

PRATT’S GOVERNMENT CONTRACTING LAW REPORT

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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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What to Do in the Event of Federal Procurement Disruptions

***By Robert K. Tompkins, Amy L. Fuentes, Roza Sheffield and
Hillary J. Freund****

In this article, the authors review the implications of disruptions to the federal procurement process, including the Trump administration's ability to delay new contract awards, exercise options on existing contracts, suspend or stop work, or terminate contracts. The authors also review some practical implications of disruptions to government operations, including potential contract administration activities, payment of invoices and lack of access to government facilities.

The Trump administration is in the midst of reviewing prior administrations' spending priorities and federal government contracts and has begun announcing a variety of actions to suspend and/or terminate pending and awarded contracts. These announcements, along with a number of the Trump administration's executive orders, threaten to disrupt federal contracting in numerous areas. Though the scope and contours of those specific disruptions remain in flux, contractors should be taking steps now to understand their rights and obligations under the potential scenarios that may play out.

It is important for contractors to understand how to navigate next steps and take a proactive approach to protect their legal business interests, potentially recover costs and address schedule and other contract impacts. This article reviews the implications of a disruption to the procurement process, including the Trump administration's ability to delay new contract awards and exercise options on existing contracts, issue suspensions of work and stop-work orders, and terminate contracts for the government's convenience. This article also reviews some practical implications of disruptions to government operations, including potential contract administration activities, payment of invoices and lack of access to government facilities.

DELAYS IN THE AWARDS OF NEW CONTRACTS AND THE EXERCISE OF CONTRACT OPTIONS

The Trump administration has announced its intent to suspend pending contract awards and withhold the exercise of options on existing contracts. This can create uncertainty for offerors.

Contractors should carefully monitor agency actions (or inactions) related to procurements in which they have pending proposals. For recently announced

* The authors, attorneys with Holland & Knight LLP, may be contacted at robert.tompkins@hkklaw.com, amy.fuentes@hkklaw.com, roza.sheffield@hkklaw.com and hillary.freund@hkklaw.com, respectively.

contract awards, it is possible that debriefings might be delayed or suspended. Offerors should carefully consider how such delays might impact timeliness considerations for potential bid protests and take steps to document the fact that pending or incomplete debriefings have not concluded. Where an award has been made, but performance has not moved forward as expected, contractors should consider whether that inaction represents, in effect, a stop work or suspension of work (see discussion below).

Some Trump administration announcements have also called for a suspension of the exercise of contract options. Contractors with active contracts should familiarize themselves with the provisions governing the timelines for the notice and exercise of options. Contractors should also proactively engage with their agency counterparts to remind them of the forthcoming options and express their willingness to accept an option exercise. This is important because once a contract has expired, the government generally cannot exercise an option to revive the contract.

SUSPENSION OF WORK ORDERS

The Federal Acquisition Regulation (FAR) allows a contracting officer to issue suspension of work orders directing a contractor to stop, delay or interrupt all or part of its work on a contract for a period of time determined to be appropriate for the government. See FAR 52.242-14. The Suspension of Work clause is typically included only in construction and architect and engineer contracts and is utilized by agencies for a number of reasons, such as changes to scope of work, defective specifications and site availability issues.

Contractors may seek to recover increased performance costs (excluding profit) as a result of receipt of a suspension of work order if the performance of all or part of the work is made for an “unreasonable period of time.”¹ However, contractors cannot recover increased costs due to (1) delays caused by the negligence of the contractor, or (2) instances for which an equitable adjustment is provided for or excluded under any other term or condition of the contract.

Claims related to costs incurred due to suspensions of work must be asserted, in writing, as soon as practicable after the termination of the suspension, delay or interruption, but not later than the date of final payment under the contract. In order to preserve their legal rights and remedies, contractors should carefully track and document any costs related to suspension of work, as well as contract schedule and other impacts, and timely submit requests for equitable adjustments.

¹ See FAR 52.242-14(b).

STOP WORK ORDERS

Stop work orders can also be utilized by agencies to stop or suspend all or part of a contract. Upon receipt of a stop work order, a contractor is required to immediately comply with its specific terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage.² Notably, if a stop work order is canceled or the period of the stop work order expires, the contractor is required to resume work.

Upon receipt of a stop work order, contractors should:

- (1) Acknowledge receipt to the contracting officer;
- (2) Immediately cease performing the work under the contract;
- (3) Read the stop work order carefully to understand the specific details;
- (4) Seek clarification from the contracting officer to understand the reasons for the stoppage, the expected duration and any other questions the contractor may need answered; and
- (5) Notify subcontractors (to invoke the equivalent stop work order in the subcontract and provide instructions consistent with the government's stop work order).

Contractors should also simultaneously review the prime contract to determine the agency's prescribed mechanism for recovering costs, as well as any required timelines for doing so (such as submission of a request for equitable adjustment). Generally, a contractor is required to assert its right to such an adjustment within 30 days after the end of the period of work stoppage.³

Contractors may be able to recover stop work order costs, such as direct costs incurred to maintain employees, facilities and equipment that are reasonably necessary to immediately resume work when the stop work is rescinded. Other potentially recoverable stop work order costs include claims by subcontractors (subject to the reasonableness, actual subcontract liability and reasonable efforts to mitigate those costs), as well as costs incurred for the demobilization and remobilization activities caused by stopping work and resuming work.

Notably, contractors are required to take reasonable efforts to mitigate these costs. As such, it is important that contractors maintain documentation to show their stop work costs were reasonable and minimized. Ideally, costs related to

² See FAR 52.242-15.

³ See FAR 52.242-15.

the stop work order are tracked and documented in a separate stop work account established at the time of receipt of the stop work order.⁴

TERMINATION FOR CONVENIENCE OVERVIEW

The FAR allows government agencies to completely or partially terminate a contract for the convenience of the government. Government agencies may utilize this provision for just about any reason, including in order to align with the new administration's shift in spending priorities. The FAR has several variations of the termination for convenience clause with slightly different rights and remedies that depend on the type of contract.⁵

When a termination for convenience occurs, contractors are typically entitled to recover:

- *Payment for Work Performed.* Contractors can claim compensation for the value of work completed up to the date of termination.
- *Termination Costs.* Contractors can seek costs directly associated with halting operations, such as demobilization expenses, fees for necessary professional services, severance for personnel and subcontractor settlements.
- *Reasonable Profit.* Contractors may be entitled to recover profit, which is typically calculated on work performed (but does not extend to unexecuted portions of the contract).⁶

The FAR outlines specific methods and bases for settlements related to terminations for convenience. This includes, among other things, clear guidelines on how settlements should be calculated and what documentation is required.

According to FAR 49.103, there are two primary methods for settling terminations for convenience:

⁴ See, e.g., Raytheon STX Corp., GSBGA No. 14296-COM, 00-1 BCA ¶ 30632 (Oct. 28, 1999) (finding reasonable costs incurred by prime contractor and subcontractor to maintain readiness of workforce to resume performance after stop work order rescinded were allowable as an equitable adjustment to the contract cost).

⁵ See, e.g., FAR 52.249-2, Termination for Convenience of the Government (Fixed-Price); FAR 52.249-4, Termination for Convenience of the Government (Services) (Short Form); FAR 52.249-6, Termination (Cost-Reimbursement).

⁶ Historically, a contractor could recover breach of contract damages, which include anticipatory (lost) profits, as a result of a termination based on inherent authority. *United States v. Speed*, 75 U.S. 77 (1868). Currently, convenience termination clauses preclude the contractor from recovering “anticipatory profits or consequential damages” (or lost profits) when the government, in good faith, terminates the contract for its convenience. See FAR 49.108-3(a); FAR 49.202(a); FAR 52.249-2.

- *Bilateral Negotiations.* This involves direct negotiations between the contractor and the government to reach a mutual agreement on the settlement.
- *Unilateral Determination.* As per FAR 49.109-7, this method is used when the contractor fails to submit a proposal or when a settlement cannot be reached through bilateral negotiations.

The two primary bases for settlement proposals are the inventory basis and the total cost basis, as outlined in FAR 49.206-2.

DE FACTO INTERRUPTIONS TO CONTRACT ADMINISTRATION AND CONTRACT PERFORMANCE

The Trump administration may take certain actions that have the effect of disrupting the ability of agencies and their employees to function, but which are not accompanied by any formal contract action such as a Stop Work or Suspension of Work notice. Nevertheless, such actions could have a severe practical impact on contractors. For example, if personnel responsible for contract administration are barred from their duty stations, have their email accounts suspended, are placed on leave and so forth, such actions may cause contract administration to come to a halt. However, even in the event of “radio silence” from their government counterparts, it is important for contractors to document and communicate their efforts to comply with contractual obligations and memorialize cost, schedule and other impacts caused by such interruptions.

In these situations, contractors should also consider the potential to recover costs related to government delay. The FAR Government Delay of Work clause provides that “[i]f the performance of all or any part of the work is delayed or interrupted (1) by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract . . . an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption, and the contract modified in writing accordingly.”⁷

Government disruptions could also preclude a contractor from being able to perform its work. For example, if a government facility, which functions as the place of performance, is closed, the contractor and its personnel may be unable to perform their work as required. Contractors should document the impact of these disruptions, including associated cost and schedule impacts, and communicate those impacts to the contracting officer or other designated agency contracting representatives and officials.

⁷ See FAR 52.242-17.

Similarly, government disruptions may lead to a delay in the processing of invoices. Notwithstanding, contractors should continue to submit invoices in a timely manner, as required under their contracts, and should track overdue payments as they may be entitled to recover interest under the Prompt Payment Act (PPA). The PPA requires the government to pay contractors interest on invoices properly submitted for work performed and accepted that go unpaid more than 30 days after submission.⁸ The FAR also contains enhanced prompt payment requirements for small business contractors, which may provide for payment in as little as 15 days. In the not-too-distant past, PPA remedies were not very significant because interest rates were low. As a result of inflation and rising interest rates, the current PPA rate is 4.625 percent. PPA interest obligations could become quite significant, particularly if delays in payment become substantial.

RECOMMENDATIONS FOR CONTRACTORS

The Trump administration's early actions signal a clear shift in priorities and policies that are impacting government contracts. Government contractors should take proactive steps, where feasible, to preserve their rights and remedies. By way of summary, contractors should take the following steps:

- Review contractual terms to ensure a clear understanding of suspension of work, stop work orders and termination-related clauses in contracts;
- Maintain thorough and up-to-date records of all project-related expenses, deliverables and progress to substantiate claims for compensation;
- Evaluate subcontractor agreements to assess how delays and terminations may cascade down to subcontractors and ensure compliance with notice and settlement provisions; proactive communication with subcontractors can help mitigate potential disputes and delays;
- Engage with legal counsel to develop a comprehensive strategy for protecting contractual rights and navigating the claims process;
- Establish open lines of communication with agency contracting officers to stay informed about timelines, procedures and expectations;
- Monitor policy developments and remain vigilant about potential future executive orders and other agency actions that might impact contract awards, performance and administration; and
- Proactively engage with trade associations to help anticipate and address emerging risks.

⁸ See FAR 52.232-5.