veteran, it is important to remember that Congress intended for veterans to obtain gainful employment in the federal service, particularly disabled veterans, a principal that dates back to the Civil War era. See Res. Of Mar. 3, 1865, No. 27, 13 Stat. 571. Further, veterans and non-veterans are both required to demonstrate their fitness for continued federal employment in a probationary or trial period. 5 C.F.R. §315.

Veterans' preference does not apply to "merit promotion" vacancies (called "competitive placement plan" or "CPP" at NASA). In the CPP process, applications are limited to specific categories of employees, such as current NASA employees, current federal employees or those with reinstatement eligibility (also called "status candidates.") Veterans can apply for CPP vacancies that permit applications from outside of NASA (for example, those that are open to all government employees within the local commuting area) and must be considered for those CPP vacancies even if they have no previous federal civil service. 5 U.S.C. § 3304 (f)(1). However, in CPP recruitment, a veteran does not receive preference. Veterans are not placed at the top of a certificate. There is no pass-over procedure and therefore no requirement to select a veteran in a CPP announcement if he or she is less qualified than other candidates. Most litigation occurs in this arena, and every year the Merit Systems Protection Board and the U.S. Court of Appeals for the Federal Circuit issue several decisions holding that the veteran, by being considered, received all that he was entitled to under the VEOA. See *Joseph v. Federal Trade Commission*, 505 F.3d 1380 (Fed. Cir. 2009).

Several procedural aspects of federal recruitment have been extensively litigated, resulting in points of clarification. The first is that agencies may post vacancy announcements for the same job through both DEU and merit promotion procedures and use either of the resulting certificates to make a selection. Predictably, litigation results when an agency chooses to fill the position through the merit promotion announcement and a veteran applicant is not selected. However, the *Joseph* case affirmed there is no requirement that agencies use the DEU certificate and select from it just because a veteran has applied through that process, in order to give the veteran the best chance for employment. Likewise, an agency can cancel a vacancy announcement rather than select a veteran, even if their purpose in doing so is to avoid selecting a particular veteran who has applied. *Abell v. Department of the Navy*, 343 F.3d 1378 (Fed. Cir. 2003). (It should be cautioned that the Court in *Abell* stated that there could be illegal reasons for cancelling a vacancy announcement for "bad faith," but no decisions have been forthcoming on what that might be. Mr. Abell argued and the Navy did not dispute, that they cancelled the certificate specifically to avoid promoting him personally into the position. The Navy prevailed in the case.)

The importance of veterans' preference continues to be affirmed in the government; in the recent revisions to the Pathways student and recent graduate program regulations, provisions were made to ensure applicability of veterans' preference to selections made under that program. 5 C.F.R. Part 362. The complexity in the interplay of these laws and regulations is reason to consult with your human resources specialist, and appreciate the technical skill required to maneuver through the maze of provisions and ensure that a hiring action will withstand scrutiny through litigation or an audit.



# Intellectually Speaking



## Race to the Patent Office?

You might have heard a rumor that there are some significant changes to patent law in the United States – we can confirm that the rumor is true – the America Invents Act was enacted on September 16, 2011. Probably the biggest change under the new law is the switch from a “first-to-invent” to a “first-to-file” system, which goes into effect on March 16, 2013. Previously, only the first inventor was entitled to the patent. However, under the “first-to-file” system, the standard has changed to award the patent to the first to file the patent application at the Patent Office (with some exceptions) – without regard to whether they were actually the first to invent.

While most foreign countries were already under a pure “first-to-file” system, the United States is transitioning to a hybrid system, where inventors will have a grace period of one year to file their patent applications without having their disclosures made during the year prior to filing used against them at the Patent Office. However, while we have that grace period, the longer we wait to file, the higher the risk is for someone to beat us to the Patent Office.

So what can you do to help? Get your invention disclosures submitted as soon as possible. You can disclose your invention online at <https://ntr.ndc.nasa.gov/>. Also, check with us before you publish your invention or disclose your invention outside of NASA to make sure that we are not prejudicing any patent rights that we may have in the invention. And, for our seasoned inventors, you will notice that some of our patent forms have changed, as the new patent law has new requirements that have affected our forms.

As always, please feel free to give your OCC Patent Attorney a call if you want more specifics on the new patent law.

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# Congratulations to Inventors of Recently Issued U.S. Patents

| Application Title   | US Patent Number | U.S. Patent Issue Date | Innovator Name         | Associated Company                                |
|---|------------------|------------------------|------------------------|---|
| Rhombohedral Cubic Semiconductor Materials On Trigonal Substrate with Single Crystal Properties and Devices Based on Such Materials | 8,257,491        | 9/4/2012               | Yeonjoon Park          | National Institute Of Aerospace Associates (NIAA) |
|   |                  |                        | Sang Choi              | NASA Langley Research Center                      |
|   |                  |                        | Glen King              | NASA Langley Research Center                      |
|   |                  |                        | James Elliott          | NASA Langley Research Center                      |
| Deconvolution Methods and Systems for the Mapping of Acoustic Sources from Phased Microphone Arrays (CIP Of LAR 16907-1)            | 8,170,234        | 5/1/2012               | Thomas Brooks          | NASA Langley Research Center                      |
|   |                  |                        | William Humphreys, Jr. | NASA Langley Research Center                      |
| Hybrid Bandgap Engineering For Super-Hetero-Epitaxial Semiconductor Materials, and Products Thereof                                 | 8,226,767        | 7/24/2012              | Yeonjoon Park          | Science And Technology Corporation                |
|   |                  |                        | Sang Choi              | NASA Langley Research Center                      |
|   |                  |                        | Glen King              | NASA Langley Research Center                      |
|   |                  |                        | James Elliott          | NASA Langley Research Center                      |
| System and Method for Aiding Pilot Preview, Rehearsal, Review, and Real-Time Visual Acquisition of Flight Mission Progress          | 8,164,485        | 4/24/2012              | Lawrence Prinzel, III  | NASA Langley Research Center                      |
|   |                  |                        | Alan Pope              | NASA Langley Research Center                      |
|   |                  |                        | Steven Williams        | NASA Langley Research Center                      |
|   |                  |                        | Randall Bailey         | NASA Langley Research Center                      |
|   |                  |                        | Jarvis Arthur          | NASA Langley Research Center                      |
|   |                  |                        | Lynda Kramer           | NASA Langley Research Center                      |
|   |                  |                        | Paul Schutte           | NASA Langley Research Center                      |

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|--|-----------|-----------|------------------|---|
| Flexible Thin Metal Film Thermal Sensing System  | 8,198,976 | 6/12/2012 | Donald Thomsen   | NASA Langley Research Center                      |
| Wireless Electrical Device Using Open-Circuit Elements Having No Electrical Connections          | 8,179,203 | 5/15/2012 | Stanley Woodard  | NASA Langley Research Center                      |
|  |           |           | Bryant Taylor    | ATK Space Division                                |
| Advanced High Performance Horizontal Piezoelectric Hybrid Synthetic Jet Actuator                 | 8,235,309 | 8/7/2012  | Tian-Bing Xu     | National Institute Of Aerospace Associates (NIAA) |
|  |           |           | Xiaoning Jiang   | TRS Ceramics, Inc.                                |
|  |           |           | Ji Su            | NASA Langley Research Center                      |
| Combination Structural Support And Thermal Protection System                                     | 8,236,413 | 8/7/2012  | H. Kevin Rivers  | NASA Langley Research Center                      |
|  |           |           | Stephen Scotti   | NASA Langley Research Center                      |
|  |           |           | Lynn Bowman      | NASA Langley Research Center                      |
|  |           |           | Max Blosser      | NASA Langley Research Center                      |
| Domain Decomposition By the Advancing-Partition Method for Parallel Unstructured Grid Generation | 8,259,104 | 9/4/2012  | Shahyar Pirzadeh | NASA Langley Research Center                      |
| Arrayed Micro-Ring Spectrometer System and Method of Use   | 8,174,695 | 5/8/2012  | Yeonjoon Park    | Science And Technology Corporation                |
|  |           |           | Glen King        | NASA Langley Research Center                      |
|  |           |           | Sang Choi        | NASA Langley Research Center                      |
|  |           |           | James Elliott    | NASA Langley Research Center                      |
| Self-Stabilizing Byzantine-Fault-Tolerant Clock Synchronization System and Method                | 8,255,732 | 8/28/2012 | Mahyar Malekpour | NASA Langley Research Center                      |
| Wireless Damage Location Sensing System  | 8,167,204 | 5/1/2012  | Stanley Woodard  | NASA Langley Research Center                      |
|  |           |           | Bryant Taylor    | Swales Aerospace                                  |
| Aircraft Configured for Flight in an Atmosphere Having Low Density                               | 8,196,858 | 6/12/2012 | Mark Croom       | NASA Langley Research Center                      |
|  |           |           | Stephen Smith    | NASA Ames Research Center                         |
|  |           |           | Paul Gelhausen   | NASA Langley Research Center                      |
|  |           |           | Mark Guynn       | NASA Langley Research Center                      |
|  |           |           | Craig Hunter     | NASA Langley Research Center                      |
|  |           |           | David Paddock    | NASA Langley Research Center                      |

|  |           |           |                   |                              |
|--|-----------|-----------|-------------------|------------------------------|
|  |           |           | Steve Riddick     | NASA Langley Research Center |
|  |           |           | John Teter, Jr.   | NASA Langley Research Center |
| Eddy Current System and Method for Crack Detection | 8,164,328 | 4/24/2012 | Russell Wincheski | NASA Langley Research Center |
|  |           |           | John Simpson      | Lockheed Martin              |

# Business Law News

## PROTESTS OF CONTRACT AWARDS – A BRIEF PRIMER

The contracting officer calls you and utters those four dreaded words: “We have a protest.” Other than knowing this is not going to be a good day, what does it mean for you?

### What is a protest?

The Federal Acquisition Regulation (FAR) defines a protest as a written objection by an interested party to a solicitation, cancellation of a solicitation, award, or proposed award of a contract, or termination of a contract. An “interested party” generally is an actual or prospective offeror who is directly affected by the agency’s action. Protests may be filed with the contracting officer or Agency (Agency protest), the Government Accountability Office (GAO) or Court of Federal Claims (COFC).



### What impact does a protest have on my procurement?

If a protest is timely filed with the Agency or GAO, (in general, within 10 calendar days of the time an offeror knew or should have known of the alleged agency action), the Competition in Contracting Act (CICA) requires the agency to stop the award or performance of the contract if already awarded. This is called a stay. There is no specified time for filing at COFC, but the court may dismiss a case if the protester waits too long before protesting to the COFC. If the protest is filed at COFC, there is no stay, but the court may enjoin performance-pending resolution of the dispute. The contracting officer also must notify the awardee and any other interested party that a protest has been filed. What this means for you is that the contractor will not begin performing the work under the contract until the protest is resolved.

### How long will it take to resolve the protest and begin work?

This depends on where the protest is filed. If the protester files an agency protest, the FAR says agencies shall make their best efforts to resolve the protest within 35 calendar days of the day on which the protest is filed. If filed at the GAO, CICA requires a decision within 100 calendar days. There is no set time limit for decisions on protests at the COFC, but the court expedites its proceedings for bid protests and usually decides cases relatively quickly.

### So this is a matter for the lawyers and CO to resolve on their own, right?

Wrong! Because you were involved in the decision to award the contract to someone other than the protester, you will need to provide assistance regarding how the evaluation was performed, as well as to address technical issues that may be raised in the protest. For example, the protester may argue the

evaluation was not performed as stated in the solicitation, or that you did not give the protester credit for some aspect of the product or service it offered. You need to be able to explain how the evaluation was performed and why the findings came out as they did. The key to winning a protest is to be able to provide documentation from the evaluation that clearly shows the evaluation was conducted properly and that the evaluators properly gave credit to the positive aspects of the proposal and identified the negative aspects of the proposal, explaining why they were negative aspects. The GAO or COFC will not substitute its judgment for yours, but if you do not clearly explain why you did what you did and why it conformed to the evaluation scheme, the GAO or COFC may well find in the protester's favor. The Contracting Officer will follow the same process for an agency protest. Remember, it was a team effort to make the award, and it will take a team effort to ensure a satisfactory resolution of the protest.

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## Space Act Agreements with International Partners

Lately there has been increased interest by activities at Langley Research Center (LaRC) to enter into Space Act Agreements (SAAs) with international partners. International SAAs (ISAAs) are a subset of SAAs authorized by NASA's enabling legislation, the National Aeronautics and Space Act, codified at title 51 United States Code section 20101, *et seq.* While the law authorizes ISAAs, there are regulatory and political considerations, which play heavily in entering into such agreements as well as other laws on international relations that apply to ISAAs. This article summarizes the general principles applicable to ISAAs and some practical considerations in attempting to enter into ISAAs.

ISAAs are SAAs with foreign entities, i.e. entities that are not domestic entities of the United States (US). This includes foreign governments, space agencies, aeronautics agencies, other governmental entities, commercial entities, schools, and any other type of foreign owned or operated entity; see NASA Advisory Implementing Instruction (NAII) 1050-1B. It does not include business entities established under the laws of a state of the US; however, if such businesses are subsidiaries of a foreign entity or represent the interests of a foreign entity many of the same political considerations that apply to ISAAs will apply to such a firm and may require special SAA provisions or even the conclusion that entering into such an SAA is not in the best interests of the US and NASA.

LaRC has created an International Activities Working Group (IAWG), headed by Jessica Woods-Vedeler, which over the last year or so has increased LaRC relationships with offices at NASA Headquarters (HQ) responsible for processing ISAAs and established a community of practice at LaRC for international activities. This has enhanced the level of knowledge regarding how ISAAs need to be processed by members of the IAWG and enhanced HQ awareness that NASA LaRC is interested in entering into more ISAAs. The IAWG has been instrumental in formulating LMS-CP-1050.7, Development of International Agreements.

Ultimately, it is the Office of International and Interagency Relations (OIIR) at HQ that is responsible for negotiation of the final ISAA provisions, see NPD 1360.2B, NAII 1050-1B, and CP 1050.7. However, OIIR depends heavily on whatever technical discipline is interested in pursuing an ISAA, and CP 1050.7 sets out a procedure that, if followed, should keep LaRC's efforts proportional to the probability of ultimately entering into an ISAA. A key consideration in evaluating the likelihood of approval at HQ is whether the ISAA assists the foreign partner in competing with domestic US commercial interests or with US governmental strategic goals. ARMD has recently released an International Strategy that provides some guidance but remains unclear on how it factors in the issue of how the foreign partner may benefit at the expense of domestic US businesses. For ISAAs, early discussions with the IAWG and the Office of Chief Counsel (OCC) are highly advised prior to engaging in anything but the most basic of conversations with a potential international partner. A best practice, as outlined in CP 1050.7, is to request permission from the appropriate HQ Mission Directorate's Associate Administrator (AA) or Program Executive to initiate exploratory discussions with a potential foreign

partner. LaRC leadership has committed to help facilitate such discussions. Building early awareness and identifying a HQ champion to advocate for the potential ISAA are key factors in facilitating approvals during the HQ abstract concurrence process. It also helps LaRC avoid expending resources on ISAs that will not be approved.

OCC's experience with ISAs is limited because OIIR and the HQ Office of General Counsel are generally responsible for ISAs. However, we have become more involved through the IAWG and creation of CP 1050.7. One observation we can make is that ISAs take considerably more time to process than the normal LaRC developed and executed Inter-Agency Agreement or domestic SAA. Consequently, you should pursue an ISAA long before the time you need it. Even in cases where it is determined an ISAA is unnecessary it takes time for HQ to arrive at that conclusion. It often takes 6-9 months to execute a non-reimbursable, collaborative ISAA with a foreign government entity such as DLR, ONERA, or JAXA. Factors that greatly impact this timeline are the level of Administrator and AA international activity and if high impact, mission level agreements are being processed, since OIIR desk officers give higher priority to those activities. There is also a Department of State review required for all ISAs with government entities that can be time consuming, although efforts are being made to shorten this process. Thus, many factors affect the time required to put an ISAA in place, including LaRC's responsiveness in the abstract approval process.

Finally, keep in mind that negotiation of an ISAA requires interaction with people who are not US citizens or Permanent Residents (often referred to as "Green Card Holders"). This is important because interactions with such people bring into play US export control laws and regulations. Discussing or sharing export controlled information with anyone who is not a citizen or Permanent Resident of the US violates the law and implementing regulations such as the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). Therefore, prior to engaging in discussions about NASA facilities or capabilities with foreign personnel, to include foreign government personnel or instructors at universities or colleges, you must think through what you intend to offer to do for the other party and determine what boundaries you need to set. Then, think through what type of questions you can expect from the potential partner and what kinds of answers you can safely provide. Be very sensitive to questions or discussions that seem to lead into areas covered by the ITAR or EAR. If you give presentations or present papers on the subject, they should be approved through the Technical Publication Submittal and Approval System (TPSAS), and it would be prudent to limit your discussions to what is approved for release in TPSAS. If you have not made any presentations or presented papers on the subject of the potential ISAA, you should vet your proposed "pitch" through TPSAS. Of course, you may always seek counsel from OCC or the Center Export Administrator, Angela DiGiosaffatte, and you are encouraged to do so as part of your preparations for discussing LaRC capabilities and facilities.

While not technically within the scope of this article, be aware that any procurement contract, i.e. procurement of goods or services using US appropriated funds, with a foreign entity requires HQ NASA Office of Procurement concurrence, see NASA Federal Acquisition Regulation Supplement Part 1825.7003.



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### **NEED A DOCUMENT NOTARIZED?**

OCC's Elaine McMahon is a notary.

To arrange for Elaine to notarize a document, please call 864-3221.

# Welcome

## **Jennifer L. Riley**



The Intellectual Property Law Team is happy to welcome Jennifer Riley as its newest member. Jennifer joins NASA after being associated with patent boutique law firms in Alexandria, VA and Hartford, CT. At those firms, Jennifer gained experience prosecuting both foreign and domestic patent applications in the fields of chemistry, materials science, and chemical engineering. Prior to attending law school, Jennifer was a chemical engineer at the United Technologies Corporation where she was a test engineer at Pratt and Whitney and a research and development engineer at UTC Power (formerly UTC Fuel Cells).

Jennifer is a graduate of the University of Massachusetts - Amherst, where she earned a B.S. in Chemical Engineering. She also received her J.D., with distinction, from Suffolk University Law School in Boston, Massachusetts.

## **R. Eric Rissling**



The Business Law Team is happy to welcome Eric Rissling as its newest member. Eric joins us from the Naval Facilities Engineering Command (NAVFAC) in Norfolk, where he worked on contract, environmental, fiscal, utility law and other matters. He has experience with source selections, contract administration issues as well as contract claims and litigation. Prior to his service with NAVFAC, Eric served as an Air Force Judge Advocate for more than 23 years.

Eric is a graduate of the University of South Carolina, where he earned a Bachelor's degree in English, and a Juris Doctor degree.

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# Humor

McKernan's Maxim – Those who are unable to learn from past meetings are condemned to repeat them.

Handy Guide to Modern Science:

1. If it's green or it wiggles, it's biology.
2. If it stinks, it's chemistry.
3. If it doesn't work, it's physics.

Jenning's Corollary to the Law of Selective Gravity – The chance of the bread falling with the buttered side down is directly proportional to the cost of the carpet.

Petzen's Internet Law – The most promising result from a search engine query will lead to a dead link.

Dunn's Law – Careful planning is no substitute for dumb luck.

Some interesting questions and answers from court proceedings:

Q. What is your name?

A. Ernestine McDowell.

Q. What is your marital status?

A. Fair.

Q. Doctor, did you say he was shot in the woods?

A. No, I said he was shot in the lumbar region.

Q. Were you acquainted with the deceased?

A. Yes, sir.

Q. Before or after he died?