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View From Brown Rudnick: The Antideficiency Act—Some Basics Every Contractor Should Know



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The Government Accountability Office (“GAO”) recently released its Antideficiency Act Report covering fiscal year 2013. In these annual reports, GAO lists the instances in the past year in which government officials violated the Antideficiency Act, and describes how, if at all, those officials were punished. It makes interesting reading for about three minutes. But what is the Antideficiency Act, and should contractors care?

Article I, Section 9, Clause 7 of the Constitution, popularly known as the “Appropriations Clause,” says: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This is sometimes referred to as Congress’ “power of the purse,” and it means that Congress gets to tell the president and the executive agencies how much money they are allowed to spend. Congress does this by making appropriations—both general appropriations on an annual basis and appropriations of specific amounts for specific purposes or projects, also known as “earmarks.” Without Congress’ permission, most of the agencies that buy goods and services from contractors can’t spend a dime.

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The Antideficiency Act is the law that implements the prohibition in the Appropriations Clause. That law says, among other things:

An officer or employee of the United States Government or of the District of Columbia government may not (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or] (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

¹ This is why government contracts contain one or both of the clauses at Federal Acquisition Regulation (“FAR”) § 52.23220, “Limitation of Costs,” and/or FAR § 52.232-21, “Limitation of Funds,” whose purpose is to prevent the government from incurring obligations it can’t pay. This also is one of the reasons why cost-reimbursement contracts have cost ceilings and why contracts have clauses that prohibit contractors from taking direction from anyone except the contracting officer. And, most famously, the Antideficiency Act is why the government has to shut down when Congress fails to pass a budget.

In theory, Antideficiency Act violators may be subject to fines, imprisonment, or both. Reportedly, though, no government employee ever has been charged with a crime for spending in excess of an appropriation. More typical consequences include being given extra training, receiving a disciplinary letter, being demoted, or in extreme cases, being fired.

GSA Reports Violation. Here’s an example of a violation and its consequences from this year’s report.²

The General Services Administration (GSA) reported a violation that involved GSA’s Federal Buildings Fund. This violation occurred when GSA entered into a contract on May 8, 2009 with a hotel to provide conference space and accommodations for a conference that was held in October 2010 that included a contractual provision that obligated the government to unlimited liability.

The GSA reported that it removed the employee responsible for the violation from federal service on June 1, 2012. GSA determined that the violation did not in-

¹ 31 U.S.C. § 1341(a).

² <http://www.gao.gov/assets/670/661911.PDF>, at 2.

volve willful or knowing intent on the part of the responsible employee.

Since the violation did not involve willful or knowing intent, no crime was committed. Still being fired is pretty bad. Also, in the future, all conferences and award ceremonies at GSA will have to be reviewed and approved by a senior official.

Contrary to a prevalent misconception, a contractor cannot violate the Antideficiency Act, since the Act's prohibitions are directed only to government officials.³ But a contractor can lose money if it is ignorant of the Antideficiency Act and lacks at least a basic understanding of the appropriations process. For example, a contractor that worked through the government shutdown assuming that it would be paid later may have been in for a rude surprise. Likewise, if a contractor knew that Congress had appropriated only \$1 billion for a specific program, but the contractor spent more than that amount, the contractor could have trouble getting paid. (In both cases, there may be arguments that the contractor can make. The point is simply that contractors need to know how the appropriations process can affect them, because the government cannot write a blank check.)

On some occasions, contractors have entered into contracts with federal agencies only to learn later that

³ See 31 U.S.C. § 1341(a).

the contracts were illegal, and therefore void, because they violated the Antideficiency Act. This would be the case, for example, if the contract includes an open-ended indemnification by the government that was not authorized by law. Contractors hoping to benefit from such an indemnification should make sure it fits within a law that provides authority for that indemnification—for example, Public Law 85804 or the Price Anderson Act Amendments law.⁴

A U.S. Department of Justice (“DOJ”) opinion issued about two years ago⁵ noted that open-ended indemnifications are common in online social media terms of service. Would such an indemnification be binding? Also, would the employee who clicked the “I Accept” button be violating the Antideficiency Act? In an interesting twist, DOJ opined that government employee would not violate the law because his or her act would be meaningless. Legally, only a contracting officer can bind the government to a contract; thus, online terms of service accepted by anyone other than a contracting officer aren't binding on the government. Now there's a cautionary tale for software contractors who think the government is accepting their license terms.

⁴ See *Parsons Transp. Group, Inc. v. United States*, 84 Fed. Cl. 779 (2008).

⁵ <http://www.justice.gov/olc/opiniondocs/aag-ada-impls-of-consent-by-govt-empls.pdf>