

The Government's Delays in Paying Invoices for Foreign Assistance Work Are Improper and Wasteful.

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This Administration inherited scores of binding contracts, grants, and cooperative agreements (collectively "Legal Instruments") entered into between USAID and various contractors and not-for-profits ("Implementing Partners"). Those Legal Instruments obligate USAID to make timely payments for services performed. This may include outstanding invoices, costs incurred under stop work and suspension orders, and costs related to terminations.

Acting USAID Deputy Administrator Peter Marocco has halted these payments. This began by freezing funding, then making excuses about the payment system, and then asserting that more time was needed to avoid paying for waste, fraud, or abuse. As of last night, Mr. Marocco has put USAID employees on Administrative Leave, further hindering the Government's ability to make payments.

In short, Mr. Marocco has effectively breached the Government's obligations to make required payment under Legal Instruments. As the following Court and Board cases demonstrate, such actions are likely to result in excessive and unnecessary financial liabilities for the U.S. Government.

- In *Perry v. United States*, 294 U.S. 330 (1935), the Government issued gold-backed bonds, promising repayment in gold or equivalent value, but subsequently voided these gold clauses, forcing creditors to accept devalued paper currency. The Supreme Court ruled that the Government had breached its contract and awarded damages. The Court quoted with approval the longstanding proposition "[t]o abrogate contracts in the attempt to lessen government expenditure would be not the practice of economy, but an act of repudiation."
- In *United States v. Winstar Corp.*, 518 U.S. 539 (1996), the Government had agreements with banks during the Savings & Loan Crisis of the 1980s, allowing them to count "supervisory goodwill" as capital reserves. Later, Congress passed laws forbidding the use of this goodwill in bank capital calculations, effectively breaking the agreement. Several banks sued, claiming breach of contract. The Supreme Court ruled that the Government had voluntarily entered into enforceable contracts and cannot escape financial liability for breaching a contract due to later policy changes.
- In *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005), the Government had entered into a contract with the Cherokee Nation as part of a broader agreement to compensate tribes under various settlement agreements. The Cherokee Nation argued that the Government had failed to fulfill its payment obligations under the terms of these contracts based on appropriated funds being unavailable. The Supreme Court ruled that the Cherokee Nation was entitled to compensation under the contract because the Government had an obligation to uphold its financial commitments so long as appropriations were available at the time the contracts were entered into.

- In *Hughes Grp. LLC*, CBCA No. 5964, 23-1 BCA ¶ 38,297 (Mar. 6, 2023), the Government improperly withheld payments to a small business for less than three months. The Civilian Board of Contract Appeals found this to constitute a material breach, and in a follow-on ruling, required the Government to pay the contractor’s attorney’s fees under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2018). *See also Housing Auth. of the City of Slidell v. United States*, 149 Fed. Cl. 614, 626 (2020) (finding the Government’s “failure to pay money when due and owing is a paradigmatic breach of contract claim.”).
- In *JKB Solutions and Services, LLC. v. USA*, No. 1:2019cv01390 (Fed. Cl. 2024), the Court of Federal claims observed that, when the Government terminates or breaches a contract in bad faith with specific intent to injure the contractor, the latter may be entitled to additional damages beyond costs incurred.

In sum, the Government must treat its contractual commitments with the same legal seriousness as contracts between private parties. The Government cannot simply refuse to pay its bills even if its policies have changed or funding has become unavailable. The failure to make timely payment, in some circumstances, may constitute bad faith and entitle the contractor to breach damages beyond costs incurred for performance, during suspension/stop work, and from termination orders. Smaller contractors may even recover attorney’s fees, as appropriate.

To be sure, payment delays resulting from a legitimate need to check invoices for waste, fraud, and abuse do not necessarily constitute a breach of contract. But the delays must be legitimate and not merely pretext for not wanting to pay. Furthermore, even when delays are legitimate, contractors are entitled to interest on overdue payments under the Prompt Payment Act, 31 U.S.C. § 3903.

To recover costs and breach damages, contractors must file financial claims under the Contract Disputes Act (“CDA”), 41 U.S.C. § 7101-7109. Grantees and cooperative agreement holders can file claims under the Tucker Act, 28 U.S.C. § 1491.

Here are the Key Lessons from these cases:

- The Government may not refuse payment of legitimate costs for services performed under Legal Instruments.
- The Government may properly terminate Legal Instruments, but this does not absolve it of legal and financial liability to pay certain costs.
- If the Government does not pay its bills, Implementing Partners may be entitled to recover not only costs but interest and possibly breach damages and attorney’s fees.

These legal principles demonstrate how Mr. Marocco’s refusal to allow USAID to make payments to Implementing Partners is likely to cause unnecessary liability to the Government and waste for American Taxpayers. Given that outstanding invoices are already exceeding a billion dollars, the extra cost of Mr. Marocco’s actions could run into hundreds of millions of dollars of waste. This risk and liability are unacceptable.