



# OCC Newsletter

NASA Langley Research Center

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## Farewell



As I said in the last OCC Newsletter, change is always constant here at Langley. And change is also constant in life. On May 30, 2015, my 40 year federal service career officially ends. I leave with wonderful memories from my Air Force career and my time here with NASA. I look back with fondness on my eight years at NASA Langley. I have had the chance to see and be a part of the fabulous work all of you do to contribute to the NASA mission and the well-being of the Nation. I am particularly honored to have led the great legal team here at NASA Langley.

I take comfort knowing I leave you with a highly competent, seasoned and knowledgeable team of attorneys and support staff to assist you with the many legal matters that arise when doing NASA's great work. They are experts in advising on intellectual property, agreements, contracts, personnel law, ethics, and many other matters. I

encourage you to seek out their advice and counsel. During my tenure I made a sustained effort to establish OCC as part of the larger LaRC team. As a result, our attorneys are an approachable group. They are problem solvers, valuable team members, and creative in helping accomplish the task (or parts of it) without going awry of the law. The earlier you seek their guidance, the less likely you or your project will face delays or roadblocks. You will find none better across NASA.

To my staff, the Director's Office, the CLC, and all of my fellow employees at NASA Langley, thank you for making my job enjoyable and easy. If you are ever down near Lake Murray in South Carolina, you might find me fishing in some quiet cove or chasing my grandchildren with my wife Trish. Best wishes for success and happiness, both personally and in your work with NASA. Enjoy and be safe.

Mike Madrid

## Office of Chief Counsel

Michael N. Madrid, Chief Counsel  
 W. Thomas "Tom" McMurry, Jr., Deputy Chief Counsel  
 Twanna Dixon, Legal Secretary  
 Elaine C. McMahan, Paralegal  
 Yvette D. Mardis, Paralegal  
 Bridgette M. Singleton, Legal Assistant  
 Gail M. Terry, Legal Assistant  
 Molly T. Moody, IT Contract Support

### Business Law Team

Michael I. Mark, Assoc. Chief Counsel  
 Shawn T. Gallagher, Attorney Advisor  
 R. Eric Rissling, Attorney Advisor

### Human Relations & Ethics Law Team

Charles A. "Pete" Polen, Assoc. Chief Counsel  
 Kenneth H. Goetzke, Jr., Attorney Advisor  
 Mona C. Williams, Attorney Advisor

### Intellectual Property Law Team

Robin W. Edwards, Patent Counsel  
 Andrea Z. Warmbier, Patent Attorney  
 Jennifer L. Riley, Patent Attorney

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## PREGNANCY DISCRIMINATION CASE AT THE SUPREME COURT

Pregnant women are protected against discrimination by the Pregnancy Discrimination Act, a part of Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Commission's guidance provides that normal pregnancy, while not considered a disability per se, may require accommodations provided to other employees who have disabilities. Additionally, complications of pregnancy such as preeclampsia could be considered disabilities requiring reasonable accommodation for their duration. A recent Supreme Court decision both rejects the broad EEOC guidance and provides clarity for the conditions under which a pregnant worker may be entitled to reasonable accommodation by interpreting the Pregnancy Discrimination Act's accommodation provision.

In the case, *Young v. United Parcel Service*, 575 U.S. \_\_\_\_ (2015), the Court overturned a Fourth Circuit ruling for the employer United Parcel Service. The plaintiff was a driver for UPS who was required to lift 70 pounds and was under a lifting restriction due to past miscarriages. The lower courts found for UPS, based on the rationale that a pregnant employee could not compare herself to non-pregnant employees receiving "light duty" or non-driving duties for reasons other than pregnancy, such as on-the-job injury or loss of commercial drivers' license. These courts incorrectly found that the basis of comparison was the reason for the restriction, which would essentially limit the plaintiff's comparators to other pregnant employees. The Supreme Court held that pregnant workers' proper comparator employees are those who are "similar in their inability to work," regardless of the reason. While EEOC's guidance stated that an employer had to provide accommodation to any and all pregnant workers, this guidance was rejected as too broad and not based on any legal authority. It should be noted that the case was not a victory for the plaintiff entirely but only entitles her to have her claims held before a jury; the lower courts had granted summary judgment, or a decision without a trial, for the employer. However, it appears that UPS's decision not to provide Ms. Young with a

reasonable accommodation (she wanted an extra employee to ride her route to help her lift any packages more than 20 pounds) may have been costly. Pregnancy policies may also come under the "sex discrimination" category. Some employers have taken the opposite approach of protecting pregnant women, or even those women of child-bearing age who might get pregnant, from harm by altering their duties. In cases where there is an adverse employment result, such as loss of overtime or other benefit, these actions have been held to be discriminatory.

One example was litigated in *International Union, United Automobile, Aerospace and Agricultural Implementation Workers of America, UAW, v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). Employer Johnson Controls restricted all women of childbearing age (except those who could prove "infertility") from working in the battery manufacturing operation to prevent lead exposure. The motivation was good—preventing any possible fetal exposure to lead and possible harm to an unborn child; this was also a policy based on OSHA recommendations that pregnant women's blood levels of lead be lower than men or women who were not pregnant. Some female employees volunteered to be sterilized so that they could keep their jobs in the battery plant, and then sued. The Court held that fears of lawsuits for birth injury did not justify the result, that the Pregnancy Discrimination Act required that pregnant women who wished to work should be able to work and take precautions, and that the policy was discriminatory towards women because risks to fertility were also present for men, but they had no restrictions on potential lead exposure. Interestingly, the policy came about after eight female employees became pregnant while working on the battery assembly line and their blood tests revealed lead levels exceeding OSHA limits.

No word on whether their offspring did, in fact, suffer the devastating harm that Johnson Controls foresaw. However, the basic principle of non-discrimination laws is that policies be based on facts, not assumptions, stereotypes, or fears.

# RATIFICATIONS

While we have written before about ratifications, we have seen a spike in unauthorized commitments of late and offer the following information to assist you in understanding what these actions are and how to avoid them.

## WHAT IS A RATIFICATION OF AN UNAUTHORIZED COMMITMENT?

Only certain people (warranted contracting officers and authorized holders of purchase cards are the most common examples) have the legal authority to bind the Government to pay for goods and services. When someone who does not have such authority causes a supplier of goods or services to perform services or deliver goods without the involvement of a contracting officer, an unauthorized commitment has taken place. Unauthorized commitments also occur when the price exceeds the authority of the person who ordered the work, e.g., when a purchase card holder (whose authority generally is limited to no more than \$3000) orders something and the price exceeds that person's authority.

Some examples of unauthorized commitments that have been ratified include situations where a purchase request was not processed in time to pay an honorarium to a guest speaker at LaRC; repair of an item of equipment performed by a vendor before a purchase request to pay for the repairs was initiated; repair of a different item of equipment by a vendor without the knowledge or permission of the LaRC point of contact; and an agreement by an individual with no authority with a media outlet for certain outreach activities.

## WHY IS THIS A BAD THING TO HAPPEN TO ME?

The Federal Acquisition Regulation (FAR) states that if you lacked authority to enter into the contract or agreement, that contract or agreement is not binding upon the Government. The FAR requires that in such cases, a process must be followed to determine whether the unauthorized

commitment can or should be ratified by someone with authority to make such commitments. Making an unauthorized commitment or purchase can subject you to possible disciplinary action. There have been instances at LaRC where action has been taken against personnel who repeatedly have made unauthorized commitments.

So at best, you are going to be required to do a lot of work to get the unauthorized commitment ratified (see next question), and at worst, you are going to suffer career-limiting consequences for your unauthorized actions.



## WHAT IS THE PROCESS TO RATIFY AN UNAUTHORIZED COMMITMENT?

The FAR and NASA FAR Supplement (NFS) require you to initiate a procurement request, which must include documentation that identifies who made the unauthorized commitment, together with a statement signed by you explaining why the normal acquisition procedures were not followed, justifying why the vendor you used was selected, identifying any other sources you considered, describing the work performed, and explaining why the price charged was agreed to. Your supervisor then has to provide documentation explaining what measures will be taken to prevent recurrence of the unauthorized commitment.

These documents will be reviewed both by the legal office as well as by procurement personnel. It is common practice for senior personnel in Procurement to meet with the supervisor of the person who made the unauthorized commitment to get further information and to determine what actions will be taken to prevent future occurrences. The process often takes several months to complete, and the documentation submitted to support the action often is returned for further explanation and clarifications.

## **IF I MAKE AN UNAUTHORIZED COMMITMENT, MUST IT BE RATIFIED?**

The short answer is “no”. Contracting officers are not required to ratify unauthorized commitments. The FAR requires that a number of conditions must be met before the contracting officer may ratify the unauthorized commitment: First, the goods or services must have been provided and accepted by the Government. Second, the ratifying official must have the authority to enter into the contractual commitment. Third, the resulting contract must otherwise have been proper if made by a properly warranted contracting officer. Fourth, the contracting officer must determine the price paid was fair and reasonable. Finally, funds must have been available continuously from the time the unauthorized commitment was made. Only if all of these conditions are met, may the contracting officer ratify the unauthorized commitment, and even then, she does not have to do so.

Some unauthorized commitments simply cannot legally be ratified. For example, purchases of alcohol are not ratifiable. You may chuckle over this, but it actually has happened at LaRC – twice. Those individuals became responsible for bills that came to thousands of dollars.

## **IF AN UNAUTHORIZED COMMITMENT IS NOT AUTHORIZED, WHAT HAPPENS?**

If your actions are not ratified, you are responsible for paying the vendor out of your own pocket. As stated above, it has happened. In addition to the alcohol purchases discussed in the previous question, there have been other instances where unauthorized actions were not ratified. In one instance, a person purchased a television without authority to do so. That individual became responsible for the bill (and also was told to take the television home, since it did not belong to the Government).

## **HOW DO I AVOID HAVING TO GO THROUGH A RATIFICATION ACTION?**

Unless you have significant resources readily available to cover unexpected bills, it behooves you to be familiar with the process for contracting for goods and services needed to carry out your mission.

Some things to keep in mind:

Do not make written or oral promises to have the Government pay for goods or services you need. Instead, contact the Office of Procurement right away for assistance in obtaining what you need under a contract issued by an authorized contracting officer.

Know who can initiate a purchase request, or know how to do it yourself, and allow sufficient time for the process to generate the purchase request. Be sure it has been approved before taking further action to obtain the goods or services.

Know the rules on purchase cards – know who can use one, and the limits on their use. LMS-CP-4540 has a very clear set of rules concerning use of purchase cards. Know what it says before using such a card.

Be sure the vendors you deal with understand you have no authority to obligate the Government. Be sure to tell them who does have that authority.

If the unthinkable happens, be up front about what happened. Contact your supervisor and the Office of Procurement for help. The OP Outreach web page has further information you can use.



## LET'S MAKE A DEAL: SHOPPING FOR THE GOVERNMENT

My wife tells me I'm a lousy shopper. Before I go to the store, I've already made up my mind about what I want to buy, I'm not interested in looking for anything else, and I want to spend as little time as possible on the endeavor. I guess that's okay when I'm spending my own money. But when it comes to spending taxpayers' money the law requires me to be a completely different kind of shopper.

Shopping for a particular brand name, or seeking a product or service from only one source, is not the way the government buys things. The Competition in Contracting Act ("CICA"), 41 USC § 253 and 10 USC § 2304, requires federal agencies to obtain goods and services using contracts, of course. Moreover, the contracts are required to be entered into only after "full and open *competition* through the use of competitive procedures." Competition is defined as "soliciting or entertaining offers from two or more competitors, comparing them, and accepting one based on its relative value."

Full and open competition is obtained through the use of sealed bids or competitive proposals and negotiations. "Competitive procedures" also encompasses other processes which have the practical effect of excluding some sources, but which are still legally considered "full and open" under CICA. For example, the law allows federal agencies to set aside certain contracts for small businesses or businesses owned by the disabled (in fact, the law encourages this).

Competition is required because it benefits the government and the general public. When multiple sources compete for the government's business, the chances increase that higher quality products or services will result than if the offerors did not have to compete. Competition also increases the government's leverage for obtaining lower prices. Competition allows for periodic changes in suppliers. This can help prevent complacency or poor service and might ultimately expand the pool of suppliers and the industrial base. Competition also curbs fraud by limiting opportu-

nities for collusive arrangements between suppliers and corrupt government employees. Similarly, competition promotes contracting based on merit rather than other less worthy considerations such as family connections or favoritism. In short, competition helps government officials reassure Americans that our tax money is not being wasted.

While full and open competition seems a good thing, unfettered wide-open completely unrestricted competition certainly is not. Soon after the implementation of CICA, Congress recognized that inordinately large numbers of proposals placed extreme burdens on the selection process. Congress narrowed the requirement as follows:



"The Federal Acquisition Regulation shall ensure the requirement to obtain full and open competition is implemented in

a manner that is consistent with the need to efficiently fulfill the Government's requirements." 10 U.S.C. § 2304(j). Efficiency in contracting is addressed at 10 U.S.C. § 2305 b(4)(B) which provides that the contracting officer can limit the number of proposal in a competitive range "to the greatest number that will permit an efficient competition among the offerors rated most highly." The use of competitive ranges keeps the universe of competitors, bids, and proposals manageable without unduly or unlawfully restricting competition

CICA does provide exceptions to its own rule. There are seven statutorily expressed exceptions that allow "other than competitive procedures." 10 U.S.C. § 2304(c). These exceptions cover common situations where competition is not possible, or where the government values other objectives (e.g., maintaining the industrial base) more highly than full and open competition. One exception allows what are usually called "sole-source awards."

By law, sole-source awards can be used only



when there is a single responsible source and no other supplies or services will satisfy agency requirements. The sole-source exception also encompasses acceptance of unsolicited research proposals as well as follow-on contracts for continued development/production of major systems.

Agency contracting officers cannot make a sole-source award unless they prepare a written justification sufficient to meet specified FAR requirements.

The contracting officer must also certify the accuracy and completeness of the justification, and then obtain the approval of a higher ranking agency official whose identity is determined by the value of the acquisition. After all that, the agency contracting officer must publish an announcement of the intended non-competitive award in Fed-BizOpps and give the reasons for making a non-competitive award. As such, sole-source awards are clearly the exception rather than the rule, are scrutinized closely, and are often quite costly.

Another important (and more widely seen) exception to CICA is the use of “special simplified procedures” when agencies make “small purchases.” This provision recognizes that the costs of conducting competitions can exceed the savings resulting from competition when agencies procure items with low prices. A “small purchase” is one whose expected value is below the simplified acquisition threshold (currently \$150,000, but a pending bill may raise it to \$500,000). Another widely used CICA exception is the purchase of commercial items whose expected value exceeds the simplified acquisition threshold but is below

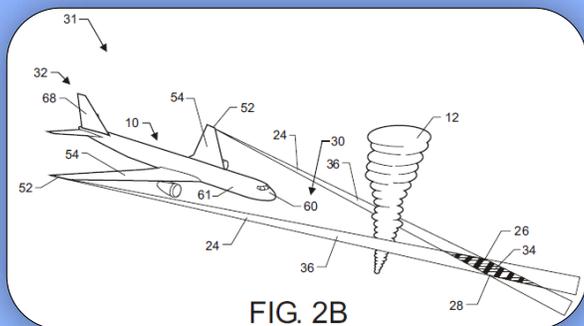
\$6.5 million. “Commercial items” is a term of art in the Federal Acquisition Regulation (FAR). It means generally an item that is widely available to the general public for purposes other than governmental purposes, and is sold or leased to the general public. You’ve probably heard such purchases called “off the shelf” purchases.

The GSA SmartPay purchase card program is technically not a contracting procedure, nor an exception to CICA. The program is actually a procurement and payment mechanism for micro-purchases. The program allows authorized Federal employees to make official Government purchases for commercial off-the-shelf supplies, goods, and services under the micro-purchase threshold of



\$3,000.

If you have any questions regarding legal requirements involved with being a professional government shopper, or contract law generally, please don’t hesitate to contact the LaRC Office of Chief Counsel at 864-3221.

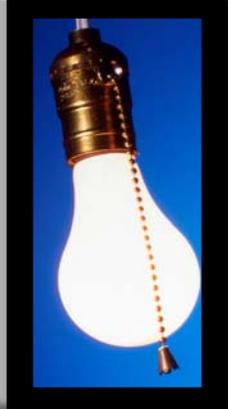


## RECENTLY ISSUED PATENTS

December 1, 2014 - May 31, 2015

- Christopher M. Cagle and Robin W. Schlecht, NASA LaRC. Patent Number 8,899,563, issued December 2, 2014, for *Flexible Volumetric Structure*
- Yeonjoon Park, NIA, and Sang H. Choi, NASA LaRC. Patent Number 8,909,491, issued December 9, 2014, for *Multi-Point Interferometric Phase Change Detection Method*
- Yeonjoon Park, NIA; Sang H. Choi, Glen C. King, James R. Elliott, and Albert L. Dimarcantonio, NASA LaRC. Patent Number 8,913,124, issued December 16, 2014, for *Lock-In Imaging System for Detecting Disturbances in Fluid*
- David D. North, NASA LaRC, and Mark J. Aull, LARSS. Patent Number 8,922,041, issued December 30, 2014, for *Tethered Vehicle Control and Tracking System*
- Mark G. Ballin and David J. Wing, NASA LaRC. Patent Number 8,977,482, issued March 10, 2015, for *Method and Apparatus for Generating Flight-Optimizing Trajectories*
- Daniel Bivolaru, NRC; Andrew D. Cutler, George Washington University and Paul M. Danehy, NASA LaRC. Patent Number 8,976,351, issued March 10, 2015, for *Spatially-and Temporally-Resolved Multi-Parameter Interferometric Rayleigh Scattering System and Method*
- Sang H. Choi, NASA LaRC, and Yeonjoon Park, NIA. Patent Number 8,982,355, issued March 17, 2015, for *Smart Optical Material Characterization System and Method*
- Christopher J. Wohl, Jr., Oak Ridge Associated Universities, Inc.; Marcus A. Belcher, NIA; John W. Connell and John W. Hopkins, NASA LaRC. Patent Number 8,987,632, issued March 24, 2015, for *Modification of Surface Energy via Direct Laser Ablative Surface Patterning*
- Lisa A. Scott Carnell, Emilie J. Siochi, Nancy M. Holloway, NASA LaRC; Kam W. Leong and Karina Kulangara, Duke University. Patent Number 9,005,604, issued April 14, 2015, for *Aligned and Electrospun Piezoelectric Polymer Fiber Assembly and Scaffold*
- William T. Yost, Daniel F. Perey, and K. Elliott Cramer, NASA LaRC. Patent Number 9,003,645, issued April 14, 2015, for *Ultrasonic Device for Assessing the Quality of a Wire Crimp*
- Jeffrey Y. Beyon, Grady J. Koch, and Michael J. Kavaya, NASA LaRC. Patent Number 9,007,570, issued April 14, 2015, for *Airborne Wind Profiling Algorithm for Doppler Wind LIDAR*
- Farzin Amzajerjian, NASA LaRC and Diego F. Pierrottet, Coherent Applications, Inc. Patent Number 9,007,569, issued April 14, 2015, for *Coherent Doppler Lidar for Measuring Altitude, Ground Velocity, and Air Velocity of Aircraft and Spaceborne Vehicles*
- Russell H. Thomas, NASA LaRC; Michael J. Czech, The Boeing Company; Alaa A. Elmiligui, Analytical Services & Materials, Inc. Patent Number 9,022,311, issued May 5, 2015, for *Active Aircraft Pylon Noise Control*

# Exactly What is New Technology and Third Party Content under the Technical Publications Submittal and Approval System (TPSAS)



Two frequently asked questions the Office of Chief Counsel (OCC) receives with respect to the Technical Publications Submittal and Approval System (TPSAS) review process are:

What information qualifies as new technology?

How do I know if I have third party content in my technical publication?

In order to more efficiently and effectively address these questions, the OCC has recently been working with the Office of Chief Information Officer (OCIO) to post new information to the Technical Publications Submittal and Approval System (TPSAS) webpage. Coming soon will be new frequently asked questions (FAQS) that give definitions for both new technology and third party content.

A new technology FAQ will be added that outlines the definition of new technology for purposes of TPSAS, which is:

- New technology not previously disclosed to NASA;
- New technology previously disclosed to NASA, but a patent application has not yet been filed; or
- New technology previously disclosed to NASA and patent application filed, but publication includes additional details/improvements not already covered by the filed patent application

Likewise, a third party content FAQ will give the definition of third party content for purposes of TPSAS, which is:

Any non-Government funded third party content

The use of third party content (such as photos and graphics) requires careful consideration of any asso-

ciated license agreement. All content available on the internet is not necessarily void of problematic restrictions or conditions that NASA cannot accept!!

Some safe places to go if you are looking for images include:

<http://www.nasa.gov/multimedia/imagegallery/>

<http://www.defense.gov/multimedia/multimedia.aspx>

<http://www.dvidshub.net/unit/nasa>

As always, the OCC patent attorneys are happy to answer any questions regarding how the above applies to the content of your specific technical publication.



## CONGRATULATIONS TO LARC's 2015 PATENT AWARD RECIPIENTS !!

LaRC's 2015 Patent Awards Ceremony was held on April 30<sup>th</sup>. The ceremony recognized 106 inventors named on 47 patents that issued in calendar year 2014. Cathy H. Mangum, LaRC's Acting Associate Director; Dr. Jean-François M. Barthelemy, LaRC's Chief Technologist; and William T. McMurry, LaRC's Deputy Chief Counsel, provided remarks. Dr. Jeremy Pinier provided musical selections. The Office of Chief Counsel again congratulates all award recipients!



# Humor

- **Yellin's Law:** The probability of winning the lottery is slightly greater if you buy a ticket.
- **Petzen's Internet Law:** The most promising results from a search engine query will lead to a dead link.
- **Grimes' Law:** Nostalgia is the realization that things weren't as unbearable as they seemed at the time.
- **Farrell's Law of New-Fangled Gadgetry:** The most expensive component is the one that breaks.
- **Norton's Law:** The washer at the Laundromat will turn all of your clothes inside out – unless they were inside out to begin with, in which case they will stay that way.
- **Sprehe's Discovery:** To locate the slowest traffic lane or check-out line, get in it.

## MORE PROBING COURT TESTIMONY...

Q: Do you drink when you're on duty?

A: I don't drink when I'm on duty, unless I come on duty drunk.

Q: (Showing picture to witness) Is that you?

A: Yes, sir.

Q: And you were present when the picture was taken, right?

Q: What can you tell us about the truthfulness and veracity of the defendant?

A: Oh, she will tell the truth. She said she'd kill that SOB, and she did!