

NICHOLS LIU

# Foreign Assistance: Moving from Outrage to Action

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Robert Nichols - Pub K Group and Nichols Liu LLP

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# Caveat

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For informational purposes only

Not legal advice

Legal services available

# EO Program Review Process

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- Executive Order “Reevaluating and Realigning United States Foreign Aid,” (January 20, 2025)
- Requires mission to produce to F for review a list of all active, pending, or proposed grants, subcontracts, contracts, or subcontracts, and provide a clear and concise statement explaining if and how the current or proposed use of obligated funds advances President Trump’s policy.
- Describes creating:
  - a process for collecting information from missions to enable determinations of “whether the foreign assistance policies and interests supported by appropriations are not duplicated, are effective, and are consistent with President Trump’s foreign policy,” and
  - a process for State’s Director of the Office of Foreign Assistance (F) and the Office of Budget and Planning (BP) to work with the Office of Management and Budget (OMB) in making those determination, and
  - review standards for making those determinations.
- The review is to be completed within 85 days and reported out to the President.

# Immediate Impacts

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- Everybody is performing cash flow analyses and determining path forward
- [Major NGO]: thought to have laid off 500 employees; instead furlough half of HQ staff, but some programs remain active due to waiver
- **CREED**

Dear CREED Community:

The Board Executive Committee met last night to take stock of the current situation and consider the way forward for CREED. It was determined that CREED will take a pause in activities with immediate effect to evaluate and ensure compliance with the Administration's guidance and related Executive Orders. As Executive Director, I will remain in position to discharge our fiduciary responsibilities.

We thank you for your support thus far and understanding of our decision to pause in light of the Administration's requirements.

Warmly,

Sadaf Chaudhry  
Executive Director CREED in Action

# EO Waivers

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- Already Approved
  - Lifesaving humanitarian assistance
  - Foreign military financing for Israel and Egypt
  - Emergency food assistance legitimate expenses incurred prior to EO under existing awards or legitimate expenses associated with stop-work orders
  - Exceptions to the pause approved by the Director of Foreign Assistance.
- Lobbying Efforts for Additional Waivers
  - Subsectors forming
    - Demining
    - Cybersecurity
    - Counterterrorism
    - WMD non-proliferation
    - Law enforcement capacity
  - Efforts underway

# Contracts: Legal Rights

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- Government has the right to issue stop work orders. Contractors must comply by mitigating costs during stop work period.
- But contracts are a legal obligation for the government to pay costs. Not paying costs is a breach of the contract.
- Possible need to enforce payment payments through Contract Disputes Act process.
- Contracts contain a “subject to the availability of funds” clause.
  - This reflects the Anti-Deficiency Act, whereby funds cannot be obligated or expended unless there are available appropriated funds.
  - Subject to availability of funds clause is not an excuse not to pay costs so long as appropriated funds remain available. *Cherokee Nation of Okla. v. Leavitt* (2005).
  - But Contracting Officers may misunderstand Anti-Deficiency Act or may fear retribution if they make payments.
  - Administration may seek to make funds unavailable through the Impoundment Control Act.

# Contracts: Getting Paid

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- Segregate stop work costs
- Prepare requests for equitable adjustment
- Submit invoices
- Convert invoices to certified claims
- Send letter stating interpretation of allowable costs during stop work (including idle labor) and asking for adequate assurances that invoices will be paid
- Prepare to enforce claims through CDA process

# Grants/CoAgs: Legal Rights

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- Recipients have a private right of action against the government when it acts arbitrarily, capriciously, abuses its discretion, or acts contrary to law.
- Grant arguably is a legally binding document that gives the right to payment so long as grants terms are met and grant has not been terminated.
- Contracts also contain a “subject to the availability of funds” clause.
- Possible need to enforce through the APA or Tucker Act.
- Subject to termination.



# Grants/CoAgs: Getting Paid

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- LOCs currently unfrozen
- Segregate suspension costs
- Submit SF 425s
- Request permission to draw down for extended period
- Send letter stating interpretation of allowable costs during suspension (including idle labor) and asking for adequate assurances that invoices will be paid
- If necessary, seek to confirm and enforce rights under Administrative Procedure Act

# Recent Lawsuit

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- Applies to OMB memo freezing grants and loans
  - M-25-13, Temporary Pause of Agency Grant, Loan, and Other Financial Assistance Programs (January 27, 2025), ordered a pause to the disbursement of federal grants and loans, to implement the Administration’s EO
  - Administrative Procedure Act lawsuit filed to stop M-25-13
  - Plaintiffs allege that
    - the implicated federal grants and funding “are the lifeblood of operations and programs for many . . . nonprofits, and even a short pause in funding . . . could deprive people and communities of their life-saving services.”
    - Defendants’ action was arbitrary and capricious, violates the First Amendment of the United States Constitution, and exceeded OMB’s statutory authority.
  - Lawsuit possibly defective based on standing, and did not make certain legal arguments
  - Nevertheless, District Court Judge issued a temporary restraining order unfreezing funds until February 3, 2025, to preserve the status quo while the court considers the merits of the case.
  - Today, OMB retracted the initial memo but stated that efforts to curtail federal funding would continue
  - Anticipate seeing another OMB memo that is more thought-out in near future
- Unclear whether the order impacts funding under Executive Order “Reevaluating and Realigning United States Foreign Aid,” (January 20, 2025) Orders

# Our Efforts

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- Legal Advice
  - Responding to stop work orders and suspension orders
  - Requests for equitable adjustment
  - Terminations for convenience
  - Labor and employment issues
  - M&A to help save jobs and programs
  - Representing to banks contractor's and NGO's rights to payment, to help protect lines of credit

# Our Efforts

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- Program Reviews
  - Gaining insight on the process
  - Shaping the process
  - Shape the review standards
  - Helping clients justify their programs
  - Lobbying for subsector waivers to EO
    - Many of the programs on hold enjoy broad bipartisan support.
    - For example, just this morning Republican Texas Senator John Cornyn emphasized the importance of PEPFAR in the confirmation hearing for HHS nominee RFK Jr.
    - Sen. Cornyn is also a member of the Senate Foreign Relations Committee.
    - We envision these types of in-roads with Members of the Majority and the Trump Administration as obvious avenues to solicit support for categories of waivers for critical programs like PEPFAR and in other areas like de-mining.

# Our Efforts

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- Lawsuits

- Contracts

- EO language pausing “new disbursements” constitute anticipatory repudiation
    - Force payment of invoices

- Grants/CoAgs

- Possible lawsuits under Administrative Procedures Act and/or Tucker Act
    - Suspension orders are contrary to 2 CFR
    - Freezing of LOCs and not approving payments is arbitrary and capricious
    - Non-payment constitutes a breach of “contract” where the grant resembles a “contract” through competitive acquisition, offer, acceptance, and consideration
    - Clarify rights to recover costs during suspension period and enforceability of payment provisions of agreements

- Impoundment Control Act

- Impoundment is any Executive action or inaction that temporarily or permanently withholds, delays, or precludes the obligation or expenditure of budgetary resources.
    - With the ICA, Congress limited the President’s ability to NOT spend appropriations as enacted.
    - Possible private right of action by contractors and NGOs to enforce.
    - Argue effective violation of the ICA

Questions?

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