

DON'T THINK THAT GAO JURISDICTION EXTENDS TO QUESTIONS OF FISCAL LAW OR THE ANTI-DEFICIENCY ACT

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The Government Accountability Office (“GAO”) has bid protest jurisdiction of violations of procurement laws and regulations, and does not generally extend to questions of fiscal law or regulation. Don’t make the mistake of thinking that this jurisdiction extends to questions of fiscal law or the Anti-Deficiency Act. Indeed, in an Army procurement for web-based postage, *Pitney Bowes, Inc.*, B-416220, July 11, 2018, recently made clear that its 31 U.S.C. § 3552, which provides GAO with its authority to consider and make recommendations on bid protests, states as follows: “A protest concerning an alleged violation of a *procurement statute or regulation* shall be decided by the Comptroller General [GAO] if filed in accordance with this subchapter.” (Emphasis added).

In its protest, Pitney-Bowes had argued that the proposal submitted by the awardee of the contract, Stamps.com, violated fiscal law and regulation by proposing to purchase postage in advance for the agency, and then later billing the agency for that postage. This proposal, according to the protester, amounted to an unlawful augmentation of the agency’s appropriation—i.e., that the agency was incurring obligations of funds that had not been appropriated by the Congress, and was therefore violating the Antideficiency Act.

The Antideficiency Act prohibits federal agencies from obligating or expending federal funds in advance or in excess of an appropriation, and from accepting voluntary services. The Act prohibits federal employees from:

- Spending or obligating funds in excess of amounts available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).
- Obligating the government to pay money before funds have been appropriated by Congress. 31 U.S.C. § 1341(a)(1)(B).
- Accepting voluntary services for the United States, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.
- Making obligations or expenditures in excess of apportionments permitted by agency regulations. 31 U.S.C. § 1517(a).

Federal employees who violate the Antideficiency Act may be subject to administrative actions, or to fines, imprisonment, or both. See <https://www.gao.gov/legal/appropriations-law-decisions/resources>.

The allegation of Antideficiency Act violation was dismissed by the GAO, citing *NTELX, Inc.*, B-413837, Dec. 28, 2016, 2017 CPD ¶ 13 n. 2. The GAO noted that allegations of violations of fiscal laws, including the Antideficiency Act were not procurement statutes and not within GAO’s bid protest jurisdiction. Although the GAO dismissed this portion of the protest, it considered the protester’s other allegations of procurement statutes and laws (the awardee’s technical approach violated regulations, agency erred in finding a quote technically unacceptable

and agency failure to adequately document the evaluation record) were considered and denied by the GAO.

The Takeaway: Do not include allegations of agency violations of the Antideficiency Act (or any other non-procurement law or regulation) in a GAO protest. Such allegations will be dismissed.

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