NASA Langley Office of Chief Counsel Newsletter

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It's time for the second issue of The OCC Newsletter. Thanks so much for the great response to our first issue. In this issue, you'll find a cornucopia (couldn't help it) of timely and relevant information in the areas of political activity, reimbursable travel, post employment, conflicts of interest, record keeping, interaction with contractor employees, information on continuing resolutions, and procurement sensitive information. In our "Dear Counsel" section, we respond to inquiries about safe harbor opinions from ethics advisors and disclosure of non-public information.

Also, please join me in welcoming our two new patent attorneys, Andrea Warmbier and Tom McBride. Both come to NASA from private law firms. We are excited to have them as members of our Intellectual Property Law Team. A short bio on each of them is listed below in the patent section, "Intellectually Speaking."

If you have any questions about the information contained in this issue, please contact one of our staff attorneys. You may reach us at 864-3221. Our goal is to ensure that you, our readers and clients, have the legal advice and information you need to better perform your job and also to keep our own legal skills and knowledge sharp.

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PERSONNEL POINTS

Hatch Act Alert!

Election Season Means More than Just Yard Signs

As federal employees, we have a unique perspective on government and politics. The insight afforded to us through our jobs inspires many of us to engage in political activity. In addition to voting, many of us take a more active role in the political process. In that regard, we federal civil servants have many options available. Yet we must remain mindful that our positions as federal civil servants require us to limit our political activity in the work place. The Act to Prevent Pernicious Politics has been on the books since 1939 and is the law that places limits on the political activity of federal employees in the workplace and limits the ability of federal employees to run for office in partisan elections. It is more commonly known as the Hatch Act. Its main author was Senator Carl Hatch of New Mexico. Senator Hatch drafted the legislation because he was concerned about the way federal jobs officials at the time used their positions to influence votes and solicit campaign cash.

The law is grounded in the idea that the federal workplace should not serve as a political battleground, and federal employees should not use their status to gain favor for particular candidates in upcoming elections. The Act balances the right of every federal employee, like all citizens, to engage in the political process with limitations that are necessary to avoid politicizing the federal workplace.

The Office of Special Counsel (OSC) enforces the Hatch Act. The summaries below briefly highlight two recent cases before the Merit Systems Protection Board (MSPB) in which OSC took action against federal employees for misuse of e-mail. The cases reflect the seriousness with which OSC pursues violations of the Hatch Act. Below the cases, you will find a few general "Hatch Act Do's and Don'ts" and a few that focus on the Hatch Act and social networking.

Potential campaign donation money lost . . . . A federal employee filed an appeal to the full MSPB petitioning his removal for a violation of the Hatch Act. The employee forwarded a ***single*** e-mail to a few office associates requesting campaign donations during the last presidential election. The administrative judge sustained the proposed removal at the hearing. The employee sought to have his punishment reduced to a temporary suspension rather than removal because he did not demonstrate deliberate disregard of the Hatch Act in forwarding the e-mail. ***The burden is on the employee to show that anything less than removal is the appropriate sanction.*** In deciding the appropriate punishment, the MSPB considered six factors: nature of the offense and the extent of the employee's participation, the employee's motive and intent, whether the employee had received advice of counsel, whether the employee had ceased the activities, the employee's past employment record, and the political coloring of the activity. ***Ultimately, the Board decided that a single e-mail did not justify removal, but did suspend the employee for 120 days for the Hatch Act violation***.

Be careful who you invite to dinner . . . . Another **federal employee was removed after 38 years of discipline-free service** for sending six e-mails inviting co-workers and subordinates to fundraising dinners and soliciting support for a campaign. The Board decided these violations warranted removal even though the administrative judge only suspended the employee for 60 days. ***Though the employee did not know she was violating the Hatch Act*** by forwarding the e-mails, ***her status as a supervisor sending e-mails to subordinates weighed heavily in the decision***.

Personnel Points

Hatch Act Alert!

Federal Employees May:	Federal Employees May Not:
Vote	Ask co-workers or subordinates to vote for a candidate
Be a candidate for office in a nonpartisan election – candidates are not affiliated with a political party	Be a candidate for office in a partisan election at the local, state, or federal level.
Assist in voter registration drives	Ask your subordinates to hand out political information
Express opinions about candidates and issues	Use your official title or position to endorse a candidate
Contribute money to political organizations	Solicit campaign contributions for anyone at any time
Attend political fundraising functions	Engage in political activity while on government duty
Attend and be active at political rallies and meetings	Engage in political activity while on a government facility
Join and be an active member of a political party	Engage in political activity while using a government car
Make campaign speeches for candidates in partisan elections	Wear partisan political buttons in the workplace

The Hatch Act and Social Networking

Do	Don't
Feel free to identify with a political party on your Facebook page	Use your title, office, computer, etc. to campaign for a partisan candidate
Follow the candidates on Twitter and hide the list of who you are following from your followers	Using Facebook or Twitter at anytime to share an invitation to a fundraising dinner for a political candidate
In your private capacity, write a blog expressing opinions concerning partisan political candidates and political parties	Blog about candidates during work hours, post official campaign literature, or use your official title in your personal blog
In your private capacity, advocate for a political candidate on your Facebook page, as long as it is shared with "all" of your friends, not just co-worker or surbordinate friends.	Post links to a candidate's contribution page on Facebook or use Facebook to campagin while in the office

More Personnel Points

I'm leavin' on a jet plane . . .

If a private, non-federal organization offers to pay for your travel to a domestic location for a meeting or similar event in your official capacity, you may accept the offer; but you must follow certain guidelines and complete an LF-92, Domestic Reimbursable Travel Form, which you may obtain in the forms catalog on the LMS web site. As the traveler, you should complete the form, sign it, submit it to your supervisor, and to the OCC and the OCFO for concurrence. **The form and supporting information must be submitted and approved before the travel takes place**. If you have the form completed properly and all the accompanying information, the approval process should occur quickly--assuming no ethics or other conflicts issues arise. In the package, you will need:

1. Your travel authorization. The reimbursable travel procedures require that the traveler have been issued a travel authorization before reimbursable travel may be accepted.

2. An invitation from the organization that has offered to pay your travel. The invitation should detail the event to which you have been invited and your role at the event and what will be reimbursed (hotel, rental car, meals, etc). The event should not be something **required** as part of your official duties but can be related to them. A typical request involves speaking at an event or participating in a meeting of general interest to or related to your official duties.

3. The invitation you receive should also state that "no NASA contract or grant funds are being used to fund the reimbursement." An e-mail invitation that includes such information will suffice.

Remember that if the reimbursement is not 100% in-kind, then the total value of the reimbursable expenses must exceed $500.00. If it is not in-kind or the billed reimbursable part does not exceed $500.00, the OCFO will not process the request because the administrative burden outweighs the benefit to NASA.

For foreign reimbursable travel, the process is the same except travelers need to complete an LF 93 and NASA Headquarters must concur on the request. To ensure timely processing of a foreign reimbursable travel request, travelers should ensure the reimbursable travel package arrives at NASA Headquarters at least 4 weeks in advance of the travel.

Ethics Edicts

Are you contemplating post-government employment? Do you want to continue working on your pet project after you leave employment with NASA? To avoid the pitfalls, stop in to get some help from your local ethics counselor before you climb that mountain!

It is certainly possible for a civil service employee to leave NASA and continue to work on the same project he or she worked on as a NASA employee. It is important for the employee who is pondering this or simply leaving the civil service to continue employment with a government contractor to remember that a number of ethics regulations and conflicts of interest and post employment laws could apply to the situation and restrict the employee's relationship to NASA and the government.

For starters, if the employee is an SES, ST, or SL, he or she cannot communicate with or appear before a NASA representative on any matter from one year from the date they are no longer an SES, ST, or SL in the government. For particular matters the employee participated in personally and substantially as a civil servant--like contracts, grants, or even certain projects or programs—that are on-going, the former NASA employee cannot communicate to or appear before any government representative on that same particular matter for the lifetime of that contract, grant, project, or program (not the former employee's lifetime). If an employee had a particular matter pending under his or her official responsibility within the one-year period before leaving government service, the former employee cannot communicate to or appear before an employee of the United States on that same matter for a period of two years.

A common source of confusion is the misconception that the post employment laws don't apply unless a former employee has served as a Contracting Officer's Technical Representative (COTR), Task Monitor, or as a member of a Source Evaluation Board (SEB). It is true that the post employment laws often apply to restrict the conduct of former government employees who have served in such positions while in the civil service. Yet post employment laws often do apply to restrict the post-government conduct of former employees who have not served as a COTR, TM, or member of an SEB.

A particularly complicated situation arises when an employee who wants to leave the civil service would like to retain NASA funding to continue their research project as an employee of a private sector company. In addition to the post employment regulations and laws that will likely apply once the employee leaves government service, other misuse of position regulations and conflicts of interest laws will apply to the employee while he or she remains a civil servant.

A federal ethics regulation (5 C.F.R. 2635.702) prohibits current employees from using their NASA position for their own private gain or the private gain of others. Continuing a NASA research project with a new private employer after leaving the civil service qualifies as private gain for the researcher and his or her new private employer. Likewise, a criminal conflicts of interest statute (18 U.S.C. § 208) operates to prohibit a current employee from being involved in a matter in which the employee has a private financial interest. Potential post-government employment and continuing NASA research in the private sector is considered a financial interest for purposes of the conflicts of interest statute.

Consequently, under the regulation and statute a current NASA employee must not engage in any discussions with any NASA official related to setting up a potential post-government employment arrangement for the employee to continue involvement in the same project on which the employee is working as a NASA employee. The only thing a current employee can do is tell their supervisor or the appropriate NASA management

official that they are interested, and that is all! If NASA is interested in providing continued funding for the researcher to continue the research project as an employee of the private sector, the decision must occur within NASA management without the current NASA employee's involvement.

An additional important factor is that a current NASA employee cannot continue to engage in any official NASA duties involving a potential outside employer. So, once a current employee opens any discussion whatsoever about potential employment opportunities with a potential post-government employer, the employee has a financial interest in that potential employment. Accordingly, as long as employment negotiations are open to any degree at all (meaning neither party has said no), the employee must disqualify themselves from engaging in any official NASA duties involving the potential employer.

This disqualification is accomplished through a disqualification letter the employee sends to their supervisor (see sample below).

Of course, there are exceptions, but how these regulations, laws, and exceptions apply is complex and confusing—and the discussion of them has been simplified significantly for this article. This complexity and confusion creates dangerous pitfalls for employees who try to climb the mountain of post-employment and conflicts of interest laws alone. We have seen first-hand the results of climbing alone.

OCC regularly helps current and former employees with how these regulations and laws apply to numerous post-employment and conflicts of interest situations, including a researcher wanting to continue funding their research once they leave NASA. If you are contemplating post-government employment or would like to continue to receive NASA funding for your research once you leave the civil service, please contact OCC at 864-3221 to seek the advice of one of our ethics counselors.

Ethics enlightenment . . .

To disqualify yourself from official NASA duties involving a private financial interest, like seeking post-government employment, use a letter similar to the below sample. Once you complete the letter (via e-mail is fine), give it to your supervisor, keep a copy, and send a copy to an ethics counselor in OCC, either Pete Polen (Charles.a.polen@nasa.gov)or Ken Goetzke at (Kenneth.h.goetzke@nasa.gov)

MEMORANDUM FOR (INSERT SUPERVISOR NAME)

SUBJECT: Disqualification Statement

1. This is to notify you that I am currently engaged in employment negotiations with (or, "I have a financial interest in") _____. I do/do not (delete inapplicable language) currently have official duties involving _____.

2. If official matters involving _____ require assignment, this is my notice to disqualify myself from participation in any official matter that will have a direct and predictable effect on the financial interests of _____. This means that I cannot act directly, or through others, in deciding, approving or disapproving official matters; nor may I recommend, investigate, advise or otherwise contribute to or influence official matters, which will have a direct and predictable impact on _____.

3. Accordingly, any official matters that will conflict with my potential employment with _____ must be handled without my knowledge or participation. Any such matters should be referred to someone who is not under my supervision.

Signature
cc: Ethics Counselor

Intellectually Speaking

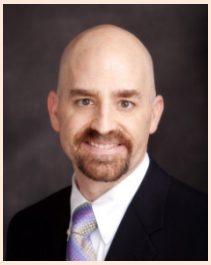
Welcome to our newest patent attorneys

Andrea Z. Warmbier

Prior to joining NASA, Andrea worked at a patent boutique law firm in Grand Rapids, Michigan, and as a member of the intellectual property group in a general practice law firm in Virginia Beach, Virginia. Andrea has experience prosecuting and licensing patents, trademarks and copyrights in various fields.

Andrea received a B.S. in Biochemistry and a B.A. in Chemistry from Virginia Tech. Andrea also received her J.D. *cum laude* from Michigan State University College of Law with a concentration in Intellectual Property and Communications Law.

Thomas K. McBride



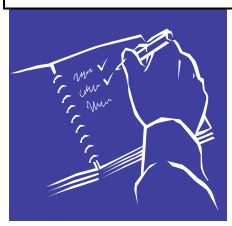
Tom joins NASA after being associated with law firms in Chicago, Illinois. In those firms, Tom gained a wide-range of experience in intellectual property transactions, patents, copyrights, and trademark. Tom also served as an in-house international corporate patent associate and chemical engineer at Universal Oil Products. He is a named inventor on six U.S. patents and on multiple foreign patents.

Tom is a graduate of the University of Illinois, where he earned a B.S. in Chemical Engineering with high distinction. He also holds a M.S. in Chemical Engineering from the University of Notre Dame. He received his J.D. *cum laude* from Loyola University Chicago in 2004, graduating first in his evening law school class.

"I never did anything by accident, nor did any of my inventions come by accident; they came by work."

Thomas Edison

Intellectually Speaking Some More



Good Record Keeping is Important. Good record keeping is obviously necessary for data analysis, publication, collaboration, peer review, and other research activities. Good record keeping is also necessary to support intellectual property claims. If you are conducting research that may be patentable or involves intellectual property, you need records to support your patent application or to defend your patent or invention if it is challenged. Good research records can prove that you were the first person to conceive of an invention.

Disputes sometimes arise over who first made an invention. This issue is usually decided on the written evidence kept by the parties to the dispute. U.S. patent practice places a premium on witnessed records when two or more parties claim the same invention. The date the idea occurred, called "conception," and the date it was put into actual practice, called "reduction to practice," are vital. For instance, but for the lack of witnessed notebooks describing his device, the man known as the inventor of the telephone would have been a talented mechanic named Daniel Drawbaugh. Although Drawbaugh was able to testify that he had talked over a crude telephone long before Alexander Graham Bell filed a patent application in 1875, Drawbaugh had not a scrap of paper dating and describing the invention. The Supreme Court rejected Drawbaugh's claim of prior inventorship in 1888 by a narrow margin of four votes to three. Similar disputes have raged over who invented the automobile, the electric light and the laser and, in all of them, records or the lack thereof played a deciding role.

Accordingly, it is often very important to be able to establish, from only your WRITTEN RECORDS, the date on which your invention was conceived. As soon as possible, you should put your developing ideas in writing, describing in as much detail as possible your concept or discovery (including any sketches or drawings), and explaining how the invention works. This writing should then be maintained in a permanently bound notebook with numbered pages, and shown in confidence, preferably to a disinterested friend or fellow worker who would not be a co-inventor, and described so that he or she understands your idea. Your friend should then be asked to witness that he or she "read and understood" the document by signing and dating it. Two witnesses are better than one.

Standard laboratory notebooks, available from the Patent Counsel, when properly completed and witnessed, are the best evidence of the date of invention. Even if you keep your records on a personal computer, make a printout of the description and then permanently paste it into the lab notebook. Never remove pages from a laboratory notebook.

Remember, using a bound notebook makes it easier to show that pages have not been added, subtracted, or substituted. You should sign and date all entries. You should also try to make regular entries and explain any lapses in experimentation due to vacation, equipment availability etc. There should be no blank spaces on a finished page; an "X" should be drawn through any unused portion of the page to prevent later entries on the same page. Use pen, not pencil, and if possible, use the same pen throughout the day in order to help support the case that an entry was made all at the same time and not altered later. If there is a need to correct an old data entry, you may return to the previous page, but the change must be easily identified as separate from the original and must be dated, initialed, and witnessed as described above. The preferable and simpler solution is to enter the correction on the current day's page, citing the earlier page and noting why the original record needed correction.

As discussed above, it is very important that a complete description be prepared of your invention. It is much better to have too much description than too little. Keep in mind that the attorney who will prepare your application, while having a degree in Engineering or Science as well as law, is probably not an expert in your particular field. In order to aid the attorney's understanding of your invention, a more detailed description than would be necessary for your colleagues should be prepared.

Congratulations to Inventors of Recently Issued U.S. Patents

Patent No.	Issue Date	Title	Inventors
7,692,116	4/6/2010	Laser Ablation for the Synthesis of Carbon Nanotubes	Brian Holloway (William & Mary) Peter Eklund (Penn State University) Michael W. Smith (NASA) Kevin Jordan (SURA) Michelle Shinn (SURA)
7,704,553	4/27/2010	Depositing Nanometer-Sized Particles Of Metals Onto Carbon Allotropes	Kent Watson (NIA) Michael Fallbach (NRC) Sayata Ghose (NRC) Joseph G. Smith, Jr. (NASA) Donavon Delozier (NIA) John W. Connell (NASA)
7,711,509	5/4/2010	Method of Calibrating a Fluid-Level Measurement System	Stanley E. Woodard (NASA) B. Douglas Taylor (Swales Aerospace)
7,723,464	5/25/2010	Novel Aromatic/Aliphatic Diamine Derivatives For Advanced Compositions And Polymers	Donavon Delozier (NRC) Kent Watson (NIA) John W. Connell (NASA) Joseph G. Smith, Jr. (NASA)
7,732,998	6/8/2010	Telescoping Cylindrical Piezoelectric Fiber Composite Actuator Assemblies	Sidney Allison (NASA) Qamar Shams (NASA) Robert L. Fox (NASA)
7,737,867	6/15/2010	Multi-Modal Cockpit Interface for Improved Airport Surface Operations	Jarvis Arthur (NASA) Randall Bailey (NASA) Lawrence Prinzel III (NASA) Lynda Kramer (NASA) Steven Williams (NASA)
7,742,663	6/22/2010	Wave Energy Transmission Apparatus for High-Temperature Environments	John Buckley (NASA - DRA) W. Christopher Edwards (NASA) Warren Kelliher (NASA) Ingrid Carlberg (NASA)
7,758,927	7/20/2010	Laser-Induced Fabrication Of Metallic Interlayers And Patterns In Polyimide Films	Gilda Miner (NASA) Diane Stoakley (NASA) Gregory Gaddy (NRC) Brent Koplitz (Tulane University) Steven Simpson (Tulane University) Michael Lynch (Tulane University) Samuel Ruffner (Tulane University)
7,760,778	7/20/2010	Thin-Film Evaporative Cooling For Side-Pumped Laser	Brian Stewart (NASA)
7,769,135	8/3/2010	X-ray Diffraction Wafer Mapping Method For Rhombohedral Super-Hetero-Epitaxy	Yeonjoon Park (NIA) Sang Choi (NASA) Glen C. King (NASA) J.R. Elliott (NASA) Albert Dimarcantonio (NASA)]
7,781,366	8/24/2010	Sol-Gel Based Oxidation Catalyst and Coating System Using Same	Anthony Neal Watkins (NASA) Bradley Leighty (NASA) Donald Oglesby (Swales Aerospace) JoAnne Patry (Swales Aerospace) Jacqueline Schryer (Swales Aerospace)
7,783,060	8/24/2010	Deconvolution Methods and Systems for the Mapping of Acoustic Sources from Phased Microphone Arrays	Thomas Brooks (NASA) William Humphreys (NASA)
7,784,732	8/31/2010	Boundary-Layer-Ingesting Inlet Flow Control System	Lewis Owens (NASA) Brian Allen (NASA)
7,792,015	9/7/10	Byzantine-Fault Tolerant Self-Stabilizing Protocol for Distributed Clock Synchronization Systems	Mahyar Malekpour (NASA)

Business Law News

CONTINUING RESOLUTIONS – WHAT YOU NEED TO KNOW

You probably have heard that the Government is operating under a "Continuing Resolution" (CR), but you may not have been told just what that means. Here are some basic things to know about CRs.

What is a CR?

A CR is a temporary appropriation that, in most instances, provides "such amounts as may be necessary for continuing activities … that were conducted in [the previous fiscal year]" for which funds were provided in the previous year's appropriations act, at a rate specified for those ongoing operations. In the case of the current CR, these funds will be available until an appropriations act is passed, or until 3 Dec 2010, whichever is later.

If there were no CR or appropriation, what may the Agency do?

In such situations, only activities authorized by law (for example, activities funded with program funds, which are available for obligation for more than one year) may be undertaken, along with actions necessary to protect life and property. Agencies may also take actions necessary to begin the phase-down of all other activities.

How is a CR different from a regular appropriations act?

CRs normally do not appropriate specified amounts of funds; rather, they appropriate such amounts as may be necessary to continue activities at the same rate for operations as was provided for in the previous fiscal year.

So what is it that I cannot do under a CR that I can under a regular appropriation?

The most important difference is that new starts are not permitted under a CR unless the CR itself specifically says so. In addition, you cannot expand the scope of an existing program, project or activity when it is funded under a CR. Further, as noted above, the rate of expenditures cannot exceed last year's appropriation rate, so if you think a program will receive additional funding in fiscal year 2011, you still cannot expend at a rate greater than that provided for in fiscal year 2010. Other things that do not change are the way funds are accounted for. So, for example, the Unified Labor accounting system has to await passage of the fiscal year 2011 appropriations act before being implemented.

How do I know what constitutes a "new start" under a CR?

As a general rule, if the Agency did not have authority in the prior year to perform the program, project or activity, then it cannot begin while the CR remains in effect. For example, certain activities of the Office of the Chief Technologist cannot be implemented under the CR because they were not included in last year's appropriations act. While planning for such activities may be permitted, the Agency cannot issue a solicitation for a new contract, grant or cooperative agreement until a regular appropriation is enacted.

If something is included in the 2010 NASA Authorization Act, can we begin action on that under the CR?

If the activity was not included in the fiscal year 2010 appropriation, you cannot expend funds under the CR for that activity. This is because an authorization act only authorizes an activity; it does not actually provide the funding. Funding only can be provided under the appropriations act. Remember, the language of the CR is to provide funds for "continuing activities", not those which have yet to begin.

Are there any exceptions to these rules provided under the current CR?

No, the current CR contains no exceptions (also sometimes called anomalies) that apply to NASA.

If I'm not sure whether I can do something under a CR, whom shall I call?

The Office of the Chief Financial Officer has detailed guidance on activities under CRs. In addition, the Office of the Chief Counsel can assist you. If your question pertains to a contract or other funding vehicle, you also should talk to the contracting officer for that contract or other funding vehicle.

"The Constants of Interacting with Contractor Employees"

While the blended workforce can be critical to varying degrees in allowing NASA to accomplish its missions, there are certain underlying constants that can help us ensure that each team member optimally interacts to achieve success. Amid the "out-sourcing/in-sourcing" debate, it is easy to forget about the constants of dealing with our contractor colleagues. There are really only a handful of key service contracting constants that fundamentally impact how we conduct our contractor relationships. The underlying constant is that while "we" support accomplishment of the same Agency mission, our contractor colleagues also have a second mission – the success of their corporate employers.

The key to appropriately working with our contractor colleagues is remembering that our Agency always has a contractual relationship with their corporate employers. From a legal and contractual perspective, our Agency relationship is not with our individual contractor colleagues. The corporate contractual arrangement requires that we carefully describe the requirements that the corporation must fulfill in exchange for agreed to contract costs or prices. The corporations are then contractually responsible for performance of our contracted work and for compliance with a host of socio-economic laws and policies and other terms and conditions.

This organizational relationship presents another service contracting constant – the potential for Organizational Conflicts of Interest (OCIs). You can think of these conflicts like you think of potential conflicts that could arise for you in relation to your annual financial disclosure. However, the conflicts at issue for our contractor colleagues primarily relate to the financial holdings (interests) of their corporate organizations. As employees of those organizations, our contractor colleagues share the same financial interests as their corporations. Those financial interests include the success of every contract and subcontract that the corporation holds as well as the corporations' overall profitability. With this in mind, if you need to obtain input about Beta Contractor's performance (or requirements, or proposal for work) from your Acme Contractor colleagues, you would need to consider whether (i) Acme Corporation has potential conflicts based on a relationship that it might have with Beta Corporation or (ii) Acme is a competitor of Beta Corporation and whether Acme might have an interest in performing the work itself. There are three recognized types of OCIs (Biased Ground Rules, Unequal Access to Information and Impaired Objectivity), and OP and OCC are here to assist you in working through them.

Another service contracting constant relates to how we interact with our contractor colleagues. If we direct them in a manner similar to which we direct our own employees, we run a risk of making them "Contingent" Agency workers. This can arise for example if we direct a contractor manager to hire or assign a particular individual to perform particular work. It can also arise if we endeavor to approve or deny leave, rates of pay,

bonuses or the like. Those are decisions for individuals' employers to make. When we have crossed the line and impacted such decisions, our Agency has occasionally been sued by the contractor employees under the theory that they are entitled to public employment benefits.

A closely related constant is the prohibition against personal services. This statutory prohibition generally requires that we do not obtain contractual services from individuals, nor may we administer service contracts as personal service contracts. Again this means avoiding crossing a line and treating contractor employees as though they are Agency employees.

A last service contracting constant worth mentioning is the prohibition against contracting for inherently governmental services. Like the in-sourcing/out-sourcing debate, the functions that constitute inherently governmental services have been occasionally "tweaked," and recently the concept of "Closely Related to Inherently Governmental Services" has arisen. However, the underlying constant is that actions that bind the government or actions that are governmental in nature (like the decision to expend appropriated funds) should remain governmental responsibilities and must not become corporate responsibilities.

With these key constants in mind, it may be easier for you to recognize when our contractual relationship with our contractor colleagues' employers may present an issue that is worth coordinating with the OP or OCC.

Procurement corner . . .

As government employees, we may not knowingly obtain or disclose contractor bid or proposal information or source selection information before the award of the contract, other than as permitted by law. Below is a short description of such information. For questions about handling and protecting such information, you may contact one of our Business Law Team attorneys at 864-3221.

Contractor bid or proposal information
This proprietary information must be secured to prevent disclosure. It includes certain nonpublic information submitted in connection with a bid or proposal, such as:

* *Cost or pricing data, including indirect costs and direct labor rates;*
* *Information about manufacturing processes, operations and techniques when marked "proprietary" in accordance with law or regulation;*
* *Information marked as "contractor bid or proposal information"; and*
* *Any other information related to a specific procurement that a company making a bid deems proprietary.*

Source selection information
This is information not previously available to the public that is prepared for use by an agency in evaluating a bid or proposal. Such information includes:

* *Bid prices for sealed bids or lists or prices;*
* *Proposed costs or prices;*
* *Source selection plans;*
* *Technical evaluation plans;*
* *Technical, cost or price evaluations of competing proposals;*
* *Competitive range determinations;*
* *Rankings of bids, proposals or competitors;*
* *Reports, evaluations and recommendations of source selection panels, boards or advisory councils; and*
* *Any other information marked as "source selection information."*

Dear Counsel

Seek a Safe Harbor!

Dear Counsel,

I hope you remember me. I asked your opinion on an ethics issue last year. It was about having my pet chimpanzee ride along with me in my government vehicle. Now, there seems to be some trouble brewing on this issue. Your opinion is my "my get out of jail card," right?

Sincerely, Carl Cover

Dear Carl,

Well, we have to first see if you followed my opinion and if you gave me all the facts. It is true that 5 C.F.R. 2635.107(b) provides that disciplinary action for violating ethics regulations will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided the employee, in seeking such advice, made full disclosure of all relevant facts. That protection is not the same for potential violations of criminal statutes. However, good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution.

There are three lessons here. First, it is a good idea to seek advice from your agency ethics official if you have any doubt on an issue. Second, it is also important to give him or her all the facts of your situation. Finally, you should follow that advice!

Counsel

Short Fused Disclosure of Non-Public Information!

Dear Counsel,

I just learned in a meeting yesterday that the Test Company will be awarded a NASA contract for providing test equipment. I think this will be a great deal for this company. Can I buy stock in the company? Can I tell friends about this great deal?

Respectfully, Danny Deal

Dear Danny,

Not so fast. Under ethics regulations at 5 C.F.R. 2635.703 an employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure. So what is "nonpublic information"? It is defined as information that the employee gains by reason of his employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know: (1) Is routinely exempt from disclosure under 5 U.S.C. 552 or otherwise protected from disclosure by statute, executive order or regulation; (2) Is designated as confidential by an agency; or (3) Has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

If in doubt ask your supervisor if the information is considered "nonpublic" or call the Office of Chief Counsel for help.

Counsel

Lawyer Humor

A cornucopia of fun:

Excerpts from actual courtroom records:

- Now doctor, isn't it true that when a person dies in his sleep, in most cases he just passes quietly away and doesn't know anything about it until the next morning?

- Q: What happened then?
  A: He told me, he says, "I have to kill you because you can identify me."
  Q: Did he kill you?

- Q: Do you recall approximately the time that you examined the body of Mr. Huntington at St. Mary's Hospital?
  A: It was in the evening. The autopsy started about 5:30 P.M.
  Q: And Mr. Huntington was dead at the time, is that correct?
  A: No, you idiot, he was sitting on the table wondering why I was performing an autopsy on him!

Quotable Quotes:

"Lawyers: Persons who write a 10,000 word document and call it a brief."

Franz Kafka

"Castles in the air are the only property you can own without the intervention of lawyers."

J. Feidor Rees

"It is the trade of lawyers to question everything, yield nothing, and to talk by the hour."

Thomas Jefferson

Lawyer in space: Media outlets recently published a new Hubble photograph of distant galaxies colliding. Of course, astronomers have had pictures of colliding galaxies for quite some time now, but with the vastly improved resolution provided by the Hubble Space Telescope, you can actually see the lawyers rushing to the scene.