

NICHOLS LIU

Reevaluating and Realigning United States Foreign Aid

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Executive Order

- Reevaluating and Realigning United States Foreign Aid
- Beginning a process that is ambiguous
- There will be winners and losers

What the EO Says

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- **Misalignment**

- The EO characterizes the current U.S. foreign aid industry and bureaucracy as misaligned with American interests and often promoting ideas in foreign countries that destabilize peace.

- **90 Day Pause**

- 90-day pause in United States foreign development assistance for assessment of programmatic efficiencies and consistency with United States foreign policy. This appears to apply to State, USAID, MCC, DFC and other departments and agencies implementing "foreign development assistance programs." The pause is on new obligations and disbursements to foreign countries and "implementing non-governmental organizations, international organizations (i.e., United Nations affiliates and other PIOs) and contractors..." This pause is for assessing the programmatic efficiencies and consistency with U.S. foreign policy. Program Reviews: It requires reviews of U.S. foreign assistance programs by relevant department and agency heads, following guidelines from the Secretary of State in consultation with the Director of the Office of Management and Budget (OMB).

What the EO Says

- **Determinations and Resumptions**
 - It states that within 90 days, the responsible heads must determine whether to continue, modify, or cease each foreign assistance program. The funding can resume earlier, in the same or modified form, if a review is completed, and the program is deemed consistent with U.S. foreign policy.
- **Approval Requirement**
 - Any new foreign assistance programs and obligations must have approval from the Secretary of State or his designee, in consultation with the Director of OMB.

Review of Programs

Is This Just Repackaging?

- Comes with expected funding cuts to Pre-COVID levels
- Associated with more assertive “America First” foreign policy
- Shored-up by close oversight by Agency-based DOGE offices, political appointees overseeing programs, and a proposed political appointee to head OAA
- Politically charged. They will be looking for stories to highlight their efforts.

Programs Likely at Risk

- Likely Targets
 - Climate activities
 - Women empowerment programs
 - Gender programs
 - Countries with limited strategic value (no strategic minerals, petroleum, ISIS presence, etc.), yet many programs are driven by strong lobbying by diaspora groups (Armenia, Bangladesh, etc.)
- Humanitarian Assistance
 - Not part of this EO review – at this point
 - Project 2025 has its sights on long-term funding of humanitarian disasters and UN-funding that have grown over the years
- Localization
 - Consideration in terms of efficiency, relative to the larger contractor, grantee model.
 - Localization activities through subawards will depend on the continuation of the program. The review may entail modifications to heighten the role of local partners.
 - Balancing localization with risk of not receiving value and non-compliance will remain a concern

Who Are the Decision Makers?

- While still developing:
 - OMB is likely to be the lead on funding apportionment issues; coordinating with State and foreign assistance agencies
 - State is likely to take leading role on reviews and policy
 - USAID's role is unclear

What Are the Criteria?

- Not yet set – industry has opportunity to advocate
- Alignment with Foreign Policy
 - USAID is a tool of foreign policy/national security: funding and program proposals are reviewed by the Directorate of Foreign Assistance at State
 - Rubio’s 3 questions tied closely to foreign policy objectives: Does it make us safer, stronger, and more prosperous?
- Efficiency
 - Not clear at this point
 - Innovation will be prioritized
 - Localization may be a consideration as its seen as a more efficient use of development dollars
 - Faith-based organizations with presence in-country are also being prioritized
 - Private sector engagement will also be a theme
 - A more accountable relationship with PIOs
 - The “aid industrial complex” is a target of reform given its high overhead and the intent to diversify the partner base.

Legal and Funding Implications

New Obligations: On Hold

- **No new awards** of contracts, grants or cooperative agreements until the program has been determined/approved as aligned with U.S. foreign policy.
- Some solicitations may be cancelled, and others may be revised.

Existing Awards: Continue or Stop Work

- May continue as is or possible stop work orders
- COs may issue Stop Work orders which outline expected parameters of the stoppage and the treatment of costs.
- According to FAR clause 52.242-15, contractors must immediately comply and minimize costs during the work stoppage.
- Stop Work Orders typically last 90 days and can be extended or converted to a termination for convenience under these circumstances.
- It is difficult to jam on the brakes on a USAID contract. Contractors usually manage regular payments (rent, utilities, etc.) that cannot be readily stopped and must comply with local labor laws requiring advance notices for layoffs.
- Contractors should make sure there's an understanding with the CO on how to treat these types of costs at the onset.
- 90-day Stop Work Orders impact cash flow and covering indirect costs, causing uncertainty in ongoing and planned activities.

Existing Awards: Termination for Convenience

In case of termination for convenience, contractors should position themselves to recover all costs and associated fixed fee (short of anticipated profit).

Existing Awards: New Disbursements

- Grants and Cooperative Agreements
 - Assistance agreements are not legal obligations of the government.
 - No right to funds: funds may be cut off at any time, and there is no enforcement mechanism like the Contract Disputes Act.
 - According to 2 CFR 340, (Termination) awards can be terminated if they no longer align with program goals or agency priorities.
 - No Stop Work Orders are issued under assistance awards.

Existing Awards: New Disbursements

- USAID may simply rely on the OMB directive not to expend funds. But that is not the end of the analysis, which differs for contracts versus assistance agreements.
- Contractors
 - Contracts are a legal obligation for the government to pay costs. Not paying costs is a breach of the contract.
 - 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 understand Anti-Deficiency Act or may fear retribution if they make payments.
 - Possible need to enforce through Contract Disputes Act process.
 - Subject to stop work orders and terminations for convenience.

Our Efforts

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- Pub K and Nichols Liu will work jointly to advance industry interests with USAID, State, DOGE, OMB and Congress
- **Pub K**
 - Functions: News
 - Functions: Advocacy & Government Relations Efforts
 - Advance policy interests and engage with key Congressional decisionmakers
 - Gaining insight on the process
 - Advocate in shaping of process and review of standards
 - Forming of PAC Underway
 - Development contractors and NGOs wanting to take part – let us know ASAP.
- **Nichols Liu**
 - Advise on rights
 - Represent individual organizations
 - Get to the front of the que to justify their programs
 - Advocating for programs

Questions?