

Responsibilities of Government Officials

Keith M. Dunn
Associate Counsel
Office of Counsel for the Assistant
Secretary of the Navy
(Financial Management & Comptroller)

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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 - fiscally 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 reappropriation, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).

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

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

Two types of violations:

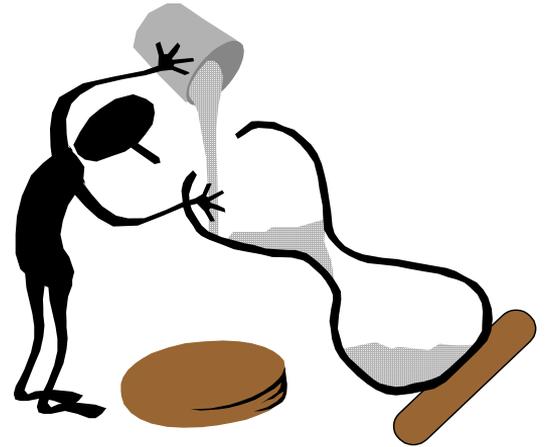
1. Using the wrong funds
2. An expenditure for a purpose for which no funds are available

A Purpose (as well as a Time) violation can be corrected if it is possible to replace the incorrect funds with the correct funds

In order to avoid the violation, the correct funds in sufficient amount must have been available at the time of the original obligation as well as at the time of the correction

Time Violations

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



Amount Violations

- Contract Issues
 - Flexibly priced contracts
 - Claims settlements
 - Multiyear contracts
 - B-322160, October 3, 2011
- Improper Augmentations
- Over-obligating MILPERS accounts
- 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

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

Duties

- Avoid
 - B-255831, July 7, 1995
- Mitigate
 - 55 Comp. Gen. 768 (1976)
- Correct
 - If proper funds available at the time of the violation and the time of correction
- Question dubious transactions
- Monitor Contract Performance
- **CYA – Consult Your Attorney!**

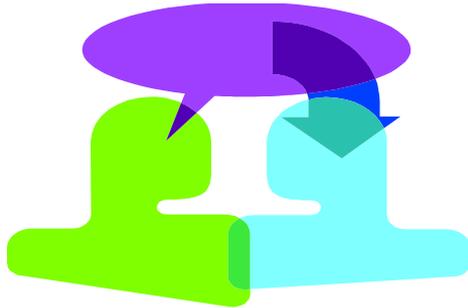
Accountable Officials



- Old view: agencies could impose accountable officer status and liability so long as they did so by specific regulation.
- GAO's view: accountable officer status and liability can be created only by statute. Matter of: Department of Defense- Authority to Impose Pecuniary Liability by Regulation, B-280764 (2000).
- Agency officials who cannot be named "accountable" pursuant to statutory authority cannot be held personally liable for illegal, improper or incorrect payments.

Now . . .

SECDEF may designate, in writing, any civilian employee or military member as an “Accountable Official.”



In order to be named an accountable official, must be responsible for providing to a certifying official information, data, or services that are directly relied upon by the certifying official in the certification of vouchers for payment

Pecuniary liability attaches.

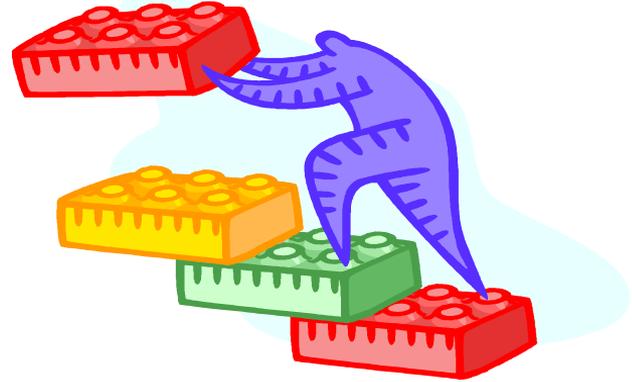
10 USC 2773a

Types of Accountable Officials

Certifying Officials - 31 U.S.C. § 3528

Disbursing Officers - 31 U.S.C. § 3321

Agents of Disbursing Officers – DoD
FMR vol. 5, chapter 2.



Certifying Officials

31 U.S.C. § 3528 and FMR vol. 5, Ch. 5

- Responsible for
 - information stated in the certificate, voucher and supporting records
 - the accuracy of computation of a voucher
 - the legality of a proposed payment from the appropriation involved
 - ensuring there is a legal obligation to pay
 - ensuring the payee has fulfilled the prerequisites to payment
 - ensuring the payment is legal under the appropriation or fund involved
 - Seek advance decisions on questionable vouchers
- And REPAYING a payment that
 - was illegal, improper or incorrect because of an inaccurate or misleading certificate
 - was prohibited by law
 - does not represent a legal obligation under the appropriation or fund involved

Disbursing Officers

- Disburse funds as provided by a voucher certified by
 - the head of the executive agency concerned
 - an officer or employee having written authorization from the head of the agency to certify vouchers
- Examine a voucher if necessary to decide if it is
 - in proper form
 - certified and approved; and
 - computed correctly on the facts certified.
- Under 31 U.S.C. § 3325 and other applicable laws, DOs are pecuniarily liable for payments not in accordance with the vouchers certified to them for payment, and for errors in their accounts. DOs who make payments in accordance with certifications of properly appointed certifying officers may be relieved of their liability. FMR vol 5. chapter 5, 050701.A.

Pecuniary Liability

FMR vol. 5, chapter 5

- Certifying Officers and Disbursing Officers are pecuniarily liable automatically when there is a fiscal irregularity based on a presumption of negligence. 28 USC 2512; 31 USC 3527
 - Certifying Officials are pecuniarily liable for payments resulting from improper certifications
 - Disbursing Officers are pecuniarily liable for payments not in accordance with certified vouchers and for errors in their accounts
- Departmental Accountable Officials are not subject to the presumption of negligence, but may be held pecuniarily liable under 10 U.S.C. § 2773a(c) for illegal, improper or incorrect payments resulting from information, data, or services they negligently provide to certifying officers; and upon which the certifying officers relied to certify payment vouchers.

Standards for Relief from Liability

FMR vol. 5, chapter 6

- Physical Loss
 - the official was carrying out official duties when the loss or deficiency occurred
 - the loss or deficiency was not the result of an illegal, incorrect or improper payment
 - the loss or deficiency was not the result of fault or negligence by the official



Standards for Relief from Liability Illegal, Incorrect or Improper Payments

- Disbursing Officials
 - payment not result of bad faith or lack of reasonable care
 - diligent collection efforts by the disbursing officials and agency were made
- Certifying Official
 - based on official records and official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information; or,
 - the obligation was incurred in good faith
 - no law specifically prohibited the payment
 - the US received value for the payment; and
 - diligent collection efforts were made to recover the payment

Requesting Relief from Liability

- FMR vol. 5 chapter 6
- Generally
 - investigation
 - request for relief by the accountable official
- Simpler process for minor losses (under \$750 without evidence of theft or fraud within the disbursing office)



Seeking Advance Decisions

- Accountable officials may seek an opinion on the legality of any obligation or claim presented to them for approval, certification or payment as specified in Vol. 5 of the DoD FMR
- DOs are not pecuniarily liable under Chapter 6 for payments they make based on advance decisions. DoD FMR Vol. 5 chap. 9 090201

