

New DEI-Focused Executive Order Implements Expansive Audit Authority and Imposes DEI Certification Obligations on All Federal Contractors, Subcontractors

by Alex Hontos, Eric Weisenburger, Chris DeLong, and Matthew Gillespie

On March 26, the Trump administration issued another DEI-focused Executive Order (“EO”) requiring all federal agencies to incorporate new anti-DEI certifications in contracts, “contract-like instruments,” and subcontracts within 30 days while giving the federal government broad audit authority. The EO marks the latest, and perhaps most significant, operationalization of the administration’s effort to prohibit DEI and imposes new and potentially substantial burdens on a broad—yet undefined—class of federal funds recipients to modify their contracts and subcontracts to include certifications against “racially discriminatory DEI activities.”

What does the order do?

The EO requires federal agencies to incorporate specific certifications related to DEI “[i]n connection with the performance of work under [the] contract” into all “contracts and contract-like instruments, including contractors’ subcontracts and subcontractors’ lower-tier subcontracts” by April 26, 2026, “to the extent permitted by law.” Agencies, contractors, and subcontractors must include the following provisions:

- Federal contractors and subcontractors must commit not to engage in “any racially discriminatory DEI activities,” as defined in the EO;
- Federal contractors and subcontractors must give the government access to “all information and reports, including providing access to books, records, and accounts” for the government to assess compliance with these provisions;
- Federal contractors “will report any subcontractor’s known or reasonably knowable conduct” in violation of these provisions to the contracting agency or if a subcontractor litigates “the validity of this clause”;
- The government can unilaterally cancel, terminate, or suspend contracts if a contractor **or subcontractor** violates these provisions, and the contractor or subcontractor may be declared ineligible for further Government contracts;
- An acknowledgment that compliance with these provisions is material under the False Claims Act.

The expansive audit-and-inspection provision is particularly notable for its lack of express

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limitations. The EO provides few guardrails to the scope of the government's access other than that it must be "for purposes of ascertaining compliance with this clause." This, in light of the federal government's already broad audit authorities under the FAR, suggests the administration intends to exercise DEI-related oversight authority.

Over the past year "illegal DEI" has been ill-defined, with one court observing that not even a person of ordinary intelligence would be able to determine what is within and without the scope of the definition.¹ The EO provides perhaps the administration's clearest articulation to date of what it considers impermissible DEI, defining "racially discriminatory DEI activities," as "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." Organizations should strongly consider re-assessing their prior compliance efforts over the past year in light of this new articulation.

The EO is also significant in the potential scope of liability contractors and subcontractors face if found to be noncompliant. In addition to contract termination, noncompliant parties may also be subject to debarment or suspension (i.e., long-term exclusion from government contracting) and False Claims Act liability, which includes treble damages and penalties. The EO additionally directs the Department of Justice to "ensure prompt review" of *qui tam* actions concerning Federal contracts or subcontracts to determine whether to intervene within the FCA's often extended statutory 60-day investigation period, consistent with the directives in the Administration's recent "Fraud Task Force" Executive Order.

Who does it affect?

The EO provides little insight into the scope of "federal contractors" and subcontractors impacted by its obligations. Under the FAR's provisions governing debarment and suspension, for example, a "contractor" is:

any individual or other legal entity that (1) directly or indirectly (e.g., through an affiliate), submits for or is awarded or reasonably may be expected to submit offers for or be awarded, a Government contract, including . . . a subcontract under a Government contract; or (2) conducts business, or reasonably may be expected to conduct business, with the Government as an agent or representative of another contractor.²

If this reflects the scope of the EO, it will have significant economic impacts: tens of thousands of entities—universities, small businesses, large businesses, even states—throughout the country may be considered contractors or "subcontractors," a term that is ill-defined even in the FAR. These obligations could be read to extend to federal grant recipients, healthcare providers, and even suppliers and vendors to federal contractors that scrupulously seek to avoid characterization as a federal subcontractor.

The EO does not address how it stands relative to existing federal contract programs that arguably violate the EO's own provisions, including the Small Business Administration's 8(a) program or programs like the Environmental Protection Agency's Disadvantaged

Business Enterprise program. Arguably these federal programs involve the assessment of race—through minority-owned business set asides, to give one example. Many federal contractors are required, by their federal contracts, to have small business subcontracting plans that expressly take into account minority-owned business development efforts. Similarly, a majority of states still require contractors to implement affirmative action plans, have preferences or plans for disadvantaged businesses, or maintain similar practices. The EO risks placing federal contractors that are also state contractors in the difficult, and potentially precarious, position of navigating compliance with the EO and federal contract terms on the one hand and conflicting state obligations on the other.

How should federal contractors respond?

The administration has now provided some guidance about the scope of illegal DEI—that is a positive insofar as the prior rhetoric and sub-regulatory guidance was ambiguous at best. While the definition appears to be a disparate-treatment standard that could be broad, some definition is better than no definition for organizations seeking to at least measure and assess their practices against an articulated standard. Federal contractors should develop plans to promptly identify and review the terms of their federal contracts and subcontracts to determine the timing and protocol to modify those terms to potentially incorporate the terms outlined in the EO. Federal contractors should also be on the lookout for contract modifications incorporating new terms and conditions soon from their contracting officers. Many subcontracts may also need to be amended to flowdown this definition and applicable provisions to subcontractors—potentially a large-scale effort for large federal contractors. Similarly, federal contractors might undertake a comprehensive assessment of potentially conflicting state and local obligations and develop a plan for addressing those conflicts with the expectation that these new terms and conditions are coming to their contracts, including potential modification of state and local contracts and subcontracts.

Relatedly, federal contractors might undertake a thorough review of their practices—including, but not limited to, employment-related practices—to identify practices that are potentially noncompliant with the EO. Once identified, federal contractors can better determine what steps, if any, they can and should take to mitigate the risk of a finding of noncompliance by the federal government. Because the EO's certification language appears to apply only prospectively, federal funds recipients should act quickly to implement any changes to policies or practices they deem necessary.

Potentially affected parties should also keep a close eye on legal developments related to this EO, particularly when and if it is challenged in court.

¹*Nat'l Ass'n of Diversity Officers in Higher Educ. V. Trump*, 767 F. Supp. 3d 243 (D. Md. 2025), *vacated* 167 F.4th 86 (4th Cir. 2025)

²48 C.F.R. 9.403.