

Maximizing Recovery Under Federal Grants and Contracts Following Trump Administration Executive Orders

Client Alerts

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The Trump Administration's "temporar[y] pause" in federal funding shocked federal funding recipients across a range of industries. Announced by the Office of Management and Budget (OMB), and ostensibly to reassess all federal financial assistance programs, the pause set off a scramble to understand its impact and protect critical sources of funding. Lawsuits and injunctions followed, and OMB changed course. But as of this writing, agencies continue to notify recipients that no federal money will be disbursed under their awards for the foreseeable future. In addition, the Administration has issued a series of executive orders which, among other things, call for an end to federal funding for Diversity, Equity and Inclusion (DEI) initiatives. Various types of contracts, including those for foreign aid with or without a nexus to DEI efforts, were terminated.

Fund recipients are alarmed by the prospect of funding delays and potential terminations for programs that support vital and previously uncontroversial missions. Although many grant recipients and contractors are currently focused on challenging the propriety of these orders, efforts will soon shift to recovering from the government the costs imposed by the funding pause and terminations.

This alert identifies bases to challenge these unprecedented actions while also offering strategies to maximize recovery.

Blanket funding pauses and terminations may violate applicable grant regulations

First things first: the funding "pause" and partial terminations may violate applicable law governing federal grants.

As a general matter, an agency is bound by its own regulations and may not ignore regulations that are in effect. Grant recipients are subject to the governing regulations set forth in 2 C.F.R. Part 200, including agency-specific versions of those regulations.

These regulations prohibit agencies from unilaterally withholding, pausing, or terminating grant funding except in narrow, limited circumstances, none of which apply to terminations or suspensions issued pursuant to these executive orders. Similarly, grants that "no longer effectuate[

] the program goals or agency priorities” can only be terminated “pursuant to the terms and conditions of the Federal award” and “to the extent authorized by law.”^[1] 2 C.F.R. § 200.340(a)(4). Mass suspensions and terminations do not, on their face, comport with these regulations.

Payment suspensions also likely violate 2 C.F.R. § 200.305(b), which requires the federal government to “minimize the time elapsing between the transfer of funds from the Federal agency or pass-through entity and the disbursement of funds by the recipient or subrecipient.” In particular, “[p]ayments for allowable costs *must not be withheld at any time* during the period of performance unless required by Federal statute [or] regulations”, or in the event that the recipient violated the terms of the award or is delinquent in a debt to the United States.^[2]

None of the exceptions that would permit withholding apply here. The Administration has never claimed, for example, that recipients are noncompliant with award terms or are otherwise delinquent. As such, federal statutes and regulations do not require the withholding of funds; indeed, they prohibit it.

For similar reasons, payment suspensions may violate 2 C.F.R. § 200.339, which permits the government to withhold payments only when it “determines that noncompliance” with “the U.S. Constitution, Federal statutes, regulations, or terms and conditions of the Federal award ... cannot be remedied by imposing specific conditions.” In that case, the government may “[t]emporarily withhold payments until the recipient or subrecipient takes corrective action.”^[3] Again, there is no suggestion of noncompliance with federal statutes, regulations, or the terms of relevant grant awards.

Additionally, payment suspensions may violate the general regulatory scheme governing grant terminations, including 2 C.F.R. § 200.340. As relevant here, an agency may terminate a grant award “*pursuant to the terms and conditions of the Federal award*, including, to the extent authorized by law, if an award no longer effectuates the program goals or agency priorities.”^[4] But federal law also requires that an agency “clearly and unambiguously specify all termination provisions in the terms and conditions of the Federal award.”^[5] And grant awards generally do not permit termination on the basis of shifting “program goals or agency priorities.” New presidential policy priorities are thus unlikely to provide a valid basis for termination.

Further, the government’s actions may constitute breaches of contract in certain cases. Grant agreements, at their core, are contracts with the government.^[6] Those contracts incorporate the federal regulations discussed above, in addition to the mandatory terms and conditions in the award itself—violating those provisions, therefore, may amount to breach of contract. Further, the government is bound by an implied duty of good faith and fair dealing, and the government breaches that duty when it fails to meet the reasonable expectations of the grant recipient “regarding the fruits of the contracts.”^[7] Unilateral and indiscriminate grant termination is a quintessential example

of a violation of reasonable expectations, in contravention of the government's duty to operate in good faith.

Operational considerations and grant dispute procedures

Recipients of federal funds are rightly concerned about the fallout from potentially unlawful government action. Some recipients are now faced with the choice of whether to stop services or wind down operations, and in short order, those recipients will pivot to maximizing recoveries from funding freezes or terminations.

Operationally, some organizations may be able to continue operations with severely reduced or no federal funding, but appropriate accounting safeguards may become necessary. For example, new accounts and charge codes should be established for costs relating to non-federally supported activities. Finance professionals should assess overhead allocations to ensure that newly prohibited activities are no longer funded by government-reimbursed overhead. Recipients should take these steps immediately, or at least before their next invoice submission to the government. In the event that requests for payment have been issued before taking these steps, those requests should be rescinded, revised, and resubmitted.

Organizations that discontinue operations have more work ahead. Among other tasks, they will need to:

- Assess the entirety of the project's supply chain, and terminate whatever is possible;
- Separate and safeguard government and private property, including memorializing which intellectual property rights are affected by the government's actions;
- Settle outstanding bills;
- Keep detailed records of all costs reasonably related to termination (including legal and accounting costs); and,
- Draft and submit to the government a catalogue of and justification for reasonable costs associated with termination.

Grant recipients faced with termination will negotiate allowable termination costs with the agency, and recipients may need to navigate related disputes. The procedure for pursuing such disputes varies between agencies, and it is less uniform than the established dispute resolution procedure for FAR-based contracts.

Some agency regulations establish procedures for resolving post-award disputes with grantees and cooperative agreement recipients. These administrative processes can help scrutinize adverse administrative actions, particularly in factually complex matters. However, it is unlikely that a dispute initiated under these processes will result in an agency reversing a termination decision applicable

to numerous grant recipients. Even so, a grantee or cooperative agreement recipient may leverage these procedures to avoid complete termination in favor of termination in part.

For example, National Institutes of Health (NIH) regulations include grant and cooperative agreement appeal procedures.^[8] Those procedures apply to all grants and cooperative agreements administered by the NIH, The Centers for Disease Control and Prevention, and the Food and Drug Administration, among others. The appeal procedures apply where the grant is terminated in whole or in part for failure of the grantee to comply with applicable law or the terms and conditions of the grant. The regulations provide an opportunity to provide a written submission, receive a written decision signed by a review committee, and appeal that decision to an appeals board.

Environmental Protection Agency regulations likewise provide dispute rights, and a written agency decision is generally required within 180 days after submitting a written and detailed post-award dispute.^[9] By contrast, the National Science Foundation (NSF), unlike most other agencies, expressly allows suspension and termination in a number of scenarios, including for failing to comply with the terms and conditions of the grant award or for “other reasonable cause.” Normally, the NSF must inform the grantee of the proposed action and provide an opportunity to correct deficiencies. However, NSF may immediately suspend or terminate a grant without notice when it believes such action is reasonable to protect the government’s interests.

Maximizing recovery – terminations

To maximize recovery in a settlement process following termination, grant recipients must be diligent. Below, we outline key actions to maximize recovery.

1. Monitor evolving policies and anticipate program impacts.

Executive orders targeting DEI initiatives or programs funded under the Inflation Reduction Act have created a wave of funding freezes and stop-work orders. Stay informed about how these policies impact your contracts and be ready to pivot if key funding sources or contracts come under review.

Stop-work orders and executive reviews may disrupt program timelines and require government input for continued progress. Plan for potential schedule slippages and prepare to request equitable adjustments to address delays.

2. Assess contracts and maintain detailed records.

Identify the termination clauses and review the government’s rights in your contracts and grants, including provisions governing stop-work orders or funding pauses.

Ensure subcontractor or subgrantee agreements flow down these provisions to avoid gaps in recoverable costs. Keep detailed documentation for labor, materials, subcontractors, and other

costs.

3. Act quickly.

Respond promptly to termination notices and immediately alert all necessary parties. Be cognizant of deadlines to submit required documents.

4. Engage counsel early.

Counsel experienced in government contracts and grants law and DEI issues can assist with navigating the termination process. These critical tasks include preparing compliant and defensible termination settlement proposals and requests for termination-related payments; negotiating time or cost adjustments for disruptions; pursuing legal remedies, including injunctions, to address unjust stop-work orders or funding freezes; and recovering termination costs through litigation if disputes arise.

The current federal contracting landscape presents unprecedented challenges, with executive orders and funding pauses creating significant uncertainty. By following best practices and building a robust strategy in conjunction with counsel, grant recipients can position themselves to manage disruptions and maximize recovery in the face of termination.

Footnotes

[1] 2 C.F.R. § 200.340(a)(4).

[2] 2 C.F.R. § 200.305(b)(6) (emphasis added).

[3] 2 C.F.R. § 200.339(a).

[4] 2 C.F.R. § 200.340(a)(4) (emphasis added). Notably, this regulation was recently amended to further restrict the government's ability to terminate awards for inconsistency with general agency policy priorities notwithstanding any specific authorizing language in the grant. *See* 2 C.F.R. § 200.340(a)(2) (2020) (omitting any reference to the "terms and conditions of the award" and permitting termination "to the greatest extent authorized by law, if an award no longer effectuates the program goals or agency priorities") (effective 8/13/2020 to 9/30/2024).

[5] 2 C.F.R. § 200.340(b).

[6] *See Thermalon Indus., Ltd. v. United States*, 34 Fed. Cl. 411, 415 (1995) (describing grant agreements as the "mechanism by which to assure each other's compliance with the grant terms").

[7] *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005).

[8] *See* 42 C.F.R. Part 50.400.

[9] *See* 2 C.F.R. Part 1500.

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