Transition – A Presidential Change Update

March 2025

Achieving Recovery After a DOGE Payment Pause, Suspension, or Termination for Convenience

Key Note:

- Government contractors have various options for recourse and cost recovery if they are negatively impacted by an agency's decision to withhold payment, issue a stop-work order or suspension, or terminate a contract convenience.

As described in a previous Thompson Hine client alert, President Trump's recent executive orders have disrupted many federal contracts and projects, particularly Executive Order 14222, *Implementing the President's "Department of Government Efficiency" Cost Efficiency Initiative.* This order has significantly impacted federal contractors, leading agencies to withhold payments, issue stop-work orders, suspend contracts, and terminate contracts for convenience. Federal contractors should prepare for these disruptions and understand their rights and options for recourse.

Although the Department of Government Efficiency (DOGE) is new, its efforts are rapidly transforming the procurement landscape. Federal contractors should know they have options for cost recovery when an invoice goes unpaid, work is suddenly paused, or a notice of termination is received. Though these options are well-established under the law, response strategy is critical. An effective response can mean the difference between full recovery and no recovery at all for contractors.

Decrease Chances of Withheld Payments with Proper Invoices

The Prompt Payment Act (31 U.S.C. 3901, *et seq.)*, requires the federal government to pay its contractors on time. A "proper invoice," as defined by the act, typically triggers payment, and the government can rarely refuse to pay when there is no alleged disagreement over performance or the amount due. If the payment is late by more than 30 days, contractors may be entitled to interest penalties under the act. Depending on the specific contract terms, FAR Subpart 32.9 and 52.232-1 through 52.232-40 govern what constitutes a "proper invoice."

To reduce the risk of an unpaid invoice, contractors should:

- Verify that the invoice complies with the FAR clauses applicable to the particular contract
- Ensure the invoice is fully compliant and meets any additional agency requirements and guidance.
- Confirm in writing with the contracting officer that there are no disputes over contract performance or invoiced amounts.

If a timely submitted invoice is deemed "proper," the contractor should contact the agency to determine why payment is being withheld. Even in current times, non-payment may occur due to innocent errors and administrative oversights. If the issue cannot be resolved informally, the contractor may consider submitting a formal claim through the statutory claims process discussed below.

Provide Notice and Seek Equitable Adjustments for Suspensions and Work Stoppages

FAR 52.242-14 governs suspensions, and FAR 52.242-15 controls how stop-work orders are issued. As a practical matter, they both serve the purpose of allowing the federal government to pause the performance of work on a contract. The major difference between the two is duration. Though they may be extended for longer periods, stop-work orders typically only last 90 days. Suspensions, on the other hand, may be indefinite.

It is important to keep in mind that FAR 52.242-14 and 52.242-15 may not be incorporated into every contract, and there have been recent reports of contracting officers invoking these clauses to pause work even where the clauses are absent from the contract.

If faced with a notice of suspension or stop-work order, contractors should:

- Review their contract to confirm whether the applicable FAR clause is incorporated.
- Act to minimize the incurrence of costs allocable to the paused work, which may include flowing down work stoppage notices to subcontractors, furloughing employees, canceling supply orders, and putting certain preparatory work on hold.
- Inform their contracting officers in writing of the changes caused by the work stoppage and of their intention to request an equitable adjustment for the increased costs.
- Carefully track all costs arising from the work stoppage.

Though these steps seem straightforward, they take a great deal of strategy to implement. Cost minimization, for example, often requires a delicate balance between stopping work while simultaneously staying in position to quickly resume work after the pause is lifted. Timing of requests for equitable adjustments are often aided by legal analysis of the specific facts surrounding work stoppages. And, because different industries are entitled to various categories of recovery, it is crucial that costs arising from a work stoppage are segregated and accurately maintained.

Prepare Settlement Proposals After Notice of Termination for Convenience

The federal government may terminate contracts “when it is in the Government’s interest.” *See* FAR 2.101. Most federal contracts include an express termination for convenience clause, and even if not express, courts may imply one under the *Christian Doctrine*.

The FAR permits contractors, through negotiation with the government, to recover reasonable profits for the work performed through the date of termination plus costs arising from the termination. Contractors should take these steps to maximize their recovery:

- Minimize and track all costs associated with the termination.
- Reject offers of “no-cost settlements” unless appropriate.
- After completion of work, prepare a written termination settlement proposal, detailing the amounts owed to the contractor.
- Initiate settlement discussions by submitting the settlement proposal to the termination settlement officer as soon as practicable but in no event longer than one year after the effective date of termination.

These steps usually require coordination across multiple teams. Due to the nuances of calculating recoverable costs permitted by the FAR, contractors are well served to consult accountants during this process. Legal counsel, whose fees may be recovered, should also be involved in the preparation of termination settlement proposals.

Terminations for convenience are difficult to defeat because contracting officers have broad discretion to decide what’s in the best interest of their agencies. But successful challenges are not impossible. A termination for convenience may be ruled wrongful where an agency terminated the contract in bad faith, arbitrarily, or in violation of a law or regulation.

Pursue Cost Recovery Through the Statutory Claims Process

When disputes over unpaid invoices, work stoppages, and terminations for convenience cannot be resolved, the Contract Disputes Act (41 U.S.C. § 7101, *et seq.*) provides a formal process for recovery. The process begins with submission of a claim to the contracting officer. These are the key considerations for presenting and preserving a claim under the Contract Disputes Act:

- The claim must be in a writing and should outline the dispute, key facts, the contractor's position, and supporting legal authority.
- If seeking monetary recovery, the claim must state a definite "sum certain."
- For claims over $100,000, certification by the contractor is required.
- Contracting officers generally have 60 days to issue a final decision on claims, though extensions are common.

When a contracting officer denies a claim, contractors may appeal to the Civilian Board of Contract Appeals, Armed Services Board of Contract Appeals, or Court of Federal Claims. Such "appeals" are the first level of formal litigation. Unpaid invoices are generally litigated as breach of contract claims against agencies. Suspensions and work stoppage orders may be contested as unlawful constructive changes. And improper terminations for conveniences are often argued as claims for violation of the applicable provisions of the FAR or breaches of the duty of good faith and fair dealing.

The Contract Disputes Act imposes many strict deadlines. Missing any of them could bar contractors from achieving recovery. Even experienced federal contractors should consult legal counsel when attempting to assert any of the rights discussed throughout this alert. Inadvertent waiver of rights by contractors is common in normal times, and the rapidly evolving procurement landscape only heightens the risk of missteps by contractors that try to go it alone.

FOR MORE INFORMATION

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