



**INTERACTING WITH
CONTRACTORS AND THE
ANTI-DEFICIENCY ACT**

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OBJECTIVE

To train FLW personnel on several fiscal law and ethical issues that can arise where personnel work with and interact with vendors and contractors.



AGENDA

- Background
- Voluntary Services
- Gratuitous Services
- Unauthorized Commitments
- Personal Services



REFERENCES



- Title 31 United States Code Section 1342
- FAR 1.602 Unauthorized Commitments
- FAR 3.104 Procurement Integrity
- Title 5 Code of Fed. Regulations Sections 2635.101, 2635.202
- Title 10 United States Code Section 1588
- Command Policy 83-07, *Contacts With Industry*
- TRADOC Memo – *SUBJECT: Army Policy for Civilian Hiring and Initiation/Continuation of Contracts for Service Personnel, dtd 23 Mar 06 (4 updates)*
- SAMR-FM Memo – *Implementation of Section 324 of the 2008 NDAA, dtd May 08, 2008*

Background

- An HQDA investigation was recently completed of an alleged Anti-Deficiency Act violation involving FLW personnel.

Voluntary Services

- Investigation resulted in a finding that Installation personnel had acted in violation of the voluntary services prohibition and that the violation had cost the government damages running into six figures.

Gratuitous Services

Unauthorized Commitments

Personal Services

- Apart from any action taken against individuals; training has been mandated for all personnel who interact with contract personnel and vendors in the normal scope of their duties.

Background

Voluntary Services

- **Voluntary services:**
 - services requested and/or provided without any contract or other legal mechanism;
 - defining a legal relationship and the extent of the government's obligation (if any) to compensate for the services.
 - **furthermore, a voluntary service.....**

Gratuitous Services

Unauthorized Commitments

Personal Services

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

- occurs where the service is solicited or readily accepted without discussion with the volunteer of terms, costs, compensation, etc.\
- the focus of the statute is on preventing after the fact claims caused by employees accepting services without first negotiating terms/or ensuring that funds are available.

EXAMPLE

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

- We need a new device.
- Govt. employee with no procurement authority asks vendor if they have something that will accomplish this need.
- Vendor says no but he can create one quickly.
- Employee says "great!"
- No discussion one way or the other about compensation or government obligations only vague allusions that if you make them we will want at least X number but no definite terms.
- Vendor creates product and submits bill for time and materials...Or states "where's my order for X number of the devices"?
- **ISSUE??????...** Requesting or accepting voluntary services violates both ethical standards and federal fiscal laws.

ETHICS STANDARD

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

- 5 CFR 2635.101: Basic Obligations of Public Service
- **Principle (6):** Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

FEDERAL STATUTORY LAW

Background

Voluntary Services

Gratuitous Services

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Personal Services

Anti-Deficiency Act

- The solicitation and/or acceptance of voluntary services or personal services except as otherwise authorized by law are automatic violations of the Anti-Deficiency Act regardless of whether a claim is ever submitted by the party performing the services.
- **Criminal Remedy:** 31 U.S.C. Section 1350
 - Imprisonment for up to 2 years if violation is knowing
 - Fine up to \$5,000.00
- **Administrative:-** 31 U.S.C. Section 1349
 - Suspension Without Pay
 - Removal from Office

10 U.S.C. Section 1342

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

An officer or employee of the U.S. Government...may not accept voluntary services or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or protect of property where the danger of injury or destruction is imminent if immediate action is not taken.

Elements of a Voluntary Services Violation

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

- Certain person was an officer or employee of the United States;
- That such person requested or affirmatively accepted voluntary services for the government;
- That the officer or employee had no authority in the law to accept such services; and
- That the services were not required to avoid an emergency involving imminent danger to human life or destruction of property.

KEY CONCEPTS

- Background
 - Requesting or accepting voluntary services violates both ethical and criminal-fiscal laws.
- Voluntary Services
 - Only Contracting Officers and other personnel given specific procurement authorization can enter into or administer contracts and other forms of agreement.
- Gratuitous Services
- Unauthorized Commitments
 - Other personnel such as Contracting Officer's Representatives (CORs) only have the authority given by the Contracting Officer.
- Personal Services
 - And very seldom can Contracting Officers act absent a contract and funds already committed and obligated.

KEY CONCEPTS (contd.)

- Background
 - A violation of the voluntary services rule can occur without a finding that the volunteer is actually entitled to compensation.
- Voluntary Services
- Gratuitous Services
- Unauthorized Commitments
 - Where a claim occurs after-the-fact there is a possibility of additional criminal violations of other Anti-Deficiency Act statutes if the services:
 - have already been accepted, and
 - funds in the right amount and account are not available OR the service is one not authorized to be procured.
- Personal Services

VOLUNTARY CREDITOR v. VOLUNTARY SERVICES

- Background
 - Voluntary services does not include voluntary creditors, e.g. a person who provides a service in hope of being compensated without any previous requests from a government officer or employee.
- Voluntary Services
- Gratuitous Services
- Unauthorized Commitments
 - However, once an employee discovers that voluntary services are being provided, the acceptance of those services already rendered and any additional services after notification could be deemed the acceptance of voluntary services.
- Personal Services

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

The term voluntary services does not include gratuitous services.

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

A **gratuitous service** is one done pursuant to a written agreement providing that the actor provides such service without any expectation of compensation or reimbursement from the United States.

KEY CONCEPTS

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

- There is no such thing as an oral gratuitous service agreement. In the absence of an approved written agreement such services would be voluntary services.
- Only a Contracting Officer or a person authorized by a Contracting Officer may execute gratuitous service agreements.

COMMON TYPES

Background

Voluntary
Services

**Gratuitous
Services**

Unauthorized
Commitments

Personal
Services

- Vendor Demonstration Agreements
- Vendor Free Training Agreements

LEGAL IMPLICATIONS

Background

Voluntary
Services

**Gratuitous
Services**

Unauthorized
Commitments

Personal
Services

- 5 CFR Section 2635.202
– *Thou shall not accept vendor promotional training contrary to applicable regulations, policies or guidance relating to the procurement of supplies and services.*
- Command Policy Memo 83-07, Contacts With Industry

NOTE

Background

Voluntary
Services

**Gratuitous
Services**

Unauthorized
Commitments

Personal
Services

Even where a Contracting Officer is involved and an agreement is reduced to writing there are significant restrictions on the acceptance of gratuitous services.

CIVIL SERVICE LAWS

Background
Voluntary Services
Gratuitous Services
Unauthorized Commitments
Personal Services

- By law civil service employees must be paid. They cannot waive their right to compensation.
- Gratuitous services cannot be accepted from an individual to perform services generally performed for pay by civil service employees.
- Accepting such services would violate the prohibition on augmentation of appropriations.
- **Therefore.....**

Background
Voluntary Services
Gratuitous Services
Unauthorized Commitments
Personal Services

...We cannot view gratuitous services as a partial solution where we have personnel slots that are authorized but not affordable. The general mission requirements must be carried out by paid employees or contractors.

EXCEPTIONS

Background
Voluntary Services
Gratuitous Services
Unauthorized Commitments
Personal Services

- 10 USC Sec. 1588
 - permits DOD agencies to accept voluntary services that principally support programs that assist individual Soldiers and their families.
 - Examples
 - Direct Medical, dental services
 - Family support (FRGs)
 - Legal Assistance/Tax preparation
 - Religious programs
 - Library and education programs
 - Housing Referral
 - MWR (NAF Programs)

EXCEPTIONS (contd.)

- Background
 - Voluntary Services
 - Gratuitous Services
 - Unauthorized Commitments
 - Personal Services
- 10 USC Sec. 1588
 - Volunteer services per this exception may be accepted but:
 - Requires a written agreement and implementation regulations.
 - DOD and DA has implemented regulations
 - FLW: volunteer coordination function is assigned to DMWR.

UNAUTHORIZED COMMITMENTS

- Background
 - Voluntary Services
 - Gratuitous Services
 - Unauthorized Commitments
 - Personal Services
- Any communication or promise to a non-federal entity purporting to bind the Government made without the authority to do so.

- Background
 - Voluntary Services
 - Gratuitous Services
 - Unauthorized Commitments
 - Personal Services
- A criminal voluntary services violation **cannot** be ratified by a contracting officer. Some **unauthorized commitments** can be ratified...

RATIFICATION

- Background
 - Correctable unauthorized commitment OCCURS:
 - an employee who lacks authority attempts in good faith to enter a contract;
 - an up-front meeting of the minds as to all contract terms;
- Voluntary Services
 - funds are available and were available at the time the unauthorized commitment occurred;
- Gratuitous Services
 - the matter involves an item or service authorized for procurement;
- Unauthorized Commitments
 - the government has received a benefit; and
 - the ratification is limited to amounts authorized by regulation.
- Personal Services

LIMITATIONS ON RATIFICATION \$\$

- Background
 - There is no legal contract; therefore, no legal amount.
- Voluntary Services
- Gratuitous Services
 - The amount that can be ratified is limited to the benefit to the government.
- Unauthorized Commitments
 - The amount cannot exceed the amount we would have paid had proper procurement procedures been followed.
- Personal Services

ACTUAL CASE

- Background
 - Employee committed to printing of conference materials and agreed to pay \$4000.
- Voluntary Services
 - Vendor was to use more expensive paper and more colors than are authorized per the print regulation. Items received and used.
- Gratuitous Services
- Unauthorized Commitments
 - Installation printing office cost to print conference material using govt standards - \$900.
- Personal Services
 - **RESULT....**
 - Government ratified \$900
 - Balance (\$3100)???: treated as a personal expense of the employee

PERSONAL SERVICES: The rendering of services on a personal basis as opposed to through the use of others.

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

PERSONAL SERVICES CONTRACT: A contract that, by its terms or as administered, makes the contractor personnel appear to be, in effect, Government employees. Generally we are prohibited from entering into personal service arrangements although there a few exceptions.

31 USC 1342 – Personal Services

Background

Voluntary Services

Gratuitous Services

Unauthorized Commitments

Personal Services

- Sub-type of voluntary services which usually occurs where we solicit/accept services from a contractor not covered by a contract.
- It generally occurs because we treat a contractor's employees as our own employees...there is NO "Other Duties as Assigned"
- The violation can occur at inception where the SOW calls for such services but usually arises during contract performance.

EXAMPLE

Background

Voluntary Services

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Personal Services

- Contract scope of work calls for the contractor to provide staff to perform tasks A, B & C.
- Once the contract starts, the Requiring Activity (RA), without notifying the KO and modifying the scope of work, tells the contractor employees "to perform tasks D, E & F instead of, or in addition to A, B & C."
- The RA's action violates the statute regardless of whether the contractor files a claim for the uncontracted work.

TRADOC POLICY MEMO

Background

Voluntary Services

Gratuitous Services

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- TRADOC requires approval to enter into new Service Contracts.

- An approval of a contract to perform tasks A, B & C, is not approval to contract for tasks D, E & F.

- Hence a personal services violation can trigger a regulatory violation as well as a statutory one.

DA MEMO – IMPLEMENTATION OF SECTION 324, NDAA

Background

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Commands must address in requests to initiate service contracts the steps they have or will take to ensure that personal service violations will not occur if the contract is approved.

“SO WHAT??”...

Background

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Gratuitous Services

Unauthorized Commitments

Personal Services

UNDER SECRETARY OF DEFENSE
1000 DEFENSE BUILDING
 WASHINGTON DC 20301-1100






\$2,837.80

POTUS

The President
 The White House
 Washington, DC 20500

Dear Mr. President:

This letter is to report a violation of the Antideficiency Act, as required by Title 31, United States Code, section 1331.

The report of the Antideficiency Act by the Department of the Army, in case number 02A03. The violation totaling \$2,837.80 occurred in fiscal year 1997 through 2000. Operation and Maintenance, Army appropriation. The violation occurred when personnel associated with the United States Army Intelligence and Security Command, Fort Belvoir, Virginia, improperly used appropriated funds to purchase bottled water. Because bottled water is considered a personal expense, the use of appropriation funds for an incorrect purpose was a violation of Title 31, United States Code subsection 1301(a) that resulted in a violation of Title 31, United States Code subsection 1341(a)(2)(A).

Enclosed is a report from the Deputy Assistant Secretary of the Army (Financial Operations). The following individual was named responsible for the violation:

Major Susan Benzil

The Army determined that no disciplinary action should be taken against the responsible individual. The Army concluded there was no knowing or willful violation of the Antideficiency Act by the individual named responsible for it.

Corrective action was taken to immediately cease the use of appropriated funds to purchase bottled water.




QUESTIONS?
