Government Contracts DEI Restrictions Under EO 14398: What Contractors Need to Know

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Federal agencies are rapidly implementing Executive Order 14398, Addressing DEI Discrimination by Federal Contractors (March 26, 2026),[1] which establishes sweeping new restrictions on contractor diversity, equity and inclusion (DEI) programs, including activities that historically may not have been interpreted to violate existing anti-discrimination law. Government contractors that have not already done so—including subcontractors and commercial products and services providers—should consider how to respond to the new policies. The Order may affect even companies that do not maintain DEI programs because prime contractors may be held responsible for certain subcontractor violations.

The FAR Council issued guidance and model deviations, and the implementing clause, FAR 52.222-90, *Addressing DEI Discrimination by Federal Contractors*, is already appearing in new solicitations. Contracting officers are directed to modify existing contracts to add the clause by July 24, 2026, and agencies have already started issuing modifications. At the same time, litigation challenging the Order is in the early stages.

How does the new executive order compare to the Administration's earlier DEI policies?

The Administration has targeted certain DEI programs from the outset, starting with Executive Order 14173, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* (Jan. 21, 2025),[2] issued on the President's second day in office. EO 14173 required contractors to certify that they did not operate DEI programs violating federal anti-discrimination laws.

EO 14398 marks a significant expansion beyond EO 14173. Where EO 14173 is framed as enforcing existing anti-discrimination law, EO 14398 establishes standalone prohibitions on specified DEI-related activities. EO 14398 requires government contractors to agree not to engage in broadly defined "racially discriminatory DEI activities":

- "Racially discriminatory DEI activities" include "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."
- Covered programs include "training, mentoring, or leadership development programs; educational opportunities; clubs; associations; or similar opportunities that are sponsored or established by the contractor or subcontractor."
- Covered participation includes "membership or participation in, or access or admission to" such programs.

What are the potential consequences of violating FAR 52.222-90?

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FAR 52.222-90 and the implementing regulations authorize severe consequences for violations, including contract cancellation, termination, suspension or debarment and potential False Claims Act exposure. The clause also states that compliance is "material to the Government's payment decisions" for purposes of the False Claims Act. The FCA is a remedy the government has already used, as demonstrated by DOJ's April 2026 $17 million settlement with IBM, the first FCA resolution premised on "illegal DEI."

The government may face practical challenges enforcing some of these remedies. Stating in a contract that compliance with a requirement is "material" does not necessarily make it so. The FAR also limits debarment to cases serving the public interest, not punishment.[3] It remains to be seen whether suspending and debarring officials will pursue debarment based on participation in DEI-related programs covered by the Order.

What responsibilities do prime contractors have for subcontractors?

The clause imposes significant obligations on prime contractors to ensure subcontractor compliance. Government contractors are required to report any subcontractor conduct violating the clause that is "known or reasonably knowable" and to take "appropriate remedial actions directed by the contracting department or agency." Prime contractors may be subject to the same range of consequences for subcontractor violations as for violations based on their own conduct. Contractors are also obligated to notify the government of any subcontractor lawsuits that "put at issue, in any way, the validity of [the] clause."

The clause is required to be flowed down in subcontracts at all tiers, including commercial products and services subcontracts, where the place of delivery or performance is in the United States.

What is the timeline for implementation?

For new solicitations, agencies are directed to include FAR 52.222-90 starting April 24, 2026.

For ongoing contracts, the FAR Council's implementing guidance for EO 14398 instructs contracting officers to "make every effort to bilaterally modify existing contracts by July 24, 2026." The memorandum further provides that "[i]f a contractor refuses to agree to a bilateral modification, the contracting officer should consider whether, absent the modification, the contract no longer meets the agency's needs and should therefore be terminated." Contracting officers have discretion not to modify contracts that expire by Dec. 31, 2026.

What is the status of ongoing legal action over the Order?

A coalition of educational associations and minority contractor associations filed suit in federal district court in Maryland challenging EO 14398.[4] Plaintiffs allege that the Order violates the First Amendment by chilling lawful expression through an overbroad definition of prohibited activities and by imposing an unconstitutional condition on government contract eligibility. The complaint also alleges that the Order's False Claims Act enforcement provision exceeds the President's authority under the Federal Property and Administrative Services Act (FPASA)[5] because it lacks a sufficiently close nexus to economy and efficiency in procurement. The plaintiffs amended their complaint in May 2026 to add a Fifth Amendment vagueness challenge and Administrative Procedure Act claims challenging the FAR Council's guidance, including its issuance without the notice-and-comment procedures required by 41 U.S.C. § 1707.[6]

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The lawsuit was shaped by earlier litigation challenging EO 14173 and related executive orders addressing "illegal DEI." There, a district court initially enjoined portions of the Administration's policies,[7] but the Fourth Circuit vacated the injunction, reasoning that plaintiffs "have no protectable speech interest in operating, and 'no constitutional right to operate[,] DEI programs that violate federal antidiscrimination law.'"[8] The new complaint alleges that EO 14398 is materially broader because its definition of prohibited "racially discriminatory DEI activities" is not limited to conduct that independently violates existing anti-discrimination law.

On June 4, 2026, the plaintiffs filed a motion for a preliminary injunction. Unless and until the court grants injunctive relief, however, the FAR Council's implementation timeline remains operative.

What should government contractors do now to prepare?

Given the implementation timeline, government contractors should not wait for the Maryland lawsuit to alter or delay implementation before deciding how to respond to FAR 52.222-90. This applies broadly to all government contractors, including subcontractors and commercial products and services providers—indeed, any company with a contract with a place of delivery or performance in the United States. While specific actions will vary depending on the type of business and size of a government contractor and consulting with counsel is urged, the following points outline considerations and potential actions to contemplate now.

First, contractors should evaluate their current activities and consider engaging counsel to conduct an assessment so that it is protected by privilege. The Executive Order may reach many longstanding corporate activities that promote diversity. The express inclusion of recruitment is significant: it aligns with DOJ and EEOC enforcement positions that diverse-slate requirements may constitute unlawful discrimination. That review should cover any program, policy or practice in which race or ethnicity plays a role—from recruiting and hiring to mentoring, employee resource groups, supplier diversity and resource allocation—and should extend to practices not labeled "DEI," such as performance metrics and supplier targets.

Second, contractors should consider whether they will, or can, accept the clause in new solicitations and existing contracts, or whether they want to pursue a challenge to the Order and its implementation on grounds already expressed in the Maryland action, which now include constitutional claims, substantive APA claims and procedural claims such as the alleged failure to follow required notice-and-comment procedures.

Third, contractors that accept the clause will need to take steps to achieve compliance and mitigate risk. That starts with adjusting their DEI-related activities as needed to comply with restrictions under EO 14398—and creating documentation supporting that any remaining activities are lawful. The Order and implementing clause also make prime contractors responsible for subcontractors' compliance. Contractors will need to flow down the requirements and determine what level of representations and certifications and oversight are necessary to satisfy their obligations under the clause.

Fourth, contractors should revise internal guidance and training across relevant functions as needed to ensure that eligibility for programs, opportunities and advancement does not involve "disparate treatment based on race or ethnicity."

These steps will allow contractors to prepare for the implementation of EO 14398 before receiving a solicitation, award or modification incorporating FAR 52.222-90.

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[1] 91 Fed. Reg. 16,147 (Mar. 31, 2026).

[2] 90 Fed. Reg. 8,633 (Jan. 31, 2025).

[3] FAR 9.402(b).

[4] *Nat'l Ass'n of Diversity Officers in Higher Educ. et al. v. Trump*, No. 8:26-cv-01532-ABA (D. Md. filed Apr. 20, 2026).

[5] 40 U.S.C. §§ 101, 121(a).

[6] *Am. Compl.*, *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, No. 8:26-cv-01532-ABA (D. Md. May 22, 2026).

[7] *Nat'l Ass'n of Diversity Officers in Higher Educ. et al. v. Trump*, No. 1:25-cv-00333-ABA (D. Md. Feb. 21, 2025).

[8] *Nat'l Ass'n of Diversity Officers in Higher Educ. v. Trump*, 167 F.4th 86, 103 (4th Cir. 2026).

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