



To: AFRC Members
Re: Talking points to respond to any shutdown-related contract suspension
Date: January 7, 2019

Note: This memo is not to be considered legal advice and if you have questions about how to respond to a suspension letter, consult an attorney. AFRC attorneys can provide contact information for attorneys who practice government contract law.

Appropriations for the Department of the Interior and the Department of Agriculture lapsed on December 21, 2018, and have not been renewed, leading to a shutdown of many government offices. In past shutdowns, federal timber sales have been suspended unlawfully. If you receive indications of a suspension on an awarded sale, below are points to consider in response to a suspension notice.

Please notify AFRC of any potential contract suspensions or other contract administration issues relating to the shutdown. This will help us advocate with the agencies and allow us to engage in litigation if needed. During the 2013 shutdown, AFRC and its members obtained a nationwide restraining order against suspension orders. We are hopeful that similar measures will not be necessary this year but need your help to be prepared.

If you receive a suspension notice, consider the following points for your letter in response to the Forest Service/BLM suspension notice:

1. There is no contract authority to suspend operations for the Anti-Deficiency Act. The suspension is unlawful.

You do not have to quote legal cases. But here is what the Court of Federal Claims said in a decision ruling that the government shutdown affecting contract completion was a breach of contract by the government. “Neither the Appropriations Clause of the Constitution, nor the Anti-Deficiency Act, shield the government from liability where the government has lawfully entered into a contract with another party.” *Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563, 571 (1997).

The United States Supreme Court clarified that the Anti-Deficiency Act’s requirements “apply to the official, but they *do not affect the rights* in this court of the citizen honestly contracting with the Government.” *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 197 (2012) (emphasis added).

2. State that you consider the suspension letter as a breach of contract.

Make clear in your letter that you consider the order to suspend operations to be in breach of contract without any contract authority.

3. Cite the contract provision not to delay operations.

As a party to the contract the agency has a duty not to delay or hinder operations and under clause B6.3 Control of Operations for scaled sales (or a similar provision in your specific contract), the agency has a duty to conduct themselves in a manner that does not impede the operations of the purchaser.

Clause B6.3 states (emphasis added): “Purchaser’s Operations shall be conducted in a workmanlike and orderly manner. The timing of required Forest Service designation of work on the ground and the performance of other Forest Service work shall not be such as to cause unnecessary delay to Purchaser.”

4. Explain specific damages that will occur if you are suspended.

State that since the agency is not operating within the authority of the contract, you are not limited to the contract damages (out-of-pockets) but are entitled to full recovery of all damages, including consequential damages. Explain your damages, including items like:

- Move-in and move-out costs
- Loss of logger for season (increased logging cost, possible delay damages beyond the duration of the shutdown since season may be lost if the logger leaves)
- Replacement cost for alternative timber
- Deterioration of wood on sale area
- Unable to complete the contract by termination date
- Mill curtailment or layoffs
- Lost profits

5. State that you believe continuation of the contract is consistent with the protection of property and supports public health and safety.

The protection of property and public health and safety are exceptions in the Anti-Deficiency Act that allow certain government employees to continue work. It may be that your sale was designed to reduce hazardous fuels or to salvage timber, or included an Emergency Situation Determination. Thus, implementing the project is in the interest of protecting property both on the sale area and possible nearby non-public lands. If so, it further undermines the agency’s refusal to provide sale administration under the contract.

In addition to responding to the suspension, you may wish to consider filing a “claim” under the contract that “disputes” the suspension for all the reasons stated above as a means to continue operations. You will particularly want to consult an attorney if you decide to pursue this option. And, you will certainly want to file a claim at some point if you have damages because of the suspension. AFRC members have obtained settlements relating to suspensions in previous shutdowns. AFRC staff are ready to help you through this process and keep sales moving.