

ROADMAP FOR ENTITIES FACING DOE AWARD TERMINATIONS

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In recent weeks, the Department of Energy (DOE) has cancelled more than 650 financial assistance awards—grants and cooperative agreements—totaling nearly \$24 billion.

While there is continuing uncertainty regarding listed cancellations and the actual status of many (if not all) of the cancelled awards are for projects that involved renewable energy sources or technologies.

The DOE has been relying heavily on 2 C.F.R. § 200.340(a)(4), which allows termination “pursuant to the terms and conditions of the Federal award, including to the extent authorized by law, if an award no longer effectuates the program goals or agency priorities.” Van Ness Feldman has prepared the following roadmap for entities affected by or potentially facing DOE financial award terminations.

Award recipients are, by law, entitled to a number of protections. Under 2 C.F.R. § 200.342, a recipient must be given an opportunity to object and to provide information challenging a termination. DOE’s own dispute resolution and appeals framework, codified at 2 C.F.R. § 910.128, favors informal resolution “whenever practicable” and provides a formal administrative appeal process to the DOE Senior Procurement Executive.

Steps to Challenge the DOE

Entities considering a challenge to a DOE financial award cancellation should take the following steps right away:

1. Obtain and review a copy of the termination letter;
2. Carefully review the DOE financial award terms and conditions, including any termination provisions; and
3. Assemble your supporting documents, including all materials related to the award and its administration, outside studies, and anticipated impacts from delays in the project.

Potential Avenues for Appeal

There are at least two potential avenues to appeal a DOE financial award termination: (1) administrative appeal within DOE; and (2) challenge in federal court. A combination of business and legal considerations will govern the appropriate strategy for a particular termination.

Administrative Remedies at DOE

DOE’s process typically unfolds in two stages. First, informal dispute resolution with the contracting officer may include mediation or other alternative dispute resolution. This stage is not bound by a specific regulatory deadline, but some DOE termination notices have asked for responses within 10 days. If the matter is not resolved informally, DOE will typically issue a written determination by certified mail setting out its final disposition, including the factual, legal, and policy bases.

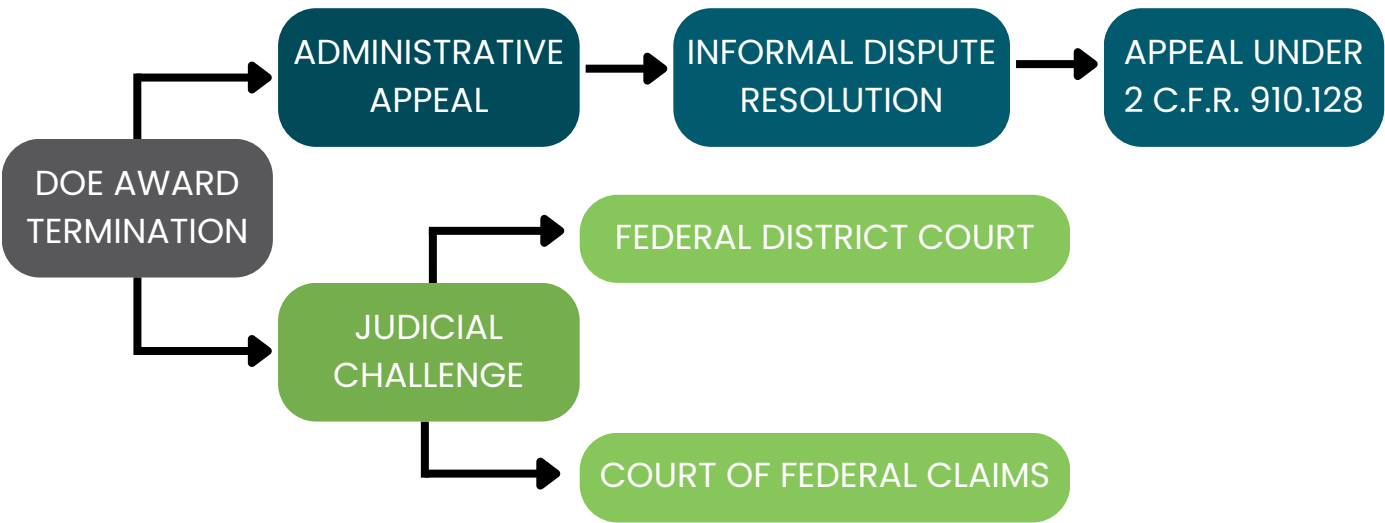
Second, a recipient may file a formal appeal to the DOE Senior Procurement Executive within 90 days of the contracting officer’s determination. DOE’s termination letters sent to date indicate that DOE will afford recipients an avenue to appeal cancellations. The appeal should include the decision being challenged, the issues in dispute, a comprehensive statement of the recipient’s position and supporting facts, and the documents that substantiate the claim. DOE may request supplemental information or convene a hearing. The Senior Procurement Executive’s decision is deemed the final decision of DOE.

Judicial Relief in Federal Court

Judicial review may be available either after DOE issues its final decision on appeal or, in certain circumstances, without exhausting the DOE appeal process. The proper forum will depend on the nature of the claims and the relief sought. Administrative Procedure Act (APA) claims seeking to set aside an agency action as arbitrary, capricious, or contrary to law generally are filed in Federal District Court. Contract-based claims seeking monetary damages may belong in the Court of Federal Claims. A number of factors will implicate the correct forum for challenging DOE actions.

Political & Municipal Engagement

During the appeal process, there may be opportunities to argue to federal, state, and local political leaders about the importance of the project (e.g., added jobs, technological advancements, community development). Changes in the level of political support for the project may be useful in DOE administrative proceedings, where the level of potential political support (and where that support is coming from) may be relevant to the agency’s reconsideration of an award termination.



For More Information

Van Ness Feldman has a team of litigators, public policy advocates, and technical experts ready to assist your organization in evaluating potential strategies following a DOE award termination. For more information, please contact [Anne Lynch](#), [Michael Farber](#), or [Lucas Agnew](#).