



# PACA Pulse

FALL 2013

PROFESSIONAL AEROSPACE CONTRACTORS ASSOCIATION OF NEW MEXICO

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

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RCrown@LRRLaw.com

## EDITORIAL SUPPORT & DESIGN

**Ro Saavedra**  
830.2345

RoSaavedra@msn.com

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## PACA Hosts the 27th BFI

*By Ron Unruh, BFI Chair*

The Professional Aerospace Contractors Association's 27th Annual Briefing for Industry (BFI), a renowned national conference, was held on August 19-21 in the face of governmental budgetary constraints, sequestration, and government travel restrictions. Amidst all the aforementioned, the BFI was nonetheless a success, garnering numerous positive comments from the attendees, both government and contractor. As expected, attendance was slightly down from 2012 and the government personnel unable to attend this year's conference were sorely missed. The event was held at the Hotel Albuquerque and chaired by yours truly, **Ron Unruh**.

PACA President **Eric Mechenbier** was the session chair for the first day and announced the opening ceremonies which included the Posting of the Colors and the National Anthem.

The BFI Program Committee procured notable dignitaries to launch and close the BFI. Major General **David J. Eichhorn** (retired) provided the Kickoff Keynote entitled, "The New Normal" which addressed the changing times. Brig. Gen. **Daryl J. Hauck**, USAF Program Executive Officer for Strategic Systems, commenced the program on the second day of the conference.

Major General **Sandra E. Finan**, Commander of the Air Force Nuclear Weapons Center (AFNWC), Kirtland Air Force Base, delivered the Luncheon Keynote on Tuesday, August 21. The AFNWC comprises more than 3,500 airman at 11 locations in the U.S. and Europe and is responsible for the entire scope of nuclear weapons sustainment functions. Prior to this assignment, Major General Finan was the Principal Assistant Deputy Administrator for Military Application, Office of Defense Programs, National Nuclear

Security Administration in Department of Energy in Washington, D. C.

Day two saw the PACA Vice President, **Andy Dobrot**, assuming the role and duties as the session chair. New Mexico Governor **Susana Martinez** took time away from her extremely busy schedule to provide the featured Keynote Luncheon speech on August 21. Her presentation was highly anticipated, requiring the hotel dining staff to set up additional seating.

Immediately following her presentation the governor departed for Florida in an effort to bring new manufacturing business to New Mexico.



**Governor Martinez**

I offer my heartfelt appreciation to all presenters, keynote speakers, attendees, and most specifically each BFI committee member for putting on an informative and fruitful conference. Many challenges were faced and overcome to include the use of virtual presentations by five of the presenters. The opportunity to network, identify new upcoming opportunities, and solidify teams and relationships was topnotch. If you did not make it, here is what you missed:

- 24 presentations from various agencies
- Over 70 contract opportunities with an estimated value of over \$8,000,000,000 for bidding in the next few years
- 21 exhibitors
- Outstanding keynote and luncheon speakers
- Excellent networking gatherings for large and small businesses

Mark your calendars for the 2014 BFI – **August 18-20, 2014.** •

## Next Luncheon Speaker

■ November 19 - Jeff Thomas, Director of the Defense Threat Reduction Agency



The Defense Threat Reduction Agency (DTRA) is the U.S. Department of Defense's official Combat Support Agency for countering weapons of mass destruction (WMD). Staff comprises Subject Matter Experts on WMD who address the entire spectrum of chemical, biological, radiological, nuclear, and high-yield explosive threats.

DTRA's programs include basic science research and development, operational support to U.S. warfighters on the front line, and an in-house WMD think tank that aims to anticipate and mitigate future threats long before they have a chance to harm the United States or its allies.

SCC-WMD, the U.S. Strategic Command Center for Combating Weapons of Mass Destruction, synchronizes



combating WMD efforts across the military's geographic commands and leverages the people, programs, and interagency relationships of DTRA at a strategic level. The team works with the military services, other elements of the United States government, and countries worldwide on counterproliferation, nonproliferation, and WMD reduction issues with the single goal of making the world safer.

Since DTRA stood up in October 1998 and SCC-WMD in August 2005, the Department of Defense and other federal agencies have increasingly looked to both for support and advice. Both organizations' responsibilities span the full range of activities necessary to combat and respond to WMD proliferation and use. At home and abroad, DTRA and SCC-WMD deliver mission success against a very real and growing threat. •



We meet the third Tuesday of each month at **Tanoan Country Club** (Rolling Hills entrance east of Eubank off Academy). Registration begins at 11:30 a.m. followed by lunch at noon. Members are admitted free and our guest fee is \$15.

To RSVP, register online at [www.pacanm.org](http://www.pacanm.org). Include your name, guest's name, and menu selection. Please RSVP by noon on the Thursday before the week of the meeting. •

## President's Corner

by Eric Mechenbier

Hi everyone. Hopefully you all made it through the recent government shutdown fiasco still intact, although obviously nobody is in better shape from it. Regardless, our annual BFI was a great success; thank you to our BFI Chair, committee members, and those of you who made it to the event.

Over the next couple of months, I am planning to modernize our communications distributions. Of course we'll keep the Pulse, but let us know your preference for LinkedIn, Facebook, Twitter, and/or an RSS feed on our webpage. Any help with this would also be greatly appreciated.



Eric Mechenbier

What do you think of our recent speaker lineup? We've tried some new things to get different local, regional, and national perspectives. We've also tried to include a couple of speakers per luncheon to see if that increases audience attentiveness. Please give us your thoughts and again, any help in suggesting and/or securing speakers would be greatly helpful. See **Don Nash** or **Stu Purviance**, or e-mail us at [board@pacanm.org](mailto:board@pacanm.org).

There is a potential opening for PACA Treasurer next year. Don't all rush to get in line, but please do let us know if you, or anyone you know, might be interested in assuming the role.

### Don't forget:

- We now have a distribution list to make it easier to contact the PACA Board of Directors: [board@pacanm.org](mailto:board@pacanm.org). Please utilize it to address any suggestions or questions you may have.
- We have added a new sponsorship level: the Premier Small Business Sponsorship at \$1,000. See **Dar Johnson** for additional details regarding benefits to your small business for sponsoring PACA.
- The PACA holiday party will be on Friday, December 6. It is a guaranteed good time and always very well attended. If you have not already made your reservation, please do so as the fast approaching deadline is November 22.
- The JT8 annual networking social will be on Tuesday, December 17 at 5:50 PM. Watch for an e-mail invitation.

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# Legal Insights: Patent Rights in Government Contracts — The Basics

By Samantha Updegraff

This two part article examines patent rights in government contracts. The basic legal structure of these patent rights are discussed here in part one.

Patents are often a company's most important asset. Thus, when a company is contracting with the federal government, the contractor has to proceed with caution to avoid loss of patent rights. Government contracts can include various forms of patent and patent rights. If a contract is subject to a patent rights clause, the contractor must adhere to the Federal Acquisition Regulation to protect its patent rights. Essentially all government contracts are subject to a patent rights clause, except government contracts for construction work or architect-engineer services that involve only "standard types of construction" – a term that is defined in the FAR. See FAR 27.303(3).

A contract is subject to the patent rights clause if the contract is for "experimental, developmental, or research work" or if the contract is for construction work or architect-engineer services and has, as a purpose, the performance of experimental, developmental, or research work or tests and involves the design of a government facility or the design of novel structures, machines, products, materials, processes, or equipment. FAR 27.303(a)(1) and (2)(i)-(iii).

## Patents and Patent Rights Defined

A patent affords a legal monopoly on an invention for 20 years from the date of filing or earliest priority date. That means that no one else can make, use, sell, or reverse engineer a patented invention as long as the patent is valid in the country in which the patent is granted. However, a monopoly granted to an inventor by the patent laws is only as good as the inventor's ability to police the invention and to sue those who infringe.

For purposes of government contracts, an invention is defined as "any invention or discovery that is or may be patentable or otherwise protectable under [the Patent laws] or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act." See FAR 27.301.

## Federal Money Used to Invent a Patentable Invention

If an invention is conceived or built in performance of a government contract, the government will have some rights to the patentable technology. The government rights can range from a non-exclusive license to full ownership of the patent rights. The amount of patent rights depends on the amount of government funding involved and which agency provides the funding. Details concerning government contracts and patent rights are explained in the Bayh-Dole Act and the FAR.

## Bayh-Dole Act

Prior to 1980, the government typically took title to inventions

that arose during performance of a government contract. Over time, Congress realized that this was a disincentive to the development of new technology because contractors could not commercialize and sell their inventions in the marketplace.

This realization led to the Bayh-Dole Act of 1980. The Bayh-Dole Act gives non-profit organizations and small businesses the right to elect to retain title to inventions developed under federally funded contracts, grants, or cooperative agreements. The government then acquires a nonexclusive, irrevocable, paid-up license. In 1983, a presidential memorandum extended this allocation of rights to large businesses and for-profit organizations.

The Bayh-Dole Act and the presidential memorandum forms the basis for the FAR's regulation of contractors' rights to retain title to inventions made in the performance of work under a government contract. The government obtains a broad license. There are statutory exceptions for contracts with the Department of Energy and NASA, which are required by statute to take title. However, these requirements can be and are often waived.

The FAR applies to all federal contracts. Provisions on patent rights are contained in FAR subparts 27.2 and 27.3 as well as 52.227-1 through 52.227-13. Defense Federal Acquisition Regulations Supplement (DFARS) applies to all Defense Department (DOD) contracts. DFARS follows FAR closely with minor supplementary provisions.

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*The Bayh-Dole Act gives non-profit organizations and small businesses the right to elect to retain title to inventions developed under federally funded contracts, grants, or cooperative agreements.*

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## Government Contract Clauses

Patent rights clauses in a prime contract are most likely contained in Section I of the contract. Typically, only the part and sub-part citations to the relevant FAR and DFARS clauses are expressly contained in that section. It is important for the contractor to review the referenced citations and definitions of terms used. Prime contracts and subcontracts may also incorporate by reference relevant FAR and DFARS clauses by specific clause number.

Patent clauses affect the patent rights in all prime contractors and subcontractors under a government contract. Again, FAR clauses are "flowed down" to all subcontractors, regardless of



*Legal Insights continued on following page*

## Legal Insights *continued*

tier. The flow down allocates rights and obligations between the subcontractor and the government, not the subcontractor and the prime.

### Retaining Patent Rights

The government obtains certain “use rights” in inventions made by the contractor during the performance of work under the government contract. The rights that the government assumes depends on the nature and timing of the contractor’s disclosure of the invention.

To retain its patent rights, the contractor must first **disclose** a subject invention to the contracting government agency, then **elect** to obtain title to the subject invention by notifying the government agency in writing, and finally must **file** an initial patent application on the subject invention. The disclosure, election, and filing all have time limits.

According to FAR 27.301 a “subject invention” is “any **invention** of the contractor **conceived or first actually reduced to practice** in the performance of **work under a government contract.**” Achieving a subject invention initiates disclosure and election responsibilities for contractors. The disclosure to the appropriate contracting officer must be in writing and must be sufficiently complete in technical detail to clearly convey understanding to the extent known at the time of the disclosure. The nature, purpose, operation and the physical, chemical, biological, or electrical characteristics of the invention must be disclosed and described. The disclosure must also identify the applicable contract and the inventors.

Under any “subject invention,” the government obtains at least a nonexclusive, nontransferable, irrevocable, global, paid-up, perpetual license to practice an invention for government purposes while the contractor owns the patent. This license may be broadened in a specific contract to provide the government with additional rights. The license may also be revoked or modified by the government to achieve expeditious practical application.

FAR 27.302(b)(1)-(4) describes narrow exceptions to Contractor’s right to elect to retain title. A few of these exceptions include but are not limited to foreign companies, national security, and contracts for government owned R&D or production facilities.

Contracting with the federal government is like dealing with no other customer. Nowhere is this axiom more true than when it comes to patent rights. Contractors who do not understand how patent rights are addressed under government contracts are at grave risk of losing these rights. In the next issue, the second part of this article discusses how contractors can preserve their patent rights and the pitfalls they must avoid. •

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Samantha is a registered patent attorney in the Albuquerque office of Lewis Roca Rothgerber LLP. She practices all aspects of intellectual property law.

This article is intended for general information only and should not be construed as legal advice or opinion. Any questions concerning your legal rights or obligations in any particular circumstance should be directed to your lawyer.

## Thank You Sponsors!

PACA is pleased to announce that **ATK** has renewed its Gold level sponsorship and **SAIC/leidos** has renewed its Silver sponsorship for a second year. PACA also recognizes two new Silver sponsors, United Technologies Aerospace Systems and Aegis Technologies, along with the first Premier Small Business sponsor, Prescient 360. **Thank you sponsors**, for your support of PACA!

To become a PACA sponsor, contact **Dar Johnson**, (505) 400-1639, [d\\_r\\_johnson@comcast.net](mailto:d_r_johnson@comcast.net).

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# Termination for the Convenience of the Government

By Tony Royle, CPA

With government funding in some areas being tight, we have seen the government increasingly terminate certain contracts before a contract's expected end date. What happens when a government contract is terminated for the convenience of the government?

This event is referred to as a "termination for the convenience of the government." Contracting officers have the authority to terminate contracts for convenience or default and to make settlement agreements with contractors whose contracts have been terminated. Most convenience termination clauses state: "The Government may terminate performance of work under this contract in whole, or from time to time, in part if the Contracting Officer determines that a termination is in the best interests of the Government." Therefore, a contracting officer (CO) has wide discretion in deciding to terminate a contract. When a CO decides to terminate a contract, the CO must notify the contractor in writing. The notice must be sent by certified mail, return receipt requested, or hand delivered with a receipt issued. The notice will usually contain: whether the contract is being terminated for convenience or for default; the date of termination; the degree of termination (either partial or complete); and any special instructions.

***Contracting officers have the authority to terminate contracts for convenience or default and to make settlement agreements with contractors whose contracts have been terminated.***

Once a contract is terminated, the contractor must take immediate steps. Most convenience clauses require the contractor to: 1) stop work immediately on the terminated portion of the contract; 2) terminate all subcontracts; 3) perform the portion of the contract not terminated and promptly submit any requests for an equitable price adjustment; 4) take actions to protect and conserve property in the contractor's possession that the government has an interest in, and, if required, return such property; 5) promptly notify the CO of any legal actions relating to the terminated contract; 6) settle any outstanding liabilities arising from the termination; 7) promptly submit a settlement proposal; and 8) advise the CO of any special circumstances.

The methods of settlement for contracts terminated for convenience are: 1) negotiated agreement between a CO and contractor; 2) a unilateral determination by the CO, if the CO and the contractor cannot agree; 3) for cost-reimbursement contracts, vouchering out; or 4) a combination of these methods.

Additionally, FAR 31.205-42 entitled "Termination Costs" provides direction to contractors when such terminations occur. Terminations give rise to the incurrence of costs or the need for special treatment of costs that would not have arisen had the contract not been terminated. One such

cost is called "settlement expenses." Settlement expenses are amounts the government pays over and above the computed amount of the settlement. Settlement expenses include the costs of reasonable legal and accounting fees for the preparation and presentation of settlement claims to the contracting officer and the termination and settlement of subcontracts. It is often advisable to seek out a professional when a termination occurs to maximize the amount of costs that are allowable and included in the termination claim submission. Therefore, a contractor should evaluate whether or not they should be spending time preparing settlement claims. It may make more sense to have legal and accounting professionals assist in preparing settlement claims and have the government reimburse the contractor for the fees incurred to the professionals in preparing the settlement claims. •

Tony is a partner in the Albuquerque office of the public accounting firm of Moss Adams LLP. He specializes in services to government contractors.

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Iris Technolog, Irvine, California





**Friday, December 6**

## **PACA Holiday Luncheon**

**11:30 a.m. – Networking social**

**12:00 noon – Lunch served**

**Tanoan Country Club Ballroom**

**You and a guest are sure to have a bright light fine time!**

**RSVP on the PACA website:**  
[www.pacanm.org](http://www.pacanm.org)

## **Stay Connected: Attend the JP8 Annual Networking Social**

This year's social event will be held on Tuesday, December 17 at Tanoan and all PACA members are invited to attend. You will soon receive an e-mail invitation and opportunity to RSVP online. There is no better opportunity to network with other contractors and key business representatives.

In addition to PACA, other sponsors include the NMTech Council; NM Optics Industry Association; NM Bio Med - Bio Tech Association; and the Energy Technology and Environmental Association. •

### **Join PACA!**

PACA membership annual dues are \$150\*. The current fiscal year runs from April 1, 2013 to March 31, 2014. Mid-year applications will be pro-rated. You may pay your dues and apply on-line at [www.pacanm.org](http://www.pacanm.org).

For more information, contact **Judy Ruiz** at **254-4329** or [vp\\_mktgpr@kirlland.cu.org](mailto:vp_mktgpr@kirlland.cu.org).

\* Dues are subject to change.

### **Spread the News**

If you know a potential member or anyone else who would like to receive the newsletter, please forward their e-mail address to [RoSaavedra@msn.com](mailto:RoSaavedra@msn.com).

This is your newsletter. If you would like to contribute an article, make announcements (promotion, job change, or a new product or service), please submit your newsletter contribution to the editor, Ross Crown, at [RCrown@LRRLaw.com](mailto:RCrown@LRRLaw.com) or call him at 764-5402.

Contributions are welcome! •

## **PACA Sponsorship Opportunities**

Support to PACA in the form of sponsorships helps make the organization a success while promoting your business. The Board has recently added another sponsorship choice, the Premier Small Business sponsorship for \$1,000.

Please contact **Dar Johnson** if you have questions about sponsorships at **505-400-1639** or [d\\_r\\_johnson@comcast.net](mailto:d_r_johnson@comcast.net).

**ANNUAL SPONSORSHIPS of \$1,000 - \$7,500:** *One time each year* space is provided for a tabletop display at a membership luncheon and the opportunity for a five minute corporate overview presentation. The table will be either in the lobby or in the banquet room, depending on the size of the room. Also, depending on room arrangement and speaker presentation, special rules may apply per event.

### **DIAMOND \$7,500**

- Sponsor level (Diamond) recognition on PACA website.
- Corporate logo on PACA signage at luncheons and events.
- Three registrations for the PACA annual Briefing for Industry.
- Recognition included in the quarterly newsletter, PACA Pulse.
- Advance electronic list of BFI attendees.
- Special reserved seating at BFI.
- Addition of company literature or giveaways in BFI Goody Bag.

### **GOLD \$5,000**

- Sponsor level (Gold) recognition on PACA website.
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- Two registrations for the PACA annual Briefing for Industry.
- Recognition included in the quarterly newsletter, PACA Pulse.
- Advance electronic list of conference attendees for the BFI.
- Addition of company literature or giveaways in BFI Goody Bag.

### **SILVER \$3,000**

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- Special reserved seating at BFI.
- Advance electronic list of BFI attendees.
- Addition of company literature or giveaways in BFI Goody Bag.

### **PREMIER SMALL BUSINESS \$1,000 (NEW!)**

*The requesting sponsor must demonstrate the company is classified as a small business.*

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- Special reserved seating at BFI.
- Addition of company literature or giveaways in BFI Goody Bag.

**SMALL BUSINESS SPONSORSHIP \$400:** Quarterly Luncheon (One sponsor per quarter for January, April, July, and October meetings and one for the December holiday party).

- Company logo on the PACA website.
- Two guests for the sponsored lunch.
- Corporate logo displayed on signage for the sponsored luncheon.
- Introduction as the luncheon sponsor and be allowed to present a five minute overview of company. Corporate brochures/tri-folds may be placed on the luncheon tables. A luncheon sponsor may not sponsor another luncheon for twelve months. •