President Trump Issues New DEI-related Obligations for Federal Contractors and Subcontractors

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On March 26, 2026, President Trump issued Executive Order 14398, "Addressing DEI Discrimination by Federal Contractors." As noted in the accompanying Fact Sheet, this executive order is a continuation of the administration's views on alleged discrimination related to DEI programs and policies. It sets forth new language that will need to be inserted into contracts and, most notably, subcontracts. Further, it sets out specific enforcement mechanisms which the government may pursue for violation of this contract clause or the stated policy of the order. These include contract cancellation, contract termination, suspension and debarment of the contractor, and False Claims Act suits against contractors. Accordingly, federal contractors and subcontractors should conduct appropriate reviews of their current policies for compliance.

New Definitions Expand Potential Scope of Allegedly Discriminatory DEI Activities

Executive Order 14398 revolves around a new definition of "racially discriminatory DEI activities," which are described in Section 2 as "disparate treatment based on race or ethnicity in recruitment, employment (*e.g.* hiring and promotion), contracting (*e.g.* vendor agreements), program participation, or allocation or deployment of resources."

While recruitment, employment, and contracting have been included in the Trump administration's prior anti-DEI efforts, the concept of "program participation" is new. It is defined as "membership or participation in, or access or admission to: training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor." This definition creates a potentially wide-ranging prohibition on various activities many businesses routinely participate in and have previously viewed as non-problematic.

Implementation by Government

Within 30 days, departments and agencies must include a new contract clause in "contracts or contract-like instruments." This also includes subcontracts. This clause provides as follows:

> *"In connection with the performance of work under this contract, the contractor agrees as follows:*

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    - *The contractor will not engage in any racially discriminatory DEI activities, as defined in section 2 of the Executive Order of March 26, 2026 (Addressing DEI Discrimination by Federal Contractors);*
    - *The contractor will furnish all information and reports, including providing access to books, records, and accounts, as required by the contracting agency pursuant to the Executive Order of March 26, 2026 (Addressing DEI Discrimination by Federal Contractors), for purposes of ascertaining compliance with this clause;*
    - *In the event of the contractor's or a subcontractor's noncompliance with this clause, this contract may be canceled, terminated, or suspended in whole or in part, and the contractor or subcontractor may be declared ineligible for further Government contracts;*
    - *The contractor will report any subcontractor's known or reasonably knowable conduct that may violate this clause to the contracting department or agency and take any appropriate remedial actions directed by the contracting department or agency;*
    - *The contractor will inform the contracting department or agency if a subcontractor sues the contractor and the suit puts at issue, in any way, the validity of this clause; and*
    - *The contractor recognizes that compliance with the requirements of this clause are material to the*

Government's payment decisions for purposes of section 3729(b)(4) of title 31, United States Code (False Claims Act)."

The clause is notable because: (a) the obligation to furnish records will now include those documents related to "program participation," which may or may not be relevant to contract performance; (b) it contains three sections (§§ 3, 4, 5) relating to contractor responsibilities for its subcontractors' compliance, which would also include subcontractors' "program participation"; and (c) it sets up noncompliance as a violation of the False Claims Act.

Government Enforcement Mechanisms and Penalties

Executive Order 14398 provides multiple avenues for the government to enforce the requirements of the mandated contract clause, including (a) cancelling, terminating, suspending contracts, and (b) suspending and debarring contractors or subcontractors based on violations. The Office of Management and Budget has been instructed to identify those economic sectors "that pose a particular risk of entities engaging in racially discriminatory DEI activities." Finally, the U.S. Attorney General's Office is empowered to bring actions against contractors and subcontractors under the False Claims Act for alleged violations of the contract clause and promptly review *qui tam* cases that allege violations of the clause.

Finally, within 60 days, the Federal Acquisition Regulatory (FAR) Council is obligated to amend the FAR to reflect the provisions of Executive Order 14398, as well as issue a deviation and interim guidance to agencies for implementation and enforcement.

Steps for Contractors and Subcontractors

Contractors and subcontractors should take the following actions:

- Evaluate all employment, contracting, training, and "program participation" policies for potential non-compliance with the order's prohibitions. This should include mentorship programs, leadership development activities, and employee resource groups (ERGs). Employers should consider conducting a privileged review of these programs with the assistance of legal counsel.

- Review subcontracting/purchasing policies for eligibility standards related to race or ethnicity.
- Coordinate with subcontractors for the possibility of reviewing the same policies to confirm they satisfy the order's prohibitions.
- Flow down the mandatory clause in your subcontracts by updating forms and templates.
- Review invoicing/certifications made to the government to ensure their accuracy.

While contractors and subcontractors have become used to the Trump administration's efforts to curb what it labels as illegal DEI, Executive Order 14398 goes further than prior efforts by addressing program participation. This new scope warrants a closer look by contractors and subcontractors to ensure compliance and mitigate risk.

For further guidance or assistance, please contact the authors or any attorney with FBT Gibbons' Government Contracting or Labor and Employment teams.