FEDERAL FINANCE: WHAT NOT TO DO!

By E. Steven Potts

Sound financial management practice is fundamentally based on a solid understanding of appropriations law and secured by strong management controls, and of course, well-trained personnel. High-quality training is the first defense against financial calamity. This paper addresses a most glaring problem: **Antideficiency Act (ADA) violations.**

The 2017 Antideficiency Reports are now a matter of public record! It contains page after page of reports — to the President, Speaker of the House, and President of the Senate — on the inability (or unwillingness) of federal agencies to follow law, rule and regulation.

My continuing question on Antideficiency Act violations is: **Why? Why? Why?**

- ***Why*** do ADA violations ranging to hundreds of millions of dollars occur year after year?
- ***Why*** does Congress consider the ADA "the cornerstone of financial control over the executive branch," yet continue to tolerate these violations — year after year?
- ***Why*** has **NO** federal employee ever been prosecuted, much less convicted under the ADA?

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Many years of root cause analysis by the author suggests these violations continue to occur for one or a combination of these three reasons:

1. *Managerial Negligence* – which I define as "the continuing failure to cure gross ignorance," or
2. *Hubris* – unmitigated arrogance, "It's MY money and I will do as I please." or
3. *Lack of proper training*, and the failure to correct it

I will leave it to you, reader, to form your own opinion as to the root cause in the cases we will discuss. Let's begin by examining a couple of the more glaring violations reported in 2017:

First, remember that reports in 2017 may not have actually happened in 2017. The law requires that ADA violations be reported "immediately." As is the case with the first violation we will discuss, many are reported several years after they have actually happened. Why is this? Well, no one wants to report themselves, do they? Sometimes it takes years of Office of Inspector General (OIG), Government Accountability Office (GAO), or auditors' investigations to discover them. Second, remember, in 2017 the federal government spent over four trillion dollars, averaging more than 10 billion dollars a day in spending. At times, several million transactions occur in a single day. This makes errors, omissions, and even criminal actions decidedly hard to find in the great mass of transactions. Finally, as in our first case here, they occur sometimes in highly classified or "sensitive" environments, and the perpetrators falsely believe they won't be found out, because "it's classified."

Having at one time had "all" the clearances one could have in the Department of Defense, let me reassure the reader on the issue of "they won't find out because it's classified!" I learned that not all auditors have all clearances, but some auditors can get any clearance you can get and so can GAO! Some of the more juicy ADA's have occurred in highly classified programs that are now public as a result.

Our first case, **GAO ADA-01-2017**, occurred in the Army Intelligence and Security Command, one of those highly classified agencies.

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So, once the misappropriation of funds was discovered, Army was able to bail itself out using the correct (RDT&E) funds, thus, no ADA violation actually occurred. Score one for the Army there!

To quote GAO:

The Army G2 improperly obligated OMA funds for two contract task orders intended to integrate eleven intelligence quick reaction capabilities into a standard Intelligence Community cloud computing environment. The task orders should have been funded with Research, Development, Test and Evaluation (RDT&E) funds. The Army G2 identified sufficient unobligated FY 2012 RDT&E funding and executed a cost transfer to correct the accounting records. This aspect of the potential violation was corrected with substitution of RDT&E funds.

Operations and Maintenance, Army (OMA) funds were appropriated to the Army for Operations and Maintenance, NOT anything else. Development requires the use of Research, Development, Testing and Evaluation appropriations. So, once the misappropriation of funds was discovered, Army was able to bail itself out using the correct (RDT&E) funds, thus, no ADA violation actually occurred. Score one for the Army there! But why did this problem occur in the first place? The law is clear: Since 1809, the Purpose Statute has limited the use of federal money to what Congress intends it to be used for. In this case, Development must be done with money appropriated for Research, Development, Testing and Evaluation, **NOT** from Operating and Maintenance funds.

So, problem solved! Army was off the hook! But...**NOT SO FAST!** Another problem was discovered in the same case.

The Army G2 also violated section 8076 of the FY 2012 Department of Defense Appropriations Act. This section established a new start prohibition against funding programs, projects, or activities (PPA) that had not previously been identified to Congress. Section 8076 prohibits making funds available for obligation for a new PPA through reprogramming unless the PPA must be undertaken immediately in the interest of national security and only after written prior notification to the Congressional Defense Committees. The Army G2 failed to meet these two preconditions. The Army G2 failure to provide the required congressional notice resulted in a violation of both section 8076 and 31 U.S.C. 1341(a)(l)(A).

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What is that? Congress actually expects agencies to **READ** the laws that Congress passes? Can't we just take that money and use it any way we want?

NO...When Congress places a specific restriction on the use of money, it must be followed; and Congress can place any restriction they want unless it is prohibited by an independent constitutional bar (South Dakota v. Dole, 483 U.S. 203 (1987).

In this case, the Army could not use any reprogrammed money for new Programs, Projects or Activities unless necessary in the immediate interests of national security, AND the Congressional Defense committees were notified in advance.

By failing to notify Congress **IN ADVANCE**, the Army used the money illegally. Congress **NEVER** appropriates money for illegal activities! Using money illegally violates the Anti-Deficiency Act, and it is a **FELONY** if one is convicted of doing so.

So, what was the outcome? The report spells it out:

The Senior Science Advisor, INSCOM; Deputy Director Futures, INSCOM; Director, Resource Integration, Headquarters Department of the Army (HQDA) G2; and Chief, Budget & Execution Division, Resource Integration, HQDA G-2, were found responsible for the 31 U.S.C. 1341(a)(l)(A) violations. The Deputy Administrative Assistant to the Secretary of the Army issued Memorandum of Counseling to the Deputy Director Futures, INSCOM; Director, Resource Integration, HQDA G2; and Chief, Budget & Execution Division, Resource Integration HQDA G-2. The Senior Science Advisor, INSCOM was not disciplined. The individual is no longer employed by the U.S. Government. The violations contained no willful or knowing intent on the part of the responsible individuals to violate the ADA.

In summary, the Army "got the job done," but three senior officials' careers were substantially impacted, and one is no longer with the government. I, however, must ask one simple question: How on earth does one get to the elevated level of these individuals, with their massive responsibilities, without (apparently) knowing anything at all about the proper use

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of federal money? How can that be? Even the most junior GS-7 who has had a course in Federal Appropriations Law knows better!

That leads us to Lesson Number One in Federal Finance:

"No money shall be drawn from the (U.S.) Treasury except in consequence of Appropriation made by law." (United States Constitution, Article I, Section 9, Clause 7).

The APPROPRIATIONS ACT — A FEDERAL LAW — gives you the money to use. It specifies the conditions you must follow for using the money. Congress writes that **LAW** and the **PRESIDENT** signs it into **LAW**. **READ** the **APPROPRIATIONS ACT** that gives you the **MONEY**! Then **FOLLOW IT**!

Our second lesson is illustrated by both the above Army example, and by a similar incident at the Department of Health and Human Services – Indian Health Service, as stated by the official report:

A violation of section 1341 of title 31 U.S.C. occurred during fiscal year 2015 in the amount of $28,416.21 in account 75-15-0390 of the Indian Health Service (IHS) when appropriated funds were used in violation of an appropriations provision, section 749 of division D of Public Law 111-8, which provides that:

"[e]ffective January 20, 2009, and for each fiscal year thereafter, no part of any appropriation contained in this or any other Act may be used for the payment of services to any individual carrying out the responsibilities of any position requiring Senate advice and consent in an acting or temporary capacity after the second submission of a nomination for that individual to that position has been withdrawn or returned to the President."

The violation occurred when Dr. Yvette Roubideaux carried out the responsibilities of the Director of IHS after her nomination for a second term had been returned twice by the Senate without action.

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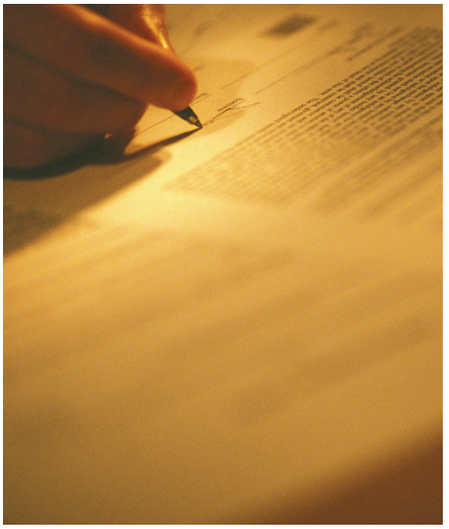

...it is not sufficient to simply use the money Congress appropriates to the agency to do the agency's business. The agency must also follow EVERY restriction contained in the Appropriations Act (and any other law applicable to the agency).

Dr. Roubideaux was nominated to a second term as Director of IHS in 2013 and 2014. Her nomination was returned a second time on December 16, 2014, after which the IHS annual appropriation was no longer available to pay her salary to carry out the responsibilities of the position. However, since neither IHS nor other individuals in the Department of Health and Human Services (HHS) with responsibility for nominations were aware of this limitation, Dr. Roubideaux continued carrying out the responsibilities of this position until February 10, 2015, when HHS learned of the applicability of this limitation.

As HHS found from this violation, it is not sufficient to simply use the money Congress appropriates to the agency to do the agency's business. The agency must also follow **EVERY** restriction contained in the Appropriations Act (and any other law applicable to the agency). In this case, one must ask "**WHY** did the agency not inform the Human Resources Office (or others responsible for processing nominations) of the restrictions on payment for persons whose nominations had been twice returned by the Senate?"

This leads us to Lesson Number Two, when dealing with federal money:

Under our Constitution, Congress writes our laws and is allowed to make such laws as strict or as loose as it chooses. As mentioned in the case above, Congress may place any restrictions it chooses on the use of appropriated funds (unless those restrictions violate the Constitution). **FOLLOW** and **ADHERE** to **ANY** and **ALL** restrictions found in the law regarding the use of your appropriated funds!

It is the agency's (meaning the head of the agency) responsibility to inform its officers and employees of restrictions on the use of federal money. Failure to do so is a clear indication of lack of internal controls, and may lead to violations of law! However, it is also incumbent upon any federal employee who uses federal funds to know the restrictions he or she may face in the use of those funds.

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For **YOU**, dear reader — if you are using federal money — **READ** the **LAW** and stick to the script. Use it only for what Congress intends it be used, and follow **EVERY** restriction in the law on the use of that money!

ABOUT THE AUTHOR:

Steve Potts is a professional management consultant and trainer with thirty years of experience advising and training executives in industry and government. He is President of Professional Services International, Inc., a firm specializing in enhancing government fiduciary responsibility and fiscal performance.

Mr. Potts has eleven years' active federal experience, including service with the U.S. Navy, the Office of the Secretary of Defense and as a Presidential Appointee with the Department of Energy. He has over twenty years of training and teaching experience, both across the U.S. and internationally, specializing in appropriations law, federal contracting, program and project management, performance measurement, auditing, budgeting, finance and accounting, and management analysis.

Mr. Potts is a Certified Defense Financial Manager(CDFM), and serves as a court-appointed fiduciary in Virginia. An acknowledged expert in Federal Appropriations Law and Federal Acquisition Regulations, Mr. Potts has trained worldwide for the U.S. Department of State Foreign Service Institute, the U.S. Agency for International Development (USAID), Graduate School USA, and the U.S. Department of Defense, and is a frequent lecturer with the U.S. Foreign Service Institute , the Federal Acquisition Institute, and the VA Acquisition Academy. He is President Emeritus of his U.S. Naval Academy class.

Mr. Potts has worked in 47 nations, 33 U.S. federal agencies, and in support of several state governments, and the District of Columbia, as well as performing projects for more than 100 companies worldwide. He has extensive public speaking experience, both in the U.S. and internationally.

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