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Foreign Assistance Contracts and Grants:

The Canary in the Coal Mine for Federally-Funded Programs

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Caveat

For informational purposes only

Not legal advice

Legal services available

Agenda

- Foreign Assistance EO and Actions
- Imminent Lawsuit by Contractors and NGOs
- Parallel Court Cases
- Financial Claims
- Path Forward

EO: Reevaluating and Realigning United States Foreign Aid

- **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."
 - 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.

EO: Reevaluating and Realigning United States Foreign Aid

- **Determinations and Resumptions**
 - 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.

Foreign Assistance Programs

- Security Assistance Programs that foster stability and security abroad by strengthening the military and law enforcement of partner countries through capacity building and training and that help countries purchase defense equipment and services produced in the United States;
- Humanitarian Assistance Programs that support disaster and emergency relief efforts that save lives, alleviate suffering, and maintain human dignity; and
- Economic and Development Assistance Programs that advance national security by helping countries meet near-term political, economic, and development needs.

EO Waivers

- 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

State Notice of Suspension

Department of State



NOTICE OF SUSPENSION

January 24, 2025

Dear Recipient:

The U.S. Department of State hereby notifies the recipient that this award is immediately suspended as of January 24, 2025. This award no longer effectuates agency priorities in accordance with the U.S. Department of State Standard Terms and Conditions.

This suspension may be further codified through an amendment to the award reflecting the termination date if deemed applicable.

Effective immediately upon receipt of this Notice of Suspension the Recipient must stop all work on the program and not incur any new costs after the effective date cited above. The Recipient must cancel as many outstanding obligations as possible.

A final performance report [and financial report] will be due 120 days after the effective date if the award is terminated.

USAID Notice of Suspension

On January 24, 2025, USAID issued a notice to all its contracting and agreement officers and award recipients stating that, in accordance with the Executive Order and direction from the Department of State:

USAID is pausing all new obligations of funding, and sub-obligations of funding under Development Objective Agreements (DOAGs), pending a review of foreign assistance programs funded by USAID.

Contracting and Agreement Officers shall immediately issue stop-work orders, amend, or suspend existing awards, consistent with the terms and conditions of the relevant award. Following a review, Contracting and Agreement Officers will communicate decisions related to whether an award will be continued, modified, or terminated with impacted contractors and recipients.

State: Pause and Review

On January 26, 2025, State Department further announced that “Secretary Rubio has paused all U.S. foreign assistance funded by or through the State Department and U.S. Agency for International Development (USAID) for review” and “is initiating a review of all foreign assistance programs to ensure they are efficient and consistent with U.S. foreign policy under the America First agenda.”

Contractor Lawsuit Imminent

- Defendants have halted and defunded scores of contracts, grants, and cooperative agreements with Plaintiff and countless other recipients.
- These *en masse* actions violate
 - binding commitments of the U.S. Government
 - the U.S. Constitution
 - the will of Congress as declared in Defendants' existing statutory authorities
 - decades of legal precedent and two existing temporary restraining orders from Federal courts
- Plaintiff are filing a Complaint seeking declaratory and injunctive relief from these improper actions under the Administrative Procedure Act, 5 U.S.C. § 701 et seq.
- Harms
 - Defendants' actions are irreversibly harming the direct economic interests of Plaintiffs to whom the Government has made awards.
 - They have already forced tens of
 - thousands of layoffs of aid workers and undercut the capabilities and vital missions of these organizations.
 - They are destroying purpose-driven nonprofit and nongovernmental organizations, as well as foreign assistance businesses large and small. These harms are already being felt across the entire sector, and if Defendants' actions are not immediately reversed, they will devastate the entire foreign assistance sector.

National Council of Non-Profits vs. OMB

- 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 alleged
 - 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.
- 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.
 - Defendants must provide written notice of the court’s temporary restraining order to all agencies to which OMB Memorandum M-25-13 was addressed.
 - Agencies may not take any steps to implement, give effect to, or reinstate under a different name the directives in OMB Memorandum M-25-13 with respect to the disbursement of Federal Funds under all open awards.
- OMB retracted the initial memo but stated that efforts to curtail federal funding would continue.

State of New York v. Donald Trump

- States challenged freezing of grants to states under APA
- U.S. District Court for the District of Rhode Island issued a temporary restraining order providing:
 - If Defendants engage in the “identification and review” of federal financial assistance programs, as identified in the OMB Directive, such exercise shall not affect a pause, freeze, impediment, block, cancellation, or termination of Defendants’ compliance with such awards and obligations, except on the basis of the applicable authorizing statutes, regulations, and terms.
 - Defendants shall also be restrained and prohibited from reissuing, adopting, implementing, or otherwise giving effect to the OMB Directive under any other name or title or through any other Defendants (or agency supervised, administered, or controlled by any Defendant), such as the continued implementation identified by the White House Press Secretary’s statement of January 29, 2025.

American Foreign Service Association v. Donald Trump

- Plaintiffs are two unions that represent employees of USAID
 - Administrative Procedure Act lawsuit
 - Object to various recent executive branch actions that they allege have “systematically dismantled” that agency and that their members are suffering or will suffer irreparable harm because of those actions.
 - Allegations of irreparable injury flow principally from three government actions:
 - (1) the placement of USAID employees on administrative leave; (2) the expedited evacuation of USAID employees from their host countries; and (3) Secretary Rubio’s January 24, 2025 order “paus[ing] all new obligations of funding . . . for foreign assistance programs funded by or through . . . USAID.”
- U.S. District Court for the District of Columbia entered a limited TRO:
 - To “maintain the status quo” while the Court considers more fully whether the challenged actions are legal
 - Requires that employees not be based on administrative leave
 - Halts expedited evacuation of employees from oversees.
 - But doe NOT unfreeze funding to contracts

Contractor Lawsuit – Possible Outcomes

- Temporary Restraining Order likely to unfreeze funds
- Likely to be appealed to the Supreme Court
- But will agencies recommence payments?
- Will Court hold the Administration in contempt

Our Efforts

- Filing claims to get paid
- 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

Commencing Contract and Grant Claims

- Contracts are enforceable under the Contract Disputes Act
- Grants and cooperative agreements may be enforceable under the APA or Tucker Act

Contracts: Legal Rights

- 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.

Grants/CoAgs: Legal Rights

- 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.
- Possible need to enforce through the APA or Tucker Act.
- Subject to termination.

Is Foreign Assistance the Canary in the Coal Mine?

- Program realignments likely to occur across the government
- Freezing of funds is devastating
- Winners and losers
- Courts' response
- Congress' response

Questions?

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