Chapter 4:

The Antideficiency Act

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CHAPTER 4

THE ANTIDEFICIENCY ACT

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I. INTRODUCTION

II. REFERENCES

A. 31 U.S.C. § 1341 (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).

B. 31 U.S.C. § 1342 (prohibiting government employees from accepting voluntary services).

C. 31 U.S.C. §§ 1511-1517 (requiring apportionment/administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds).

D. 31 U.S.C. § 1344 (prohibiting the unofficial use of passenger carriers).

E. OMB Circular A-11, Preparation, Submission, and Execution of the Budget (July 2013) [hereinafter OMB Cir. A-11], available at http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc.

F. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 14 [hereinafter DOD FMR] available at http://comptroller.defense.gov/fmr/.

G. Defense Finance and Accounting Service - Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000 w/ changes through May 2011) [hereinafter DFAS-IN 37-1], available at http://asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200.

H. Air Force Instruction 65-608, Antideficiency Act Violations (18 Mar 2005) [hereinafter AFI 65-608] available at http://www.e-publishing.af.mil.

I. Defense Finance and Accounting Service - Denver, Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (Sep. 1999) [hereinafter AF Procedures for Administrative Control of Appropriations] available at https://dfas4dod.dfas.mil/library/pubs/7200-1.pdf.

J. Department of Navy, NAVSO P-1000, Financial Management Policy Manual (Dec. 2002) [hereinafter DON FMPM], available at http://www.fmo.navy.mil/policies/regulations.htm.

K. Principles of Federal Appropriations Law, U.S. Government Accountability Office, Volume II, Third Edition, Chapter 6, (March 2011) [hereinafter Red Book], available at http://www.gao.gov/legal/redbook.html.

L. Hopkins and Nutt, The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978).

III. BACKGROUND

A. History

1. The original Anti-Deficiency Act (ADA) was enacted in 1870 (16 Stat. 251) for the purpose of preventing the federal government from making expenditures in excess of the amounts that Congress appropriated. *See* Red Book, 6-34 to 6-35.

2. The ADA was amended in 1905 (33 Stat. 1257) and in 1906 (34 Stat. 48) for the purpose of preventing expenditures in excess of apportionments (divisions within an appropriation). These amendments required that certain appropriations be apportioned over a fiscal year to obviate the need for a deficiency appropriation. Originally, the authority to make, waive, or modify apportionments was the head of the agency. Today, that authority rests with the Office of Management and Budget (for executive branch apportionments). *See* Red Book, 6-35. *See* E.O. 6166 (June 10, 1933).

3. The ADA was amended again in 1951 (64 Stat. 765), in 1956 (70 Stat. 783), and in 1957 (71 Stat. 44) for the purpose of strengthening the apportionment procedures and the agency control procedures. *See* Red Book, 6-35 to 6-36.

B. Summary of ADA Prohibitions

1. In its current form, the ADA states that an "officer or employee of the U.S. government" **may not**:

a. "Make or authorize an expenditure or obligation *exceeding an amount available* in an appropriation" unless authorized by law (emphasis added). *See* 31 U.S.C. § 1341(a)(1)(A);

b. Involve the government "in a contract or obligation for the payment of money *before* an appropriation is made unless authorized by law" (emphasis added). *See* 31 U.S.C. § 1341(a)(1)(B);

c. "[M]ake or authorize an expenditure or obligation *exceeding* -- (1) an apportionment; or (2) the amount permitted by regulations prescribed under section 1514(a) of this title" [i.e., a formal subdivision] (emphasis added). *See* 31 U.S.C. § 1517(a); or

d. "[A]ccept voluntary services [for the United States] or employ personal services. . .except for emergencies involving the safety of human life or the protection of property," or unless authorized by law. *See* 31 U.S.C. § 1342.

2. The ADA imposes prohibitions (or fiscal controls) at three levels: (1) at the **appropriations** level, (2) at the **apportionment** level, and (3) at the **formal subdivision** level. The fiscal controls at the appropriations level are derived from 31 U.S.C. § 1341(a)(1)(A) and (B). The fiscal controls at the apportionment level and at the formal subdivision level are derived from 31 U.S.C. § 1517(a). Thus, if an officer or employee of the United States violates the prohibitions (or fiscal controls) at any of these three levels, he/she thereby violates the ADA.

3. The Comptroller General summarized the intent and effect of the ADA in an often-quoted 1962 decision.

> These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditure or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriations under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, *within the limits and purposes of appropriations* annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, *in advance of appropriations made* for

such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made (emphasis added).

To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

4. To whom does the ADA apply?

a. The ADA applies to "any officer or employee of the United States Government" and thus, it applies to all branches of the federal government—executive, legislative, and judicial. Nevertheless, whether a federal judge is an "officer or employee" of the U.S. Government remains an open question, in some cases. *See* Red Book, 6-39.

b. By the plain wording of the statute, 31 U.S.C. § 1341 specifically applies to any officer or employee who makes or authorizes an expenditure or obligation. Additionally, DOD applies the ADA by regulation to "commanding officers, budget officers, or fiscal officers. . .because of their overall responsibility or position." *See* DOD FMR, Vol 14, Ch 5, para. 050301.

IV. THE ANTIDEFICIENCY ACT'S FISCAL CONTROLS

A. APPROPRIATIONS – THE FIRST LEVEL. 31 U.S.C. § 1341

1. The ADA imposes two fiscal controls at the **appropriations** level. These controls prohibit obligating and expending appropriations "*in excess of*" the amount available in an appropriation or "*in advance of*" an appropriation being made. 31 U.S.C. § 1341(A)(1)(A) and (B). The provisions located in 31 U.S.C. § 1341(A)(1)(A) and (B) are often considered the key provisions of the ADA; in fact, the original ADA contained only these provisions. *See* Red Book, 6-38.

2. The **"In Excess Of"** Prohibition

a. An officer or employee may not make or authorize an obligation or expenditure that **exceeds** an amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A).

b. DOD Examples

(1) The Navy over-obligated its Military Personnel, Navy appropriation from 1969-1972 by nearly $110 million. This is an example of how the Navy violated the ADA by obligating an appropriation *in excess* of the amount available in that appropriation, and has been called the "granddaddy of all violations." *See* Red Book, 6-43.

(2) The Navy lost its "place of honor" for committing the "granddaddy of all violations" when the Army over-obligated four procurement appropriations from 1971 to 1975 by more than $160 million involving approximately 900 contractors and 1,200 contracts. Once the Army realized it had over-obligated these appropriations, it ceased payments to the contractors and requested GAO's *recommendations*. In a December 1975 letter, the Army requested the GAO's advice regarding some potential courses of action. In response, initially, the GAO opined that "obviously these contracts violate the 'Antideficiency Act.'" Additionally, the GAO stated that the Army had a duty to mitigate the Antideficiency Act violations. The GAO endorsed one of the Army's proposals whereby the Army would terminate "contracts for which no critical requirement exists." This option, however, would only mitigate the violation; it would not make funds available to the unpaid contractors. The GAO further commented that the Army could request Congress to appropriate additional funds (i.e. a deficiency appropriation) for the purpose of satisfying these outstanding obligations. The GAO specifically *disapproved* an Army proposal to use current year funds to cover the obligations.[1] To the Chairman,

[1] The GAO rejected the Army's proposal to use current year funds (i.e. 1976 annual appropriations) to satisfy these outstanding prior years' obligations by stating:

> The proposal to apply current funds (either directly or through reprogramming) to payments on continuing contracts is apparently designed to achieve full performance of such contracts and also provide some immediate relief to contractors by cash payments. *In our opinion, this action would be precluded by* 31 U.S.C. § 712a (1970) [now located at 31 U.S.C. § 1502, the "Bona Fide Needs Statute"]. . . Under these circumstances, 31 U.S.C. § 712a would preclude the use of *current* appropriations to fund these *prior* year contracts since such transactions would constitute neither "the payment of expenses properly incurred" nor "the fulfillment of contracts properly made" in fiscal year 1976 (emphasis added).

Chairman, Committee on Appropriations, B-132900, Feb. 19, 1976.

Committee on Appropriations, House of Representatives, B-132900, Feb. 19, 1976. *See also* Red Book, 6-43.

(3) Not to be outdone, in fiscal 2002 the Air Force embarked upon an obligation of over $300 million against its Missile Procurement appropriation, for replacement of Minuteman guidance systems. Unfortunately, the funds weren't available at the time of obligation, resulting in an ADA violation.[2]

c. Other Examples

(1) USEC Portsmouth Gaseous Diffusion Plant "Cold Standby" Plan, B-286661, Jan. 19, 2001; Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992) (stating that where the agency expended "training and employment services" funds for an unauthorized purpose, the agency violated the Antideficiency Act's "in excess of" prong because no funds were available for that unauthorized purpose).[3]

(2) As far as amounts go, it could be some time before the Department of Housing and Urban Development is unseated from their position of prominence with an ADA violation in excess of $1.5 billion in FY 2004.[4]

Thus, the GAO reasoned that obligating and expending current year 1976 funds to pay for contracts the Army awarded in previous years would violate the Bona Fide Needs Rule. This rule prohibits the government from obligating and expending current year funds for prior year needs. *Id.*

[2] *See* US Government Accountability Office, Antideficiency Act Report Information, FY 2006, available at http://www.gao.gov/ada/adarptinfofy06.pdf. In this case, funds were obligated in excess of amounts apportioned under a continuing resolution for missile procurement. *Id.*

[3] The GAO was somewhat less decisive in their language, stating that the violation "could be viewed as either in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose." Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992).

[4] *See* US Government Accountability Office, Antideficiency Act Report Information, FY 09, available at http://www.gao.gov/ada/adarptinfofy09.pdf. In this case, Congress had set a FY 2004 commitment level of $3.8B for various loan guarantee commitments, and by December 2003, HUD had made commitments exceeding the cap by $1,529,229,523. *Id.*

d. What is the "amount available" under 31 U.S.C. § 1341(a)(1)(A)?

(1) "Amount available" means the unobligated balance of a particular appropriation.[5]

(2) Thus, if the DOD Appropriations Act provides $31B in the Army O&M appropriation, then the "amount available" for obligation is $31B.[6] As obligations are made against this appropriation, the amount available for new obligations declines.

(3) Earmarks[7] may also limit the "amount available" in a particular appropriation. Thus, if an earmark establishes a maximum amount that may be obligated, then once that amount has been obligated, no further obligations may occur. Any obligation in excess of the earmark would violate 31 U.S.C. § 1341(a)(1)(A) (the *in excess* of prong). For example, if the DOD Appropriations Act provides that as part of the Army's O&M appropriation, the Army receives "not to exceed $12,478,000 . . .for emergencies and extraordinary expenses," then $12,478,000 is an earmark. If the Army obligates in excess of $12,478,000 for emergencies and extraordinary expenses, then the Army has violated 31 U.S.C. § 1341(a)(1)(A) by obligating *in excess* of the amount available. *See* Red Book, 6-41.

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[5] *See* Red Book, 6-84.

[6] For example, the FY 2012 DOD Appropriations Act, Div. A, Title II (Operation and Maintenance, Army) states in relevant part:

> For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; and not to exceed **$12,478,000** can be used for *emergencies and extraordinary expenses*, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes, **$31,072,902,000**. (emphasis added)

[7] An "earmark" is a portion of a lump-sum appropriation (i.e. an O&M appropriation which is made to fund at least two programs, projects, or items) where Congress designates a certain amount of appropriation as "either a maximum or a minimum or both." *See* Red Book, 6-26, 6-41. Note that under a "not to exceed" earmark, "the agency is not required to spend the entire amount on the object specified." *Id.* If within the Army's O&M appropriation, $12.5M is earmarked for emergencies and extraordinary expenses and the Army does not obligate the full $12.5M, then the unobligated balance "may—within the time limits for obligation—be applied to other unrestricted objects of the [lump sum] appropriation [in this case, the Army O&M appropriation]." *Id.*

e. The GAO has opined that this statute prohibits obligations in excess of appropriated or authorized amounts and obligations that violate specific statutory restrictions on obligations or spending.

(1) Regarding statutory restrictions, if Congress states that no funds appropriated shall be available for a particular purpose, and an agency expends funds for the prohibited purpose, then the agency violates the Antideficiency Act. Reconsideration of B-214172, B-214172, 64 Comp. Gen. 282 (1985); Customs Serv. Payment of Overtime Pay in Excess of Limit in Appropriation Act, B-201260, 60 Comp. Gen. 440 (1981) (stating that where an appropriation limits the payment of overtime to an individual employee to $20,000 in one year, if an agency exceeds this $20,000 limit, it has violated both the Antideficiency Act's "in excess of" prong and its "in advance of" prong).[8]

(2) Examples of recurring statutory restrictions in the annual DOD Appropriations Act:

(a) "None of the funds appropriated or otherwise made available pursuant to . . . this Act shall be obligated or expended to finance directly any assistance or reparations for the governments of Cuba, North Korea, Iran, or Syria . . ."[9]

(b) "None of the funds made available by this Act may be used to support any training program involving a unit of the security forces or police of a foreign country if the Secretary of Defense has received credible information from the Department of State that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken."[10]

[8] See 10 USC § 2222 (as amended by FY 2012 National Defense Authorization Act Section 901) which states that a violation of the antideficiency act will result if funds available to the DOD are obligated for covered defense business system programs that will have a total cost in excess of $1,000,000 over the period of the current future-years defense program submitted to Congress unless certain exceptions are met.

[9] FY 2012 DOD Appropriations Act, Div. A, Title VII, Sec. 7006.

[10] *Id.* at Sec. 8058.

f. The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment, e.g., expired appropriations. Matter of Adjustment of Expired and Closed Accounts, B-253623, 73 Comp. Gen. 338 (1994); The Honorable Andy Ireland, House of Representatives, B-245856.7, 71 Comp. Gen. 502 (1992).

3. The **"In Advance Of"** Prohibition. An officer or employee may not involve the government in a contract or obligation for the payment of money **before** an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments under Licensing Agreement, B-225039, 66 Comp. Gen. 556 (1987) (20-year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

a. So, for example, if on 15 September 2012 (FY 2012), an Army contracting officer awarded a contract obligating FY 2013 Army O&M funds for an FY 2013 need, that contracting officer would have violated the ADA by obligating funds "before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B). Such a violation is also referred to as obligating funds *in advance* of their availability.

b. What does "before an appropriation is made" mean? An "appropriation is made" when *all the following have occurred*: (1) Congress has passed the appropriation act, (2) the President has signed the appropriation act, and (3) the date is 1 October (or later) of the fiscal year in which the appropriation becomes available.[11]

(1) So, if Congress passes the FY 2013 DOD Appropriations Act on 29 September 2012, then as of 30 September 2012 the funds contained in this appropriation are still not available because it is not yet 1 October 2012 (and the President has not yet signed the act). If an Air Force contracting officer awarded a contract on 30 September 2012 obligating FY 2013 Air Force O&M funds for a FY 2013 need, then the contracting officer would have violated the ADA by obligating funds "before the appropriation was made." This is a violation of the *in advance* of prohibition.

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[11] *See* Red Book, Vol I, 5-9. *See generally* Red Book 6-146.

(2) Likewise, if Congress passes the FY 2013 DOD Appropriations Act on 1 October 2012 (FY 2013) but the President has not yet signed the act, then the appropriations subject to this act are still not yet available. Under these circumstances, if an Army contracting officer awarded a contract on 1 October 2012 obligating FY 2013 Army O&M funds, then the contracting officer would have violated the ADA by obligating funds "before the appropriation was made."

c. Funding gaps. A funding gap "refers to the period of time between the expiration of an appropriation and the enactment of a new one." *See* Red Book 6-146. Obligating funds during a funding gap violates the ADA by obligating funds *in advance* of their availability, unless an exception applies. *See* Red Book 6-146. *See also* Chapter on Continuing Resolution Authority of Fiscal Law Deskbook for discussion of exceptions during a funding gap.

4. Exceptions to 31 U.S.C. § 1341(a)(1)(A) and (B). Government officials may obligate or expend *in excess of* an amount available in an appropriation or involve the Government in a contract *in advance of* an appropriation being made <u>if authorized by law</u>.

a. The statute must specifically authorize entering into a contract i*n excess of* or *in advance of* an appropriation. <u>The Army Corps of Eng'rs' Continuing Contracts</u>, B-187278, 56 Comp. Gen. 437 (1977); <u>To the Secretary of the Air Force</u>, B-144641, 42 Comp. Gen. 272 (1962).

b. The existence of a law creates an exception to the statutory prohibition regarding entering into a contract i*n excess of* or *in advance of* an appropriation.

(1) The Feed and Forage Act (aka The Adequacy of Appropriations Act) (41 U.S.C. § 11) (*in excess* of exception).

(a) This statute permits the DOD and the Coast Guard to contract *in excess of* an appropriation for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies but cannot exceed the needs for the current fiscal year (FY).[12] In DOD, this authority is limited by regulation to "emergency circumstances. . .[where] action cannot be delayed long enough to obtain sufficient funds." See DOD FMR, vol. 3, ch. 12, para. 1201 and 1202. Report use of this authority to the next higher level of command. See DOD FMR, vol. 3, ch. 12, para. 120207 (Jan. 2001); DFAS-IN 37-1, ch. 8, para. 0818 (requiring local commanders to forward reports through command channels).

(b) The authority conferred by the Feed and Forage Act is "contract" authority, and does not authorize disbursements. See, DOD FMR, vol. 3, chap. 1201; AF Procedures for Administrative Control of Appropriations, § 4, para. E. So, if the Air Force exercised its "contract authority" under 41 U.S.C. § 11 to incur obligations for F-16 fighter fuel exceeding its available O&M appropriation, then the Air Force could only obligate its O&M funds by awarding a contract; the Air Force could not disburse those funds unless and until Congress granted additional funds.

[12] The full text of 41 U.S.C. § 11 states:

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.

Id.

(2) Multi-year Contract Authority (*in advance* of exception). See, e.g., 10 U.S.C. §§ 2306b, 2306c, 2829; 41 U.S.C. § 254c. See also FAR 17.104; DFARS 217.170; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream, B-224081, 67 Comp. Gen. 190 (1988) (DLA lacked authority to execute multiyear contract).

(a) Multi-year contract authority permits an agency to award contracts for terms in excess of one year obligating one-year funds.

(b) DOD is authorized under 10 U.S.C. §§ 2306b and 2306c to award contracts for goods and services for terms not exceeding five years so long as certain administrative determinations are met. 10 U.S.C. § 2306c was enacted specifically in response to a request from the Air Force following the GAO's "Wake Island" decision.[13] 10 U.S.C.§§ 2306b and 2306c pertain to contracts for installation maintenance and support, maintenance or modification of aircraft and other complex military equipment, specialized training, and base services. These statutes permit DOD to obligate the entire amount of a five-year contract to an annual fiscal year appropriation current at the time the contract is awarded (i.e. an O&M appropriation) even though some of the goods or services procured do not constitute the needs of that fiscal year. *See* Red Book, 6-49 and Red Book Vol I, Chap 5, 5-45.

5. Contracts Conditioned Upon the Availability of Funds. See FAR 32.703-2; To the Secretary of the Interior, B-140850, 39 Comp. Gen. 340 (1959); To the Postmaster Gen., B-20670, 21 Comp. Gen. 864 (1942).

[13] To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962). In this case, the Air Force awarded a three-year contract for aircraft maintenance services for aircraft landing at Wake Island (a remote island in the Pacific Ocean) obligating one-year funds. The GAO concluded that this contract violated the ADA's *in advance* of prohibition because it obligated the Air Force to pay the contractor in future fiscal years using only one-year funds. Following this GAO decision, the Air Force requested that Congress enact a statute which would have authorized such a contract. Congress responded by enacting 10 U.S.C. § 2306c. *See* Red Book, 6-49 and Red Book Vol I, Chap 5, 5-45.

a. Agencies may award certain types of contracts (i.e. contracts for "operations and maintenance and continuing services") prior to an appropriation becoming available if the solicitation and contract include the "subject to the availability of funds" clause, FAR 52.232-18, Availability of Funds. See FAR 32-703-2(a). See also To Charles R. Hartgraves, B-235086, Apr. 24, 1991, 1991 US Comp. Gen. LEXIS 1485 (award without clause violated the ADA's "in advance" of prong).

b. The government may not accept supplies or services under these contracts (containing the "subject to the availability of funds" clause) until the contracting officer has given written notice to the contractor that funds are available. See, FAR 32.703-2(c).

c. The "subject to the availability of funds" clause will not be read into a contract pursuant to the "Christian Doctrine." See To Charles R. Hartgraves, B-235086, Apr. 24, 1991, 1991 US Comp. Gen. LEXIS 1485. So, if a contracting officer awards a contract near the end of one fiscal year citing funds of the next fiscal year and neglects to insert the "subject to the availability of funds" clause into the contract, then the award of the contract violates the ADA's prohibition against obligating funds *in advance* of their availability.

d. When a contracting officer awards a contract—containing a "subject to the availability of funds" clause—citing funds of the next fiscal year, this is not a true exception to the ADA's *in advance* of prohibition. This is because when a contracting officer awards a contract subject to the availability of funds, no funds of the next fiscal year are obligated unless and until those funds become available.

6. Variable Quantity Contracts. Requirements or indefinite quantity contracts for services funded by annual appropriations may extend into the next fiscal year if the agency will order specified minimum quantities in the initial fiscal year. The contract also must incorporate FAR 52.232-19, Availability of Funds for the Next Fiscal Year. See FAR 32.703-2(b).

B. APPORTIONMENT – THE SECOND LEVEL. 31 U.S.C. §§ 1512 – 1515, 1517(a)(1)

1. Requirement. 31 U.S.C. § 1512 requires apportionment of appropriations. 31 U.S.C. § 1513(b) requires the President to apportion Executive Branch appropriations. The President has delegated the authority to apportion executive branch appropriations to the Office of Management and Budget (OMB).[14]

2. Definition. An "apportionment" is a distribution by the OMB of amounts available in an appropriation into amounts available for specified time periods, activities, projects, or programs. The OMB apportions funds to federal agencies based upon the agency's request on SF 132 (Apportionment and Reapportionment Schedule). With regard to DOD, the OMB generally apportions funds on a quarterly (four times per year) basis. OMB Cir. A-11, § 20.3; DOD FMR, vol 3, chap 2, para 020102; DOD FMR, vol 3, chap 13, para 130204.

3. The apportionment is OMB's plan on how to spend the resources provided by law. OMB Cir. A-11, § 120.1; Purpose of Apportionment. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. OMB Cir. A-11, § 120.2. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation. See 31 U.S.C. § 1512.

a. Exceptions. Apportionment at a rate that would create a need for a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:

(1) Military and civilian pay increases;

(2) Laws enacted after budget submission which require additional expenditures; or

(3) Emergencies involving life or property.

[14] Appropriations for the legislative and judicial branches are apportioned by officials having administrative control over those appropriations. 31 U.S.C. § 1513(a).

b. An agency violates the apportionment statute if it must curtail its activity drastically to enable it to complete the fiscal year without exhausting its appropriation. To John D. Dingell, B-218800, 64 Comp. Gen. 728 (1985); To the Postmaster Gen., B-131361, 36 Comp. Gen. 699 (1957).

4. The ADA Prohibition

a. An officer or employee of the United States may not make or authorize an obligation or expenditure that **exceeds** an amount available in an **apportionment**. 31 U.S.C. § 1517 (a)(1).[15, 16]

b. It can be argued that the statute *does not* prohibit obligating in advance of an apportionment. See Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997). However, service regulations prohibit the practice. *See* FMR Vol III, Chap 13, para 130203A (stating that "except in certain circumstances, as specified in OMB Circular No. A-11, appropriations…by the OMB are required before funds may be obligated."). *See also* AF Procedures for Administrative Control of Appropriations, § 2, para. B.1 (providing that activities may not incur obligations until appropriations are actually apportioned). Moreover, GAO's Red Book clearly asserts that such an act would be an ADA violation. See Red Book, 6-141 for further discussion.

c. So, if an Army contracting officer awarded a contract obligating a given year's O&M funds, exceeding the apportionment for those O&M funds, then the contracting officer would have violated the ADA by exceeding the apportionment. 31 U.S.C. § 1517 (a)(1). Since an apportionment is a division of an appropriation (i.e. a division of the Army O&M appropriation), it is possible to exceed an apportionment without exceeding the appropriation.

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[15] The relevant ADA provision states in pertinent part: "An officer or an employee. . . may not make or authorize an expenditure or obligation *exceeding* an (1) apportionment or (2) the amount permitted by regulations prescribed under section 1514(a) of this title" [i.e., a formal subdivision] (emphasis added). *See* 31 U.S.C. § 1517(a).

[16] Since the Antideficiency Act requires an apportionment before an agency can obligate the appropriation, 31 U.S.C. § 1512(a), an obligation *in advance of* an apportionment violates the Act. See B-255529, Jan. 10, 1994. In other words, if zero has been apportioned, zero is available for obligation or expenditure.

C. ADMINISTRATIVE SUBDIVISIONS – THE THIRD LEVEL. 31 U.S.C. § 1514

1. Administrative Fiscal Controls. 31 U.S.C. § 1514 requires agency heads to establish administrative controls that: (1) restrict obligations or expenditures to the amount of apportionments; and (2) enable the agency to fix responsibility for exceeding an apportionment. These regulations include:

   a. OMB Cir. A-11, § 150.7. This circular applies to all Executive agencies and requires OMB approval of fund control systems.

   b. DOD Directive 7000.14-R; DOD FMR, vol. 14, ch. 1.

   c. DFAS-IN 37-1, ch. 4 (Army); Air Force Procedures for Administrative Control of Appropriations § 5; DON FMPM, ch. 3. (Navy)

2. Administrative Subdivision of Funds. OMB Cir. A-11, § 150.7; DOD FMR, vol. 1.

   a. **"Formal" Administrative Subdivisions** (i.e. Allocations and Allotments). DFAS-IN 37-1, ch. 3, paras. 0312, 0314; Air Force Procedures for Administrative Control of Appropriations, § 5, para. B. These are formal administrative subdivisions prescribed generally by 31 U.S.C. § 1514. The Army transmits these funds on a computer generated form (DA Form 1323) called a Fund Authorization Document or FAD. The Air Force uses AF Form 401, Budget Authority/Allotment; AF Form 402, Obligation Authority/Suballotment; and AF Form 1449, Operating Budget Authority (for O&M funds).

   b. **"Informal" Administrative Subdivisions** (i.e. Allowance/Target/Advisory Guide). DFAS-IN 37-1, ch. 3, para. 031402; Air Force Procedures for Administrative Control of Appropriations, § 6, para. B. These distributions do not create formal administrative subdivisions. The Army also uses DA Form 1323 to distribute an allowance, but the form is called a Fund Allowance System (FAS) document for this type of distribution.

3. The ADA Prohibition

a. An officer or employee may not make or authorize an obligation or expenditure that **exceeds** the amount available in a **formal administrative subdivision** established by regulations. See 31 U.S.C. §1517(a)(2).[17]

b. So, if a Navy contracting officer awarded a contract obligating FY 2013 O&M Navy funds which exceeds a formal subdivision (of FY 2013 Navy O&M funds), then the contracting officer would have violated the ADA's prohibition against exceeding a formal administrative subdivision. Since a formal administrative subdivision is a division of an apportionment (i.e. a division of the Navy O&M apportionment), it is possible to exceed a formal administrative subdivision without exceeding an apportionment or exceeding an appropriation.

Discussion Problem: On 30 August, the Directorate of Public Works at Fort Tiefort had $170,000 remaining in its O&M allowance. On 2 September, the contracting officer awarded a contract for $170,000 using these funds, but the Defense Accounting Office erroneously recorded this obligation as $120,000. As a result, the Directorate of Resource Management believed that the Directorate of Public Works still had $50,000 left in their O&M allowance. To avoid losing this money, the contracting officer awarded a contract on 20 September obligating $50,000 in O&M. Is there an ADA violation?

[17] The relevant ADA provision states in pertinent part: "An officer or an employee. . . may not make or authorize an expenditure or obligation *exceeding* an (1) apportionment or (2) the amount permitted by regulations prescribed under section 1514(a) of this title" [i.e., a formal subdivision] (emphasis added). *See* 31 U.S.C. § 1517(a).

V. P-T-A VIOLATIONS AND THE ANTIDEFICIENCY ACT (AKA ACTIONS THAT CAN RESULT IN ADA VIOLATIONS)

A. Purpose

1. A violation of the Purpose Statute (31 U.S.C. § 1301(a)) may also lead to a violation of the Antideficiency Act (31 U.S.C. § 1341 or § 1517), but all Purpose Statute violations are not ADA violations. To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (stating that even if the wrong appropriation was charged, the ADA is not violated unless the proper funds were not available at the time of the obligation and at the time of correction and continuously between those two times).[18] See also AF Procedures for Administrative Control of Appropriations, § 10, para. F.4. (providing that a reportable ADA violation may be avoidable if proper funds were available at the time of the original, valid obligation). Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); Funding for Army Repair Projects, B-272191, 97-2 CPD ¶ 141. The November 2010 update to the DOD FMR changed the three-part ADA corrections test to a two part ADA corrections test. Specifically, the DOD FMR provides that even if the wrong appropriation was charged, the ADA is not violated unless the proper funds were not available at the time of the obligation and at the time of correction. DOD FMR.

2. Common "Purpose Statute" Violations - Operation and Maintenance (O&M) Funds.

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[18] The GAO has stated:

> Not every violation of 31 U.S.C. § 1301(a) [the Purpose Statute] also constitutes a violation of the Antideficiency Act. . .Even though an expenditure may have been charged to an improper source [i.e. the wrong appropriation], the Antideficiency Act's prohibitions against incurring obligations *in excess* or *in advance of* available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both 31 U.S.C. § 1301(a) and § 1341(a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriation fund source, although available at the time, was subsequently obligated, making re-adjustment of accounts impossible (emphasis added).

To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422.

a. There is a limitation of $750,000 on the use of O&M funds for construction. This is a "per project" limit. See 10 U.S.C. § 2805(c). Exceeding this threshold may be a reportable ADA violation. See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (holding that where purpose violations are correctable, ADA violations are avoidable); DOD FMR, vol. 14, ch. 2, para. 020404.4A.1 (stating an ADA violation may occur if this limitation is exceeded); cf. AF Procedures for Administrative Control of Appropriations, § 6, para. C.6(a) ("Noncompliance with a statutory restriction on the use of an appropriation is a reportable violation").

b. DOD activities may use O&M funds for purchase of investment items costing not more than $250,000. See Department of Defense Appropriations Act, 2011, Pub. L. No. 112-10, § 8031. Use of O&M in excess of this threshold is a "Purpose" violation and may trigger an Antideficiency Act violation. See DOD FMR, vol. 14, ch. 2, para. 020404.4A.2.

3. The GAO's concept of "correcting" a Purpose Statute violation (thereby avoiding an ADA violation) is not new. *See* 16 Comp. 750 (1910); 4 Comp. Dec. 314 (1897); DOD FMR, vol. 14, ch. 2, para. 020201.D.

4. "Correcting" a Purpose Statute violation. Despite violating the Purpose Statute, officials **can** avoid an ADA violation if *both* of the following conditions are met:

a. **Proper funds** (the proper appropriation, the proper year, the proper amount) **were available[19] at the time of the erroneous obligation**; and

b. **Proper funds were available** (the proper appropriation, the proper year, the proper amount) **at the time of correction for the agency to correct the erroneous obligation**.

5. Funding Correction

[19] A fair interpretation of recent GAO cases would be that "available" as it is applied in the "ADA Correction Test" means an existing balance in an appropriation in either "current" or "expired" status. Interagency Agreements—Obligation of Funds Under an IDIQ Contract, B-308969 (May 31, 2007).

a. Whenever an agency obligates and/or expends improper funds (i.e. the wrong appropriation or the wrong fiscal year), the agency must de-obligate the improper funds and obligate the proper funds. This is called a "funding correction" and must be accomplished whether or not the original obligation results in an ADA violation.

b. For example, if the Air Force obligated Air Force, O&M funds for a construction project with a funded cost of $1 million, then the Air Force has committed a Purpose Statute violation by obligating O&M funds when it should have obligated Unspecified Minor Military Construction Funds. This Purpose Statute violation will result in an ADA violation unless the Air Force can pass both prongs of the ADA correction test. Whether there is an ADA violation or not, the Air Force must accomplish the "funding correction" by de-obligating the improper funds (Air Force, O&M) and obligating the proper funds (Unspecified Minor Military Construction Funds). *See* DOD FMR, vol. 14 ch. 5, para. 0504.

B. Time ("Bona Fide Needs Rule")

1. A violation of the Bona Fide Needs Rule (31 U.S.C. § 1502(a)) also may result in a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. See DFAS-IN 37-1, ch. 8, para. 0803; AF Procedures for Administrative Control of Appropriations, § 10, para. G.

2. To determine whether a Bona Fide Needs Rule violation results in an ADA violation, **follow the same analytical process described above** for determining whether a "Purpose Statute" violation is correctable.

3. Common Bona Fide Needs Rule Violations

a. Formal Contract Changes. Contract changes that are "within the scope" of the original contract must be funded with the appropriation *initially obligated by the contract*; this is true even if the contract change occurs in a fiscal year subsequent to the fiscal year the contract was awarded. Contract changes that are "outside the scope" of the original contract must be funded with the *appropriation that is current at the time the change is made*. See, The Honorable Andy Ireland, B-245856.7. 71 Comp. Gen. 502 (1992). Obligating funds of the wrong fiscal year results in a violation of the Bona Fide Needs Rule, however, this violation may be corrected (thereby avoiding an ADA violation) by applying the ADA 2-part Correction Test.

b. Agencies may not expend *current* fiscal year funds for *future* fiscal year needs. To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962) (stating that a contract for services and supplies with a 3-year base period violated the Bona Fide Needs Rule and the Anti-Deficiency Act because the contract obligated the government in advance of appropriations for the second and third years of contract performance). Such a Bona Fide Needs Rule violation will result in a *per se* ADA violation because this violation cannot pass the ADA 2-part test (if the "proper funds" are future year funds, it is impossible to pass the first prong of the ADA 2-part test—that "proper funds were available at the time of the erroneous obligation"). Note that this analysis differs if you in-appropriately obligated *future* year funds for a *current* year need – in that case you *may* be able to correct with ADA's 2-part test.

C. Amount

1. As previously discussed, making or authorizing obligations or expenditures in excess of funds available in an appropriation, apportionment, or formal administrative subdivision violates the Antideficiency Act. 31 U.S.C. §§ 1341 and 1517.

2. Nevertheless, obligations or expenditures exceeding an informal subdivision of funds do not violate the ADA unless to do so would cause a formal subdivision, an appropriation, or an appropriation to be exceeded.

3. To determine whether an Amount violation results in an actual ADA violation, follow the same analytical process described above used in determining whether a "Purpose Statute" violation is correctable.

4. Common Amount Problems

a. Exceeding the amount available in an informal subdivision, formal subdivision, apportionment, or appropriation. Remember that the ADA only applies at the following levels: formal subdivision, apportionment, and appropriation. Exceeding the amount available in an informal subdivision does not violate the ADA, however, this could lead to an ADA violation if it causes a formal subdivision, apportionment, or appropriation to be exceeded. For example, if a contracting officer at Altus AFB over-obligated its O&M, Air Force allowance (an informal subdivision), that over-obligation would not violate the ADA unless the over-obligation caused an over-obligation of a formal subdivision (in Altus' case, most likely their MAJCOM, AETC), or of an appropriation or apportionment.

b. Over Obligations of Expired and Closed Appropriations. Over obligations arising under expired and closed appropriations may not be paid from current appropriations. If an agency incurs such over obligations, it must report the over obligation to the President and to Congress, and Congress may enact a deficiency appropriation or authorize the agency to pay the over obligations out of current appropriations; absent Congressional authority, a deficiency will continue to exist in the account. Thus, an over obligation of a prior year appropriation is a reportable violation of the Anti-Deficiency Act; this violates the "in excess of" prong of 31 USC § 1341(a)(1)(A). Additionally, charging an over obligation of a prior year appropriation to a current year appropriation violates the Bona Fide Needs Rule. See, The Honorable Andy Ireland, B-245856.7. 71 Comp. Gen. 502 (1992).

Discussion Problem: The Chief of Staff at Fort Tiefort has decided that the post needs a memento for presentation to all of the local officials, foreign dignitaries, and senior US Government personnel that routinely visit the Fort. Determined to make sure that the memento is as unique as Fort Tiefort, the Chief commissions a world-renowned military artist to create a painting that captures the spirit of Fort Tiefort and the highlights of its service to the nation. The artist charges $50,000 for the painting, which will be hung in the main corridor of the headquarters building. The post also purchases 500 prints of the painting (the Chief wants to make sure they don't run out) to use as mementos for presentation for the visitors. Each print costs $200. Fort Tiefort uses its O&M allowance of funds to cover the entire $150,000 cost of this venture. Any fiscal problems here?

Discussion Problem: On 1 July 2012, the Fort Tiefort contracting officer awarded a $690,000 contract for the construction of a storage facility. The contract was funded with FY 2012 O&M funds. Things went smoothly until 8 October 2012 (FY 2013) when the contracting officer

issued what she thought was an *in-scope contract modification* increasing the contract price by $50,000. The general rule for in-scope modifications is that they are funded from the same source as the original project was funded from, so the contracting officer cited FY 2012 O&M funds on the modification. On 28 October 2012, the Army Audit Agency (AAA) conducted a random audit of Fort Tiefort's contracting process and determined that the 8 October modification was *outside the scope of the original contract*. Any fiscal issues here?

Discussion Problem: On 3 August 2012, the Fort Tiefort contracting officer awarded a contract for 100 off-the-shelf computers for a total of $260,000 obligating FY 2012 O&M funds. The computers were to be used in a warehouse complex that would be completed (i.e., ready for installation of the computers) sometime in November 2012 (FY 2013). Any fiscal issues here?

D. Additional Antideficiency Act Related Issues

1. Indemnification Provisions. Generally, the GAO and courts have ruled that "open-ended" indemnification provisions in contracts violate 31 U.S.C. § 1341. See e.g., Union Pacific Railroad Corp. v. United States, 52 Fed. Cl. 730 (2002); United States Park Police Indemnification Agreement, B-242146, 1991 US Comp. Gen. LEXIS 1070, Aug. 16, 1991 (stating that absent specific statutory authority, indemnification provisions which subject the government to indefinite or potentially unlimited liability violate the ADA); Project Stormfury, B-198206, 59 Comp. Gen. 369 (1980). To Howard Metzenbaum, B-174839.2, 63 Comp. Gen. 145 (1984); Assumption by Gov't of Contractor Liability to Third Persons, B-201072, 62 Comp. Gen. 361 (1983); Reimbursement of the State of New York Under Support Contract, B-202518, Jan. 8, 1982, 82-2 CPD ¶ 2; cf. E.I. DuPont De Nemours v. United States, 365 F.3d 1367 (2004) (holding that the Contract Settlement Act of 1944 exempted certain contracts with indemnification provisions from operation of the Antideficiency Act). There are statutory exceptions to this general rule:

   a. Public Law 85-804 (codified at 50 U.S.C. §§ 1431- 1435 and implemented by E.O. 10,789 and FAR Subpart 50.4) allows the Secretary of Defense and Service Secretaries to approve the use of contract provisions which provide that the U.S. will indemnify a contractor against risks that are "unusually hazardous" or "nuclear" in nature.

   b. 10 U.S.C. § 2354 authorizes indemnity provisions for unusually hazardous risks associated with research or development contracts.

c. 42 U.S.C. § 2210(j) permits the Nuclear Regulatory Commission and Department of Energy to initiate indemnification agreements that would otherwise violate the Antideficiency Act.

d. Thus, the above examples are statutory exceptions to "open ended indemnification" provisions that would—absent statutory authority—violate the ADA's prohibition against obligating "in advance of" or "in excess" of the amount available in an appropriation.

2. Judgments. A court or board of contract appeals may order a judgment in excess of an amount available in an appropriation or a subdivision of funds. While the "Judgment Fund" (a permanent appropriation allowing the prompt payment judgments) may be available to pay the judgment, the Contract Disputes Act requires agencies to reimburse the Judgment Fund. See, 31 U.S.C. § 1304(a); 28 U.S.C § 2677; 28 U.S.C § 2414. Reimbursement of the Judgment Fund must be paid from appropriations current at the time of the judgment against the agency. If the judgment exceeds the amount available in the appropriate current year appropriation, this deficiency is not an Antideficiency Act violation. Bureau of Land Management, Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308 (1984) (stating that where current funds are insufficient to reimburse the Judgment Fund there is no ADA violation); Availability of Funds for Payment of Intervenor Attorney Fees, B-208637, 62 Comp. Gen. 692 (1983).

3. Augmentation. An Antideficiency Act violation may arise if an agency retains (aka "augments") and spends funds received from outside sources, absent statutory authority. Unauthorized Use of Interest Earned on Appropriated Funds, B-283834, 2000 US Comp. Gen. LEXIS 163, Feb. 24, 2000 (unpub.) (stating that an agency's spending the $1.575 million in interest it earned after depositing its 1998 appropriation in an interest bearing account was an unauthorized augmentation of funds resulting in an ADA violation). Thus, if an agency improperly receives and retains funds, i.e. interest, from a source other than Congress, then the agency has improperly augmented its appropriation. This augmentation leads to an ADA violation where the agency then expends these additional funds—thereby making obligations or expenditures "in excess" of the amount available in its appropriation.

4. Unauthorized Commitments. Because an unauthorized commitment does not result in a legal obligation, there is no Antideficiency Act violation. Nevertheless, subsequent ratification of the unauthorized commitment could trigger an Antideficiency Act violation. See DFAS-IN 37-1, ch. 9, para. 090211; Air Force Procedures for Administrative Control of Appropriations, § 10, para. E; see also FAR 1.602-3(a).

Discussion Problem: SGT Jones, who has no authority to make purchases on behalf of the government, goes to the local parts store and charges a new diesel engine to the government. Is this a problem?

VI. THE ANTIDEFICIENCY ACT'S LIMITATION ON VOLUNTARY SERVICES. 31 U.S.C. § 1342

A. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.) (stating that when the agency directed contractors to continue performance despite its insufficient appropriated funds, the agency violated the ADA's prohibition against acceptance of voluntary services). **Thus, absent specific statutory authority, the acceptance of voluntary services is a *per se* ADA violation**.

1. Definition. "Voluntary services" are those services rendered without a prior contract for compensation, or without an advance agreement that the services will be gratuitous. Recess Appointment of Sam Fox, B-309301, 2007 US Comp. Gen. LEXIS 97, June, 2007; Army's Authority to Accept Servs. from the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982.

2. **The ADA Prohibition**. An officer or an employee may not accept 'voluntary services' unless authorized by law. 31 U.S.C. § 1342. The statute states in pertinent part: "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." Id.

a. When voluntary services may be accepted:

(1) When authorized by law; or

(2) For emergencies involving the safety of human life or the protection of property.

b. Examples:

(1) In 2005, the DOD Comptroller concluded that the Oregon Army National Guard accepted "voluntary services" in violation of 31 U.S.C. § 1342 when it accepted free services (without authority to do so) from four civilians who helped to conduct training. A general officer was named responsible for this violation. *See* the GAO's ADA Database at gao.gov/legal products/ADA Reports/2005.

(2) In 2007, the GAO concluded that the President's appointment of Mr. Sam Fox as ambassador to Belgium while Congress was in recess where Mr. Fox could not be compensated (per 5 U.S.C. § 5503) until confirmed did **not** constitute "voluntary services" prohibited by 31 U.S.C. § 1342. *See* Sam Fox, 6.

3. Acceptance of voluntary services does not create a legal obligation of the government. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, 1990 US Comp. Gen. LEXIS 735, July 30, 1990; Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). Cf. T. Head & Co. v. Dep't of Educ., GSBCA No. 10828-ED, 9**3-1** BCA ¶ 25,241.

4. The voluntary services prohibition dates back to 1884.[20]

5. Examples of some types of voluntary services authorized by law:

a. 5 U.S.C. § 593 (agency may accept voluntary services in support of alternative dispute resolution).

[20] Recess Appointment of Sam Fox, B-309301, 2007 US Comp. Gen. LEXIS 97, June, 2007. In 1884, Congress first prohibited the acceptance of voluntary services in an appropriations law. Congress enacted this provision after receiving claims for "extra services performed here and elsewhere by [employees] of the Government who had been engaged after hours." *Id.* In 1905, Congress passed a permanent statute in order to "cure [the] abuse" where agencies would "coerce their employees to 'volunteer' their services in order to stay within their annual appropriation." *Id.* Later, these employees would seek payment and then Congress would feel a moral obligation to pass a deficiency appropriation. *Id.*

b. 5 U.S.C. § 3111 (student intern programs).

c. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

d. 10 U.S.C. § 2602 (President may accept assistance from Red Cross).

e. 10 U.S.C. § 10212 (SECDEF or Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

f. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).

B. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs. -- Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

C. Gratuitous Services Distinguished

1. It is not a violation of the Antideficiency Act to accept unpaid services from a person, where an advance written agreement is executed that (1) states that the services are offered without expectation of payment, and (2) expressly waives any future pay claims against the government. See Dep't of the Treasury – Acceptance of Voluntary Services, B-324214, Jan. 27, 2014, 2014 WL 293545; See Sam Fox, 4; Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982; To the Adm'r of Veterans' Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

2. However, an employee may *not* waive compensation (via a gratuitous services agreement) if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int'l Dev. -- Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm'n, B-66664, 26 Comp. Gen. 956 (1947).

3. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program -- State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, 1987 US Comp. Gen. LEXIS 1815, Jan. 2, 1987 (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). Cf. Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

Discussion Problem: For the last year, Ft. Tiefort's Army Command has been pushing subordinate commands to implement the command's Voluntary Services Program (VSP). Authority for the VSP flows from 10 U.S.C. § 1588, which permits the Secretary of the Army to accept voluntary services for programs that support members of the armed forces and their families (such as family support, child development and youth services, and employment assistance for spouses). The VSP has worked so well at Ft. Tiefort that the CG there decided to expand the program. Under Ft. Tiefort's Improved VSP (IVSP), volunteers have painted offices, straightened out the post HQ's filing system, and refurbished a dilapidated old building completely (to include putting on a new roof) using materials donated by local merchants. Any ADA issues?

VII. VOLUNTARY CREDITOR RULE

A. Definition. A voluntary creditor is one who uses personal funds to pay what is perceived to be a government obligation.

B. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. Bank of Bethesda, B-215145, 64 Comp. Gen. 467 (1985).

C. Claims Recovery. U.S. International Trade Commission – Cultural Awareness, B-278805, 1999 US Comp. Gen. LEXIS 211, July 21, 1999 (noting that agencies, not the GAO, now must render decisions on such claims); Lieutenant Colonel Tommy B. Tompkins, B-236330, 1989 US Comp. Gen. LEXIS 1305, Aug. 14, 1989; Claim of Bradley G. Baxter, B-232686, 1988 US Comp. Gen. LEXIS 1511, Dec. 7, 1988; Irving M. Miller, B-210986, 1984 US Comp. Gen. LEXIS 1127, May 21, 1984; Grover L. Miller, B-206236, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine). Cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, 1991 US Comp. Gen. LEXIS, July 22, 1991. See DFAS-IN 37-1, ch. 9, para. 092037. Claims are recoverable if:

1. The underlying expenditure is authorized;

2. The claimant shows a public necessity;

3. The agency could have ratified the transaction if the voluntary creditor had not made the payment.

VIII. PASSENGER CARRIER USE. 31 U.S.C. § 1344

A. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for "official purposes." Federal Energy Regulatory Comm'n's Use of Gov't Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov't Vehicles for Transp. Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not ADA violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm'n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).

B. Exceptions.

1. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.

   a. The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344(b)(8).

   b. The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork, or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).

2. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.

3. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-Work Transp. for Ambassador Donald Rumsfeld, B-210555.5, 1983 US Comp. Gen. LEXIS 115, Dec. 8, 1983.

C. Penalties

1. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).

2. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a $10,000 fine).

IX. SANCTIONS FOR ANTIDEFICIENCY ACT VIOLATIONS

A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a), 1518

1. Officers or employees who authorize or make prohibited obligations or expenditures are subject to administrative discipline, including suspension without pay and removal from office.

2. Military Members "may be subject to appropriate administrative discipline or may be subject to action under the UCMJ." DOD FMR, vol. 14, ch. 9, para. 0901. Civilian employees may be disciplined by "written admonishment or reprimand, reduction in grade, suspension from duty without pay, or removal from office." DOD FMR, vol. 14, ch. 9, para. 0901.

3. **Good faith or mistake of fact does not relieve an individual from responsibility for a violation under this section**. Factors such as "a heavy workload at year end" or an employee's "past exemplary record" generally are relevant only to determine the appropriate level of discipline, not to determine whether the commander should impose discipline. See DOD FMR, vol. 14, ch. 9, para. 0902.

B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519. A **knowing and willful violation** of the Antideficiency Act is a Class E felony. Punishment may include a $5,000 fine, confinement for up to two years, or both. See also DOD FMR, vol. 14, ch. 9, para. 0903.

X. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-11, § 145.2; DOD FMR, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, chs. 3, 4; DON FMPM, pt. E. See also U.S. DEP'T OF ARMY, ANTIDEFICIENCY ACT (ADA) INVESTIGATION MANUAL (Jan. 1998) available at http://asafm.army.mil/Documents/OfficeDocuments/FinancialOps/Guidances/ada//ada-im.pdf.

A. Reporting Suspected Violations.

1. The DOD Financial Management Regulation contains the primary (DOD) guidance regarding the investigation and reporting of ADA violations. According to the FMR, an individual learning of or detecting a suspected ADA violation must report within two weeks the possible violation to his/her chain of command. Upon receiving the report, the military service comptroller "shall evaluate the potential violation for validity and completeness and if it determines a potential violation has occurred, assign a case number for tracking purposes." DOD FMR, vol. 14, ch. 3, para. 0301.[21]

2. It should be noted by Army practitioners that DFAS-IN 37-1 (applying solely to the Army) requires that individuals detecting a possible violation "inform the Director for Resource Management (DRM)" who will then *immediately* notify the commander responsible.[22]

3. Information that must be reported:

a. Accounting classification of funds involved;

[21] In November 2010, Chapter 3, Volume 14 of the FMR was updated and in that update, the FMR deleted the requirement to report preliminary cases to the Office of the Under Secretary (Comptroller) Deputy Chief Financial Officer and clarified when a case number is assigned. DOD FMR, vol. 14, ch. 3, Summary of Changes.

[22] *See* DEFENSE FINANCE AND ACCOUNTING SERVICE, INDIANAPOLIS, REG. 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION para. 040204 (01 May 2008). Rather than report within two weeks to the chain of command (under the FMR), 37-1 requires reporting to the DRM followed by immediate notification to the affected commander, who then has 15 days to send a flash report through the MACOM to the Assistant Secretary of the Army for Financial Management & Comptroller. *Id.* For the remainder of the outline, the text refers to FMR requirements (which apply to all services).

b. Name and location of the activity where the alleged violation occurred;

c. Name and location of the activity issuing the fund authorization;

d. Amount of fund authorization or limitation that allegedly was exceeded;

e. Amount and nature of the alleged violation;

f. Date the alleged violation occurred and date discovery;.

g. Means of discovery;

h. Description of the fact and circumstances of the case;

i. Anticipated dates of completions of the investigation and submission of the report; and

j. The names of work phone numbers of member of the preliminary investigation team.

B. Investigations

1. The first step in the investigation process is a **preliminary review** to gather basic facts and ultimately factually establish whether an Antideficiency Act violation "may have occurred." DOD FMR, vol. 14, ch. 3, para. 0302. The focus of this review is on the potential violation and not on corrective actions. In the Army, the investigating officer is normally appointed by either the installation commander of by the applicable Major Army Command (MACOM) commander. *See* DFAS-IN-37-1, ch. 4, para. 040204. In the Air Force, the investigating officer is normally appointed by the Major Command's Comptroller—although the Air Force Comptroller could assume these duties. See AFI 65-608, Chap 3, para 3.4.

   a. Completion of the preliminary review is usually required within **14 weeks** from the date of the initial discovery. DOD FMR, vol. 14, ch. 3, para. 030202. For Army activities, the preliminary review must be completed within 90 days after discovery of the suspected ADA violation. DFAS-IN 37-1, ch. 4, para. 040204. For the Air Force, the review must be completed and reported to SAF/FMFP no later than 90 days from the review start date. AFI 65-608, para. 3.3.

   b. The preliminary review should focus on the suspected violation and not on corrective actions. *See*, FMR, Chap 3, para 030202.

   c. The results of the preliminary review must be forwarded to the applicable DOD Component Comptroller, and coordinated with the applicable DOD Component office of legal counsel. *See*, FMR, Chap 3, para 030204.

2. Upon considering the preliminary review, if the DOD Component Comptroller involved determines that there is a potential violation, then a **formal investigation** must be initiated within two weeks of the approval of the preliminary review report. DOD FMR, vol. 14, ch. 3, para. 030205. On the other hand, if the DOD Component involves determines that no violation occurred, then the preliminary review completes the investigation process. FMR, vol. 14, ch. 3, para 030204.

a. The purpose of the formal investigation is to determine the relevant facts and circumstances of the suspected violation – if a violation has occurred, what caused the violation what are appropriate corrective actions and lessons learned, and who was responsible. DOD FMR, vol. 14, ch. 4, para. 0401.

b. Typically, the Army Command/Air Force MAJCOM commander approves and appoints an adequately trained and qualified individual(s) to serve as formal investigator(s). DOD FMR, vol. 14, ch. 4, para. 040201; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, para. 4.3. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within **12 months and two weeks** from the date the preliminary report ended (or 12 months from the date the formal investigation began if there is no related preliminary review). DOD FMR, vol. 14, ch. 7, para. 070102.

c. The investigating officer (IO) must address the following questions:

(1) Did the violation occur because an individual carelessly disregarded instructions?

(2) Did the violation occur because an individual was inadequately trained or lacked knowledge to properly perform his or her job? If so, then was the individual or a supervisor at fault?

(3) Did the violation occur because of an error or mistake in judgment by an individual or a supervisor?

(4) Did the violation occur because of lack of adequate procedures and controls? If so, then who was at fault?

(5) Did the violation occur because of other reasons? If so, then who was at fault? DOD FMR, vol. 14, ch. 5, para. 050302.

d. If the IO believes criminal issues may be involved, the investigation should be stopped immediately and the IO should consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. DOD FMR, vol. 14, ch. 5, para. 050302(F).

C. Establishing Responsibility

1. Responsibility for a violation is fixed at the moment the improper activity occurs, e.g., overobligation, overexpenditure, etc.

2. A responsible individual(s) is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Reports may name commanders, budget officers, or finance officers because of their positions if they failed to exercise their responsibilities properly. "However, the investigation shall attempt to discover the specific act -- or failure to take an action -- that caused the violation and who was responsible for that act or failure to take an action." DOD FMR, vol. 14, ch. 5, para. 050302.

3. The investigation report *must* assign responsibility for the violation to "one or more individuals" so that "appropriate administrative or disciplinary action" may be imposed. DOD FMR, vol. 14, ch. 5, para. 050302. Generally, the responsible party (or parties) will be the highest ranking official in the decision making process who had actual or constructive knowledge of precisely what actions were taken and the impropriety or questionable nature of such actions. See To Dennis P. McAuliffe, B-222048, 1987 US Comp. Gen. LEXIS 1631, Feb. 10, 1987.

D. Reporting the Report of Violation (to OSD Comptroller)

1. At the conclusion of the formal ADA investigation, the IO "shall prepare a Report of Violation that documents the results of the investigation pursuant to DOD FMR, Vol 14, ch. 7.

2. OSD Comptroller will consider the report and if it agrees, then it will prepare notification letters to the President, Congress, the GAO. OMB Cir. A-11, para. 145.7; DOD FMR, vol. 14, Ch. 7, para. 0705. As of 8 December 2004, the report must also be transmitted to the Comptroller General. See Transmission of Antideficiency Act Reports to the Comptroller General of the United States, B-304335, Mar. 8, 2005 (citing 31 U.S.C. §§ 1351, 1517(b), as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title II, § 1401, 118 Stat. 2809, 3192 (2004)).

3. Contents of the final ADA report (to OSD). DOD FMR, vol. 14, Ch. 7, figure 7-1.

   a. Administrative information;

   b. Type of the violation;

   c. Identification of the responsible individual(s);

   d. Cause and circumstances of the violation;

   e. Date and description of how violation was discovered;

   f. Disciplinary action taken;

   g. Corrective action taken;

   h. Evidence of willful intent to violate; actions taken to correct the violation; and

   i. Statement of the responsible individual(s), if any.

   j. Statement as to whether the system of administrative control is adequate.

4. The GAO now maintains an online database of all reported ADA violations which are transmitted to it by the federal agencies. *See* www.gao.gov/legal/antideficiency.html. This database includes the letters from the agency head reporting the ADA violation to the President, Congress and the GAO. The letters generally describe the violation, the appropriation involved, and the amount. Normally, the name(s) of the responsible party also appears on the letters.

XI. CONTRACTOR RECOVERY WHEN THE ADA IS VIOLATED

A. Recovery Under the Contract

1. A contract may be null and void if the contractor knew, or should have known, of a specific spending prohibition. Hooe v. United States, 218 U.S. 322 (1910) (contract funded with specific appropriation). Cf. American Tel. and Tel. Co. v. United States, 177 F.3d 1368 (Fed. Cir. 1999).

2. Where contractors have not been responsible for exceeding a statutory funding limitation, the courts have declined to penalize them. See, e.g., Ross Constr. v. United States, 392 F.2d 984 (1968); Anthony P. Miller, Inc. v. United States, 348 F.2d 475 (1965).

3. The exercise of an option may be inoperative if the government violates a funding limitation. The contractor may be entitled to an equitable adjustment for performing under the "invalid" option. See Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327.

B. Quasi-Contractual Recovery. Even if a contract is unenforceable or void, a contractor may be entitled to compensation under the equitable theories of quantum meruit (for services) or quantum valebant (for goods). 31 U.S.C. § 3702; Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Claim of Manchester Airport Auth. for Reimbursement of Oil Spill Clean-up Expenses, B-221604, Mar. 16, 1987, 87-1 CPD ¶ 287; Department of Labor--Request for Advance Decision, B-211213, 62 Comp. Gen. 337 (1983).

C. Referral of Claims to Congress. The GAO may refer non-payable claims to Congress. 31 U.S.C. § 3702(d); Campanella Constr. Co., B-194135, Nov. 19, 1979, 79-2 CPD ¶ 361.

Final Discussion Problem: For years, the Army owned an administrative office building adjacent to Fort Mojave. Several months ago, the Army Command (formerly known as "Major Command") Facilities Inspection Team directed the Commander of Fort Mojave to make several upgrades to the building. Fort Mojave's Engineer obtained funds for the project and forwarded a purchase request to the contracting officer. This document certified that $70,000 O&M was available for the project. Two months later, the contracting officer awarded an $82,000 contract to Constructors, Limited. To date, the contractor has received $40,000 in progress payments. Yesterday, the Engineer learned that the Corps of Engineers had conveyed the building to the State one month before the award of the renovation contract. Any fiscal problems here?

XII. CONCLUSION