

# Responsibilities of Government Officials

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# General Principles

Executive Order 12674 as modified by Executive Order 12731 states 14 general principles that broadly define the obligations of public service

2 core concepts:

- employees shall not use public office for private gain
- employees shall act impartially and not give preferential treatment to any private organization or individual

# General Provisions

- Public service is a public trust
- No conflicting financial interests
- No misuse of nonpublic Government information
- No solicitation or acceptance of improper gifts
- Put forth honest effort in the performance of duties
- Employees shall not knowingly make unauthorized commitments or promises purporting to bind the Government
- Act impartially and do not give preferential treatment to any private organization or individual
- Protect and conserve Federal property and do not use it for other than authorized activities

# General Provisions, continued

- Do not engage in outside employment or activities that conflict with official Government duties and responsibilities
- Disclose waste, fraud, abuse and corruption
- Satisfy in good faith obligations as citizens, including all financial obligations
- Adhere to all laws and regulations regarding equal opportunity
- Endeavor to avoid any actions creating the appearance you are violating the law or ethical standards
  - appearance is determined from the perspective of a reasonable person with knowledge of the relevant facts

# Misuse of Position

- Use of public office for private gain
  - inducement or coercion of benefits
  - imply Government sanction
  - endorsements
- Use of nonpublic information to further a private interest
- Use of Government property
  - includes office supplies, telephones, computers, copiers and any other property purchased with Government funds
- Use of official time
  - employee's own time
  - time of a subordinate



# Unauthorized Commitments

- Authority of heads of agencies to contract:
  - FAR vests contracting authority in head of the agency. FAR 1.601(a)
  - Within DoD: Secretaries of Defense, the Army, the Navy and the Air Force. DFARS 202.101
    - Directors of the defense agencies have been delegated authority to act as head of the agency for their respective agencies
  - Head of the agency may establish subordinate contracting activities and delegate agency's contracting functions to the heads of them. FAR 1.601(a)
  - The agency head thus delegates his or her actual authority to the Head of the Contracting Activity (HCA)

# Delegation to HCAs

- Authority of heads of contracting activities (HCAs)
  - HCAs are contracting officers. FAR 1.601; 2.101
  - Overall responsibility for managing contracting actions within their activities.
  - 
  - HCA delegates actual contracting authority to agency employees selected, appointed and trained as contracting officers.
  - Via SF 1402, Certificate of Appointment (“warrant”). FAR 1.603-3

# Delegation to Contracting Officers

- Authority of contracting officers
  - May enter into, administer, or terminate contracts, make related determinations and findings.
  - May bind the government according to limitations of SF 1402. FAR 1.602-1
  - “No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures including clearances and approvals, have been met.” FAR 1.602-1(b)

# Actual/Apparent Authority

- Actual Authority
  - Government bound by agents acting within the actual scope of their delegated authority to contract.
  - Actual authority in government contracting equates to a warrant
  - Vendor's belief that a government agent has authority ("apparent authority") does not bind the government.
  - Acting without authority results in a UAC
- Contracting authority of all other personnel
  - No warrant = No contracting authority

# Definition of Unauthorized Commitment

. . . . an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government

-- Federal Acquisition Regulation 1.602-3 (a)



# Unauthorized Commitments

- Examples
  - Ordering goods or services without a contract/authority
  - COR directing contract changes
- Negative consequences:
  - Agency - claims, litigation, invoicing/payment issues, reporting requirements, impacts contractor relationships
  - Employee – may be financially responsible for the UAC
  - Contractor - no means for payment

# Ratification

- Ratification is available as a contracting solution when:
  - (1) Government received items and received a benefit;
  - (2) Ratifying official has authority;
  - (3) Contract would have been proper if conducted by KO;
  - (4) Price determined fair and reasonable by KO;
  - (5) KO recommends payment and legal counsel concurs;
  - (6) Funds are available **and** were available; **and**
  - (7) In accordance with limitations prescribed under agency procedures.  
FAR 1.602-3.
- Availability does not justify UAC
- UACs reportable to the head of the contracting activity
- UACs prohibited in Standards of Conduct

# The Ratification Process

- Statement by employee
  - Specifics: Who, what, when, where, why, & how
  - What was the bona fide need?
  - How did the Government benefit?
  - Why were contracting procedures not followed?
- Endorsement by Commanding Officer
  - Concurs with underlying statement
  - Discipline and/or steps to avoid similar situations
- Determination & Findings by contracting officer, Chief of Contracting Office
- Modification/contract by contracting officer
- Invoice and payment

# The Antideficiency Act

. . . it shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.

16 Stat. 251 (1870)

# Statutory Provisions

The Antideficiency Act prohibits federal employees from:

- making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).
- involving the government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. 31 U.S.C. § 1341(a)(1)(B).
- accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.
- making obligations or expenditures in excess of an apportionment or reappportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

# Reports to the President and Congress

The Secretary of Defense must report violations to the President and Congress (31 U.S.C. §1351, 1517(b)). The report must also be transmitted to the Comptroller General and Office of Management and Budget.

GAO publishes summary reports of ADA violations on its website.



# Disciplinary Action

- If disciplinary action is required then the Military Department returns the case to USD(C) with proposed disciplinary action
- Disciplinary action shall be:
  - administered on a case-by-case basis
  - based on relevant factors including:
    - the nature and seriousness of the offense (e.g. negligent or willful)
    - the record, experience, and position of the responsible individual
- Administrative discipline for civilians may include:
  - Written admonishment or reprimand
  - Reduction in grade
  - Suspension from duty without pay
  - Removal from office
- Military personnel may be subject to administrative discipline or action under the Uniform Code of Military Justice

# Criminal Penalties



- A knowing and willful violation of the Antideficiency Act is a Class E felony. 18 USC 3559(a)(5)
- Punishment may include a \$5,000 fine, confinement for up to two years, or both. 31 USC 1350

# No Private Right of Action

In view of the explicit provisions of 31 USC 1351, there is no private right of action for declaratory, mandatory, or injunctive relief under the Antideficiency Act.

Thurston v. US, 696 F. Supp. 680 (D.D.C. 1988)



# Violations of the ADA

Every ADA violation is in essence an Amount violation, as the prohibitions in the ADA are against spending more money than is available at the time the obligation is made.

However, violations of the ADA may fall into any of the three categories of Purpose, Time and Amount.

# Purpose Violations

Using the wrong funds

- expense investment threshold
- MILCON thresholds
- project splitting

An expenditure for a purpose which no funds are available

- food; bottled water
- gifts and other trinkets

# Time Violations

- Contracting prior to an appropriation being enacted
- Obligating funds after the period of availability for obligation has expired
- Bona fide need violations



# Amount Violations

- Contract Issues
  - Flexibly priced contracts
  - Claims settlements
- Over-obligating MILPERS accounts
- Improper Augmentations
- Indemnification Agreements
  - Project Stormfury, 59 Comp. Gen. 369
  - Terms & conditions in commercial contracts
- Ignoring statutory restrictions on the availability of funds
  - B-319009, April 27, 2010; B-326013, August 21, 2014; B-327432, June 30, 2016

# The Miscellaneous Receipts Act

(b) Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

...

(d) An official or agent not complying with subsection (b) of this section may be removed from office. The official or agent may be required to forfeit to the Government any part of the money held by the official or agent and to which the official or agent may be entitled.

# Repayment Exception

- Reimbursements
  - payment for goods/services provided
  - must be authorized to provide goods/services and retain payment
- Refunds
  - return of payments made in error, overpayments, or adjustments for amounts previously disbursed
- Credited to the appropriation initially charged with the related expenditure
- Takes on the character and status of that account

## CPSC – Voluntary Use of Personally-Owned Equipment to Conduct Government Business, B-327376, February 19, 2016

- BYOD program whereby employees, without reimbursement for costs, voluntarily could use their own devices to conduct government business, would not result in an improper augmentation of CPSC's appropriation nor constitute a gift from to the agency.
- CPSC may use its appropriation to support the program.
- Lots and lots and lots of issues involved.

# Voluntary Services

- An agency may not accept voluntary services except in emergencies involving human life and property. 31 USC 1342
- Distinction between voluntary services and gratuitous services
  - An agency may accept unpaid services if a person executes an advance written agreement (1) stating that the services are offered without expectation of payment, and (2) expressly waives any future claims against the government. B-324214, January 27, 2014
- Statutory authority to accept certain voluntary services
  - 10 USC 1588
  - 10 USC 2601

# Consumer Product Safety Commission

## ADA 14-09

- Employee furloughed on October 1, 2013 as part of an orderly shutdown from a lapse in appropriations
  - signed furlough notice
  - and then worked anyway
- IG concluded the employee committed a knowing and willful violation of the law
  - referred the case to DoJ, which declined to prosecute
  - employee received a memorandum of reprimand and was required to receive ADA training

# Indemnification Agreements



An open-ended indemnification clause violates both the Antideficiency Act, 31 USC 1341, and the Adequacy of Appropriations Act, 41 USC 6301.

By entering into an agreement to indemnify where the amount of the government's liability is indefinite or unlimited, an agency has exposed itself to liability in excess of any appropriation.

15 Comp. Dec. 405 (1909); Hercules, Inc. v. US, 516 U.S. 417 (1996); numerous GAO and court decisions

# Exceptions

- Specific statutory authority to enter into open-ended indemnification agreements
- The agency is in control of its liability
  - the amount of the liability can be ascertained at the time of the agreement
  - the agency has available budget authority to cover the potential liability
- Examples:
  - The government's liability under the indemnification agreement is limited
  - The agreement provides the agency will indemnify for damage to specific items of property
  - The occurrence of events that would require payment by the government solely is in the hands of the government

OMB Memorandum, April 4, 2013; OLC Memorandum, March 27, 2012, Antideficiency Act Implications of Certain Online Terms of Service Agreements

- Government employees may not agree to open-ended indemnification provisions in social media TOS
  - 31 USC 1341(a)(1)(A) & (B) prohibits making or authorizing an obligation in excess of amount available in an appropriation, or involving Government in an obligation before an appropriation is made unless authorized by law
  - Open-ended, indefinite indemnification exceeds amount available and are in advance of appropriations
- Whether an ADA is created depends on whether the employee had contracting authority
  - An employee without contracting authority does not violate the ADA because no obligation was created

# Agency Communications

No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes . . .

- Sec. 715, Financial Services and General Government Appropriations Act

No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress.

- Sec. 8001, Department of Defense Appropriations Act

None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress.

- Sec. 8013, Department of Defense Appropriations Act

# Grassroots Lobbying



- Clear appeals to the public to contact Members of Congress in support of or in opposition to pending legislation.
- “clear appeal” must be overt or explicit.

# Publicity or Propaganda

## Not Permitted:

- “publicity of a nature tending to emphasize the importance of the agency or the activity in question”
- self-aggrandizement
- covert propaganda

## Permitted:

- clear communications by an agency, identified as such, designed to communicate with the public about activities and policies

# A Tale of Two Tweets

The Dept. of Transportation violated section 715 when it retweeted and liked a tweet urging followers to tell Congress to pass pending legislation.

U.S. Dept. of Transportation – Violation of Governmentwide Anti-Lobbying Provision, B-329368, December 13, 2017

While not violating prohibitions on using appropriations for grassroots lobbying or publicity or propaganda, the Dept. of Energy violated the Purpose Statute, 31 USC 1301, when it tweeted concerning a guest column by the Secretary of Energy on health care.

U.S. Dept. of Energy – Tweet Concerning the Secretary of Energy's Guest Column on Health Care, B-329373, July 26, 2018