

ARTICLE

Gov't Contractor Strategies For Getting Paid Amid Uncertainty

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The government contracting landscape is being reshaped in ways that few could have anticipated. The formation of the Department of Government Efficiency, combined with sweeping executive orders, mass agency personnel reductions and widespread contract terminations have introduced significant uncertainty into a previously stable federal market environment.

Contractors are now facing an unprecedented wave of unpaid invoices, terminations, stalled communications with agency personnel and even explicit agency directives halting contract payments indefinitely.

While the full impact and duration of these changes remain uncertain, contractors cannot afford to wait for clarity. Immediate action is essential to mitigate financial risks and accelerate payments that, until recently, were routine and uncontroversial.

The good news is that there are several legal and procedural mechanisms that remain available to contractors to vindicate their contractual rights. But navigating them effectively in this new environment requires a more strategic and assertive approach than before.

Ensuring Timely Payment of Invoices

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One of the most pressing issues facing many contractors is unpaid invoices. Under the Prompt Payment Act, agencies generally must pay invoices within 30 days.

And under Federal Acquisition Regulation 32.905(b)(3), if an agency rejects an invoice, it should do so within seven days and provide specific reasons for the rejection. In the absence of a timely rejection, the invoice is presumed valid, and interest begins accruing automatically once the payment is overdue, beginning on Day 31.

Even with these statutory protections for contractors, agencies have been delaying payment on routine invoices. Contractors must act decisively to protect their interests. The first step is to be persistent, including written follow-up with the contracting officer, reiterating the statutory deadlines and requesting written explanations for delays. Raising the risk of additional expenses may have value, given the administration's focus on reducing wasteful spending.

Explaining why you should be paid is also important. Many agencies are in the process of developing systems that will require a government official to provide written justification as to why an invoice should be paid before disbursing funds.

In the meantime, to facilitate timely payment, contractors should be prepared to provide written justification for their invoices to explain what specific work they performed, why it is consistent with the terms of their contract and how the work serves the interests of the administration.

If the agency remains unresponsive or does not provide an adequate reason for nonpayment, contractors should consider escalating the issue by converting an unpaid invoice into a certified claim under the Contract Disputes Act.

Agencies are required to issue a decision on a CDA claim within 60 days or identify a date by which they will issue a decision. If the agency fails to act within a reasonable time, contractors can deem the claim denied and appeal to the federal courts or the cognizant board of contract appeals. The boards offer accelerated procedures that provide for resolution within 180 or even 120 days, depending on the value of the claim.

Accelerating Resolution of Termination Settlements

The recent wave of contract terminations has left many contractors in a difficult position. While termination settlement proposals, or TSPs, remain the standard mechanism for seeking compensation for work performed and costs incurred, the timeline and recoverable costs can vary depending on contract type.

It is thus important to review your contract's specific termination provisions and applicable timeline. For noncommercial contracts, contractors typically have one year to submit a TSP, although contractors can and should submit it sooner.

Contracts for commercial products or services can vary. There is support in case law and Defense Contract Management Agency guidance for contractors being able to submit a TSP any time within the six-year statute of limitations for contract claims.^[1] But agencies are also attempting to shorten the standard one-year period,

giving contractors a truncated deadline to respond.

Because contracts for commercial products and services allow the parties to agree to terms that deviate from the standard provisions, it is important to know your contract terms and be careful not to inadvertently agree to a timeframe that is not workable for your business. All things being equal, prompt submission of a TSP increases a contractor's chances of receiving timely payment.

Although it depends on the magnitude and complexity of the TSP, termination settlement negotiations often take several months even in the best of conditions. Historically, a prudent path to maximizing a contractor's recovery is to work cooperatively with the government and remain patient during delays.

In today's environment, however, where agencies are slow-walking payments and aggressively seeking to limit financial outflows, contractors may do well to consider a more aggressive approach. If an agency delays or fails to engage in good faith negotiations, a contractor should consider converting the TSP into a CDA claim to trigger the 60-day clock to issue a decision.

Seasoned contractors know to document their costs in their standard recordkeeping system. But documenting the negotiation process can be just as crucial for accelerating payment.

In certain cases, contractors can immediately appeal a TSP when negotiations reach an impasse. An immediate appeal can shorten the 60-day clock, but also carries risk because, unless certain statutory prerequisites are met, contractors are at risk of their claim being dismissed for jurisdictional defects.

Aggressively Pursuing Requests for Equitable Adjustment and CDA Claims

The calculus for pursuing a request for equitable adjustment or CDA claim may also have changed.

In the past, requests for equitable adjustment, or REAs, were typically viewed as a less adversarial approach to seeking additional compensation, which had the benefit of maintaining customer relationships while enforcing your contract rights.

But if agencies have now decided to take a hard line against the disbursement of any additional government funds under a contract, then an REA may just further delay payment. Because REAs may now carry the risk of delay and inaction, in some instances it may be more productive for a contractor to escalate immediately to a CDA claim that can be adjudicated by a neutral third party in federal court or a board of contract appeals.

On the other hand, REAs still carry some strategic value. REAs allow for the recovery of legal expenses, making them a good choice for contractors unfamiliar with the disputes process. Those contractors can get the benefit of seasoned government contracts attorneys, while potentially recovering some or all of their legal costs.

Other costs, such as employee time spent preparing the TSP, can also be recoverable in an REA, though not a claim, and, depending on the level of effort, an REA may make sense for that reason.

Some contractors may still value a less adversarial approach as a strategic decision. REAs offer that and can make sense if there is a belief that the agency may actually pay at some point without litigation. And some agencies may process REAs faster if they involve funding modifications rather than formal disputes.

Overall Takeaways for Contractors Operating in This New Era

Contractors are operating today in a different environment than they did in the past. The combination of executive orders, personnel cuts and shifting agency priorities is disrupting government contracts and impacting contractor bottom lines.

Contractors must consider taking a proactive and strategic approach to enforcing their rights. In a time of uncertainty, those who act strategically and swiftly will be best positioned to navigate this changing landscape and ensure timely payment for their work.

[1] See *Woolery Timber Mgmt. Inc., CBCA 6031, 19-1 B.C.A. (CCH) ¶ 37245* (Jan. 31, 2019) ("The termination for convenience provision in the commercial items clause contains no one-year time limit. Accordingly, it appears that WTM can still pursue a remedy for any increased costs resulting from the September 2017 convenience termination[, notwithstanding the government's argument that over one year had passed following the termination.]") (citation omitted); see also *DCMA Terminations Manual* at 3.3(d) ("In the instance of a Commercial contract that is terminated for the convenience of the government, the settlement proposal must be submitted within 6 years from the effective date of the termination notice.").