

New Executive Order Requires Federal Contractors to Agree Not to Engage in Racially Discriminatory DEI Activities

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Executive Summary

- **What’s new:** President Trump has issued an executive order requiring that federal contractors agree in their contracts not to engage in “racially discriminatory DEI activities.” The executive order also requires contractors to provide access to records showing compliance, and imposes other obligations.
- **Why it matters:** Contractors or subcontractors who do not comply with the executive order may have their contracts canceled, terminated or suspended, may be declared ineligible for future federal contracts, and could face civil or criminal penalties under the False Claims Act.
- **What to do next:** Contractors should review their policies and practices, as well as their work with subcontractors, for compliance with the required clause and assess if their recordkeeping procedures align with the executive order’s reporting requirement.

On March 26, 2026, President Trump issued an executive order that requires executive departments and agencies to include a specific clause in contracts by which federal contractors and subcontractors agree not to engage in “racially discriminatory DEI activities.” In the event of a contractor’s or subcontractor’s non-compliance, the contracting agency is authorized to cancel contracts, or to declare the contractor or subcontractor ineligible for further government contracts. Contractors also could face civil or criminal penalties under the False Claims Act.

Executive Order 14398 (EO 14398), titled “Addressing DEI Discrimination by Federal Contractors,” also requires contractors to (i) provide access to records and files to confirm compliance with the clause, (ii) report any subcontractors’ non-compliance, (iii) inform the contracting agency of any subcontractor suits that put at issue the validity of the compliance clause, and (iv) recognize that their compliance is material to the government’s payment decisions under the False Claims Act (FCA).

EO 14398 was issued pursuant to the Federal Property and Administrative Services Act (FPASA). An accompanying [fact sheet](#) summarizes the order and provides additional background. EO 14398 builds upon a prior executive order that was issued last year on January 21, 2025 (EO 14173). EO 14173 required agencies to include a term in every contract or grant award whereby the counterparty certifies that it does not operate any programs promoting DEI that violate federal anti-discrimination laws, and that their compliance with such laws is material to the government’s payment decisions under the FCA.

The latest executive order requires that, within 30 days, executive departments and agencies subject to FPASA ensure that contracts, contractors’ subcontracts and subcontractors’ lower-tier subcontracts include the following compliance clause:

In connection with the performance of work under this contract, [the contractor /appropriate party (contractor)] agrees as follows:

1. 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);

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2. 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;
3. 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;
4. 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;
5. 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
6. 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).

Defining Racially Discriminatory DEI Activities

Unlike previous executive orders, EO 14398 explicitly defines what constitutes illegal DEI for these purposes. Specifically, the order states that “racially discriminatory DEI activities” means “disparate treatment based on race or ethnicity in the recruitment, employment (*e.g.*, hiring, promotions), contracting (*e.g.*, vendor agreements), program participation, or allocation or deployment of an entity's resources.”

Notably, EO 14398's definition of discriminatory DEI activities does not expressly cover other legally protected characteristics beyond race or ethnicity, such as gender, sex or religion.

Program participation is defined broadly to include “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.”

Penalties and Implementation

EO 14398 instructs the Director of the Office of Management and Budget to issue guidance to contracting agencies to ensure compliance with the order, and along with the attorney general, assistant to the president for domestic policy, and chairman of the Equal Employment Opportunity Commission, to identify economic sectors that are high risk for engaging in racially discriminatory DEI activities and provide guidance to contracting agencies to ensure compliance within such sectors.

Additionally, EO 14398 instructs the attorney general to consider FCA enforcement against any contractors or subcontractors that violate the clause and ensure prompt review of private litigation under the FCA. The potential for FCA enforcement is particularly noteworthy, given the potential magnitude of exposure, including treble damages and penalties linked to inflation, as well as liability under criminal statutes.

Lastly, EO 14398 directs the Federal Acquisition Regulatory Council to amend the Federal Acquisition Regulation to include the compliance clause in federal procurement, solicitations and contracts, and remove any provisions that conflict with the compliance clause, and within 60 days, issue guidance regarding agency implementation of the compliance clause.

Next Steps

Contractors should review their policies and practices, as well as their subcontracts, to ensure compliance with the required clause. Contractors should also evaluate their recordkeeping procedures to see if they align with the executive order's reporting requirement. Additionally, contractors should watch for any subsequent guidance from executive departments and agencies, including the Office of Management and Budget, regarding compliance.