

Managing Risk in the Everchanging World of the Trump Administration's Executive Orders

ACC NCR's First 100 Days of the New Administration Conference

Speakers:

- Nayna M. Diehl, Vice President, Deputy General Counsel, CACI International Inc.
- Denise Giraudo, Partner and Labor & Employment Leader, Sheppard Mullin
- Ryan Roberts, Partner and Government Contracts Leader, Sheppard Mullin

May 7, 2025

Presenters



Nayna M. Diehl
CACI



Denise Giraudo
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Friendly Reminder

This presentation is provided for information purposes only and does not constitute legal advice and is not intended to form an attorney client relationship. As you are aware, things are changing quickly. This presentation does not reflect an unequivocal statement of the law, but instead represents our best interpretation of where things currently stand in this very fluid environment.

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Agenda

DEI EOs

Implementation
Update

Litigation

FAQs

GovCon
Potpourri



PRESIDENTIAL ACTIONS

ENDING RADICAL AND WASTEFUL GOVERNMENT DEI PROGRAMS AND PREFERENCING

EXECUTIVE ORDER

January 20, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose and Policy. The Biden Administration forced illegal and immoral discrimination programs, going by the name “diversity, equity, and inclusion” (DEI), into virtually all aspects of the Federal Government, in areas ranging from airline safety to the military. This was a concerted effort stemming from President Biden’s first day in office, when he issued Executive Order 13985, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.”

Pursuant to Executive Order 13985 and follow-on orders, nearly every Federal agency and entity submitted “Equity Action Plans” to detail the ways that they have furthered DEI’s infiltration of the Federal Government. The public release of these plans demonstrated immense public waste and shameful discrimination. That ends today. Americans deserve a government committed to serving every person with equal dignity and respect, and to expending precious taxpayer resources only on making America great.



PRESIDENTIAL ACTIONS

ENDING ILLEGAL DISCRIMINATION AND RESTORING MERIT-BASED OPPORTUNITY

January 21, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Purpose. Longstanding Federal civil-rights laws protect individual Americans from discrimination based on race, color, religion, sex, or national origin. These civil-rights protections serve as a bedrock supporting equality of opportunity for all Americans. As President, I have a solemn duty to ensure that these laws are enforced for the benefit of all Americans.

Yet today, roughly 60 years after the passage of the Civil Rights Act of 1964, critical and influential institutions of American society, including the Federal Government, major corporations, financial institutions, the medical industry, large commercial airlines, law enforcement agencies, and institutions of higher education have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called “diversity, equity, and inclusion” (DEI) or “diversity, equity, inclusion, and accessibility” (DEIA) that can violate the civil-rights laws of this Nation.



PRESIDENTIAL ACTIONS

DEFENDING WOMEN FROM GENDER IDEOLOGY EXTREMISM AND RESTORING BIOLOGICAL TRUTH TO THE FEDERAL GOVERNMENT

The White House

January 20, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 7301 of title 5, United States Code, it is hereby ordered:

Section 1. Purpose. Across the country, ideologues who deny the biological reality of sex have increasingly used legal and other socially coercive means to permit men to self-identify as women and gain access to intimate single-sex spaces and activities designed for women, from women’s domestic abuse shelters to women’s workplace showers. This is wrong. Efforts to eradicate the biological reality of sex fundamentally attack women by depriving them of their dignity, safety, and well-being. The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system. Basing Federal policy on truth is critical to scientific inquiry, public safety, morale, and trust in government itself.

This unhealthy road is paved by an ongoing and purposeful attack against the ordinary and longstanding use and understanding of biological and scientific terms, replacing the immutable biological reality of sex with an internal, fluid, and subjective sense of self unmoored from biological facts. Invalidating the true and biological category of “woman” improperly transforms laws and policies designed to protect sex-based opportunities into laws and policies that undermine them, replacing longstanding, cherished legal rights and values with an identity-based, inchoate social concept.

Accordingly, my Administration will defend women’s rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male.

Sec. 2. Policy and Definitions. It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality. Under my direction, the Executive Branch will enforce all sex-protective laws to promote this reality, and the following definitions shall govern all Executive interpretation of and application of Federal law and administration policy:

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The Administrator

Contractor Notice re Implementation of Executive Order

MEMORANDUM

To: All GSA Contractors

From: Stephen Ehlkian
Acting Administrator 

Date: January 22, 2025

Subject: Policy Statement Regarding Intent to Suspend Enforcement of Contractual DEI Terms in Existing Agreements

Consistent with President Trump's priorities and agenda, Executive Order, *Ending Radical and Wasteful Government DEI Programs and Preferencing* (January 20, 2025); Executive Order, *Initial Rescissions of Harmful Executive Orders and Actions* (January 20, 2025); and Executive Order, *Ending Illegal Discrimination And Restoring Merit-Based Opportunity* (January 21, 2025), to the maximum extent permitted by law, the General Services Administration (GSA) intends to take immediate action to begin forbearing enforcement of all contract clauses, provisions, terms, and conditions, related to "diversity, equity, and inclusion" (DEI). These programs divided Americans by race, wasted taxpayer dollars, and resulted in discrimination. As set forth by President Trump, forbearing enforcement will provide immeasurable benefits to the American people.

This forbearance may include, but is not limited to, any clauses that mandate diversity-related obligations, any reporting or record keeping requirements specifically related to the same and to requirements imposed on contractors on a firm-wide basis, in each case not otherwise mandated by law.

We are aware of efforts by some in government and private industry to disguise these programs by using coded or imprecise language. If you are aware of a change in your contract since November 5, 2024, to obscure the connection between the contract and DEI or similar ideologies, please report all facts and circumstances to GSAtruth@gsa.gov within 10 days. Our goal is to help alleviate you of these unnecessary, illegal, and divisive contractual provisions and regulatory overreach. As a reminder, compliance in all respects with all applicable Federal

U.S. General Services Administration
1800 F Street NW
Washington, DC 20405
www.gsa.gov



Ending Illegal Discrimination and Restoring Merit-Based Opportunity

On January 21, 2025, the White House and President Donald Trump issued an Executive Order: "[Ending Illegal Discrimination and Restoring Merit-Based Opportunity](#)", which revoked Executive Order 11246. For 90 days from the date of this order, Federal contractors *may* continue to comply with the regulatory scheme in effect on January 20, 2025.

The Office of Federal Contract Compliance Programs shall immediately cease:

- Promoting "diversity".
- Holding Federal contractors and subcontractors responsible for taking "affirmative action"; and
- Allowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.

It is important to note that requirements under Section 503 of the Rehabilitation Act, 29 U.S.C. 793, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), 38 U.S.C. 4212, both enforced by OFCCP, are statutory and **remain in effect**.

Additional information regarding OFCCP's current activities will be forthcoming in the upcoming weeks.

If you have any questions, please [contact the OFCCP Customer Service Helpdesk](#) at 1-800-397-6251 or 711 for TTY-Based Telecommunications Relay Service.



The Director

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20545

MEMORANDUM

TO: Heads and Acting Heads of Departments and Agencies

FROM: Charles Ezell, Acting Director, U.S. Office of Personnel Management

DATE: January 21, 2025

RE: Initial Guidance Regarding DEIA Executive Orders

Pursuant to its authority under 5 U.S.C. § 1103(a)(1) and (a)(5), the U.S. Office of Personnel Management ("OPM") is providing the following initial guidance to agencies regarding the President's executive orders titled *Ending Radical and Wasteful Government DEI Programs and Preferencing* and *Initial Rescissions of Harmful Executive Orders and Actions*, which repeals Executive Order 14035, *Diversity, Equity, Inclusion and Accessibility in the Federal Workforce*.

Steps to Close Agency DEIA Offices: In light of the above Executive Orders, each should take prompt actions regarding the offices and agency sub-units focusing exclusively on DEIA initiatives and programs (the "*DEIA offices*"). Specifically, agency heads should take the following steps:

1. No later than **5:00 pm EST on Wednesday, January 22, 2025**
 - a. Send an agency-wide notice to employees informing them of the closure and asking employees if they know of any efforts to disguise these programs by using coded or imprecise language a template agency-wide notice is attached as [Appendix 1](#).
 - b. Send a notification to all employees of DEIA offices that they are being placed on paid administrative leave effective immediately as the agency takes steps to close/end all DEIA initiatives, offices and programs.¹ A template employee letter is attached as [Appendix 2](#).
 - c. Take down all outward facing media (websites, social media accounts, etc.) of DEIA offices.

¹ The authority for placing these employees on paid administrative leave is set forth in the OPM memorandum entitled "Guidance on Probationary Periods, Administrative Leave and Details" issued January 20, 2025.

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National Aeronautics and Space Administration

Mary W. Jackson NASA Headquarters
Washington, DC 20546-0001



January 23, 2025

MEMORANDUM FOR NASA CONTRACTOR AND GRANTEE COMMUNITY

SUBJECT: Initial Guidance Regarding Diversity, Equity, Inclusion, Accessibility (DEIA) Executive Orders

On January 20, 2025, the President of the United States of America signed an Executive Order (E.O.) titled, "[Initial Rescissions of Harmful Executive Orders and Actions](#)", which repeals Executive Order 14035, Diversity, Equity, Inclusion and Accessibility in the Federal Workforce". The U.S. Office of Personnel Management (OPM) issued a memorandum, dated January 21, 2025, titled, "[Initial Guidance Regarding DEIA Executive Orders](#)" to federal agencies.

To implement the E.O. requirements, OPM directed federal agencies to take immediate action to identify and terminate DEIA initiatives and programs and remove final or pending documents, directives, orders, materials, and equity plans issued in response to the now-repealed Executive Order 14035, Diversity, Equity, Inclusion and Accessibility (DEIA) in the Federal Workforce (June 25, 2021). To date, the following directions are provided:

Contracts and Grants. NASA Contractors and Grantees immediately shall cease and desist all DEIA activities required of their contracts or grants. In accordance with FAR 52.242-15, Stop Work clause, a stop work order may have been issued to stop all or any part of the DEIA related activity. Additionally, FAR 52.249, Terminations clause modifications may also be issued to implement this change. This work may include but is not limited to: DEIA plan requirement, training, reporting, considerations for staffing, or any other direct or indirect contract or grant activity. All Contractors and Grantees shall notify their Contracting Officer or Grant Officer if they identify requirements within their contracts or grants that are in violation this guidance.

Guidance. Consistent with the DEIA E.O. and the [Regulatory Freeze Pending Review E.O.](#), additional guidance will be issued to further implement the executive order requirements, such as updating and removing DEIA related policy guidance in the NASA FAR Supplement, Grant and Cooperative Agreement Manual, Grant and Cooperative Agreement Procedures, and the Grant and Cooperative Agreement Terms and Conditions.

Websites, social media, accounts, etc. NASA Office of Procurement has removed external and internal facing contract and grant websites that include DEIA related policies and documents, and these website were taken offline as of 5pm January 22, [per OPM guidance](#).

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EO 14173 Primary Goals



Rid the Federal workforce of all personnel whose job focuses on enhancing DEI programs within the Federal Government



Rid the Federal Government of all activities and programs promoting/supporting DEI



Compel Federal contractors and grantees to end any/all DEI efforts









Pressure organizations (companies, universities, associations, etc.) to end their internal DEI efforts, whether or not they are Federal contractors or grantees

Critical Dates



Implementation

The Path From EO To Implementation

- Government Pronouncements 
- Agency Memoranda 
- CO/GO Emails 
- FAR Deviations 
- Formal Contract Modifications 
- FAR Changes
 - Interim Rule 
 - Final Rule



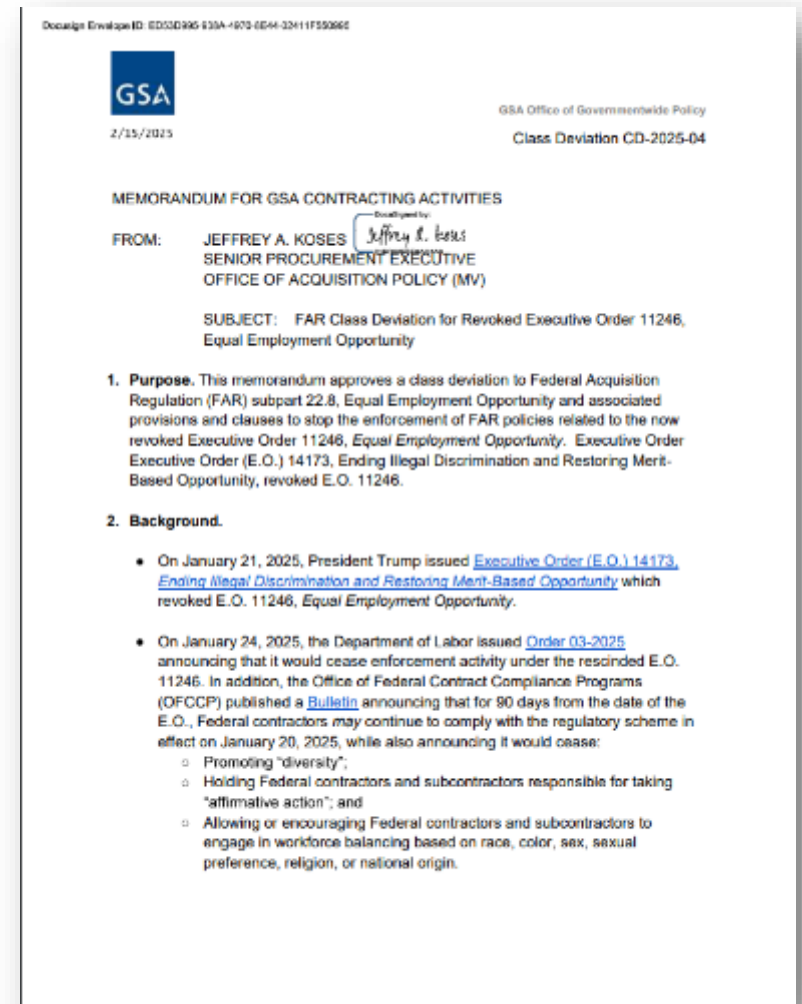
Secretary's Order 03-2025 - To Cease and Desist All Investigative and Enforcement Activity Under Rescinded Executive Order 11246.

Date: January 24, 2025

1. **Purpose.** To immediately cease and desist all investigative and enforcement activity under the rescinded Executive Order 11246, *Equal Employment Opportunity* (September 24, 1965), and the regulations promulgated under it. DOL no longer has any authority under the rescinded Executive Order 11246. This order applies to all DOL employees, including OFCCP, OALJ, and ARB.
2. **Authorities.** This Order is issued pursuant to the President's Executive Order, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* (January 21, 2025), which repeals Executive Order 11246 and its subsequent amendments.
3. **Orders.**
 - a. Cease and desist all investigative and enforcement activity under the rescinded Executive Order 11246 and the regulations promulgated under it. This includes all pending cases, conciliation agreements, investigations, complaints, and any other enforcement-related or investigative activity.
 - b. Notify all regulated parties with impacted open reviews or investigations by January 31, 2025, that the EO 11246 component of the review or investigation has been closed and the Section 503 and VEVRAA components of the review or investigation are being held in abeyance pending further guidance.

GSA Class Deviation CD-2025-04

- Deviation to “to stop the enforcement of FAR policies related to the now revoked Executive Order 11246”
- Removes multiple FAR clauses, certs, and reps
- Instructs COs on how to contractually implement changes



Contract Clause Target Scorecard



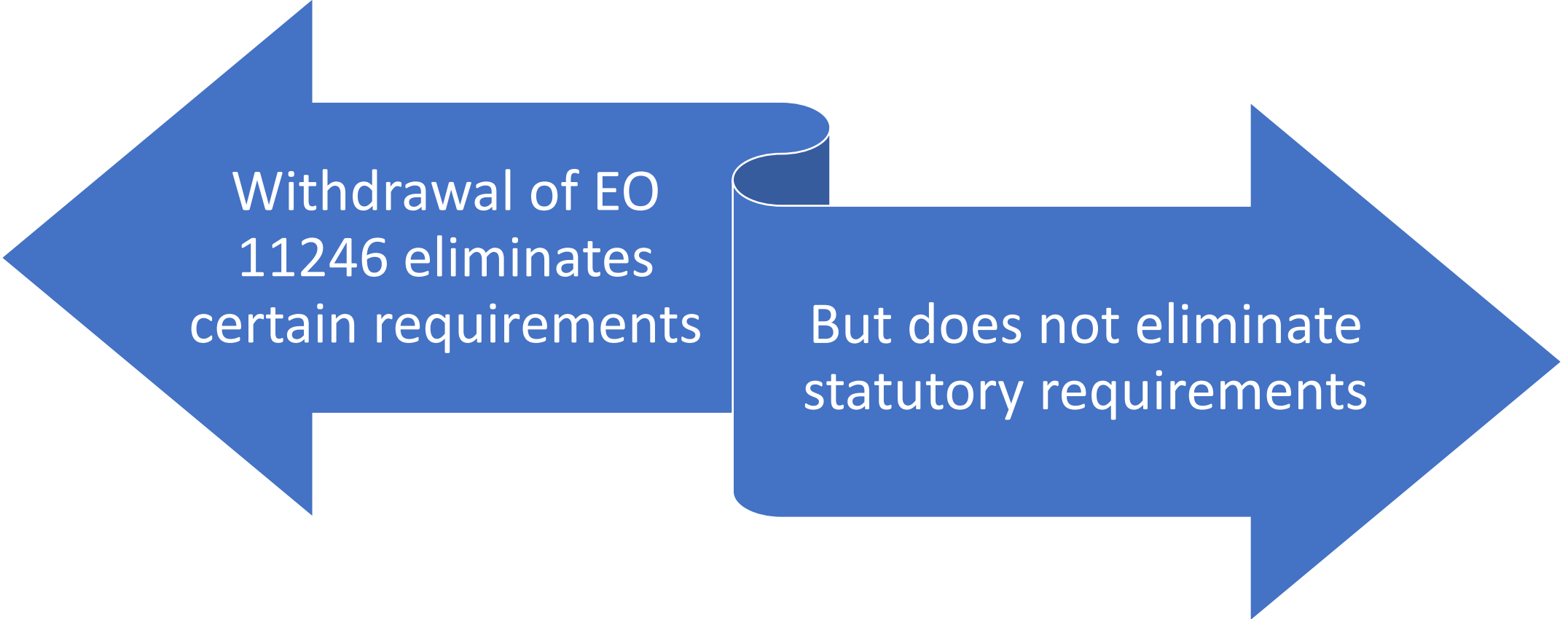
- FAR 52.222-9 (Apprentices and Trainees)
- FAR 52.222-21, Prohibition of Segregated Facilities
- FAR 52.222-22, Previous Contracts and Compliance Reports
- FAR 52.222-23 (Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction)
- FAR 52.222-24 (Pre-award On-site Equal Opportunity Compliance Evaluation)
- FAR 52.222-25 (Affirmative Action Compliance)
- FAR 52.222-26 (Equal Opportunity)
- FAR 52.222-27 (Affirmative Action Compliance Requirements for Construction)
- FAR 52.222-29 (Notification of Visa Denial)

Internal and External Messaging

- Some companies will have to modify their programs – some significantly
- Messaging will be key
 - Companies want to ensure all employees feel safe, supported, and heard
 - Companies want to communicate a clear intent to comply with the law

“We are aware of efforts by some in government and private industry to disguise these programs by using coded or imprecise language.” –GSA Memorandum

EO 11246 vs. Statutory Obligations



The diagram consists of two large blue arrows pointing in opposite directions, one to the left and one to the right, connected by a central horizontal bar. The left arrow contains the text 'Withdrawal of EO 11246 eliminates certain requirements'. The right arrow contains the text 'But does not eliminate statutory requirements'.

Withdrawal of EO
11246 eliminates
certain requirements

But does not eliminate
statutory requirements

EO 14173 Forthcoming Contract Clauses



- “A term requiring such counterparty or recipient to certify that it does not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”
- “A term requiring the contractual counterparty or grant recipient to agree that its compliance in all respects with all applicable Federal anti-discrimination laws is **material** to the government’s payment decisions for purposes of section 3729(b)(4) of title 31, United States Code.”

In The Meantime . . .

All contractors must certify that they do not operate any programs promoting DEI that violate any applicable anti-discrimination laws and agree that such certification is material for purposes of the government's payment decision and therefore subject to the False Claims Act. See 31 U.S.C. 3729(b)(4).

CERTIFICATION REGARDING COMPLIANCE WITH APPLICABLE FEDERAL ANTI-DISCRIMINATION LAW

The Contractor or prospective offeror certifies that -

☐

Is in compliance in all respects with all applicable Federal anti-discrimination laws is material to the government's payment decisions for purposes of section 31 USC 3729(b)(4) (False Claims Act);

☐

does not operate any programs promoting Diversity, Equity, and Inclusion that violate any applicable Federal anti-discrimination laws.



U.S. Consulate General, Dubai
Date: February 12, 2025

Dear Prospective Quoter:

Subject: Request for Quotations number 19TC1225Q0003 for CGR Landscaping Works.

Enclosed is a Request for Quotations (RFQ) 19TC1225Q0003 for CGR Landscaping Services at Consulate General Residence Umm Suqeim 2, Dubai-UAE.

company submitting a technically is the right to hold discussions per hour holding discussions, although are is a need to do so.

M (local time) on Thursday 20th their representatives by 03:00 PM

Attendance is limited to only two persons per company.

Quotations are due by 03:00 PM (local time) on Thursday 6th March 2025. No quotations will be accepted after this time. Proposals must be in English and incomplete proposals will not be accepted.

Your quotation must be submitted electronically to DubaiGSOProcurement@state.gov. It is important to make sure the submission is made in specific size and format; in MS-Word 2007/2010 or MS-Excel 2007/2010 or Adobe Acrobat (pdf) file format. The file size must not exceed 30MB. If the file size should exceed the 30MB, the submission must be made in separate files and attached to separate emails with less than 30MB each. Hard copies of quotations and links to quotations are not acceptable and shall not be considered for the evaluation process.

In order for a quotation to be considered, you must also complete and submit the following:

1. SF-1449
2. Section I, Pricing
3. Section 5 Representations and Certifications
4. Additional information as required in Section 3
5. Proof of SAM Registration
6. NDAA 889 compliance certification

Offerors shall be registered in the SAM (System for Award Management) database at <https://www.sam.gov> prior to submittal of their quotation as prescribed under FAR 4.1102. Failure to be registered at time of proposal submission may deem the offeror's proposal to be considered non-responsible and no further consideration will be given. Therefore, offerors are highly encouraged to register immediately if they are interested in submitting a response to this requirement.

Government's Enforcement Tools

- New certification
- New reporting hotline
 - GSAtruth@gsa.gov
- False Claims Act
 - DOJ
 - Whistleblower
- Direction to agencies to identify
 - Specific companies to investigate
 - Key sectors of concern and particular “egregious” violators
 - Actions to align, among other things, programs, contracts, and grants with the EO



Federal Civil False Claims Act

Claim

Contract, order,
invoice

Falsity

Either new false
certification or
implied false
certification re
compliance
generally

Materiality

EO calls for new
certification to
concede
materiality

Scienter

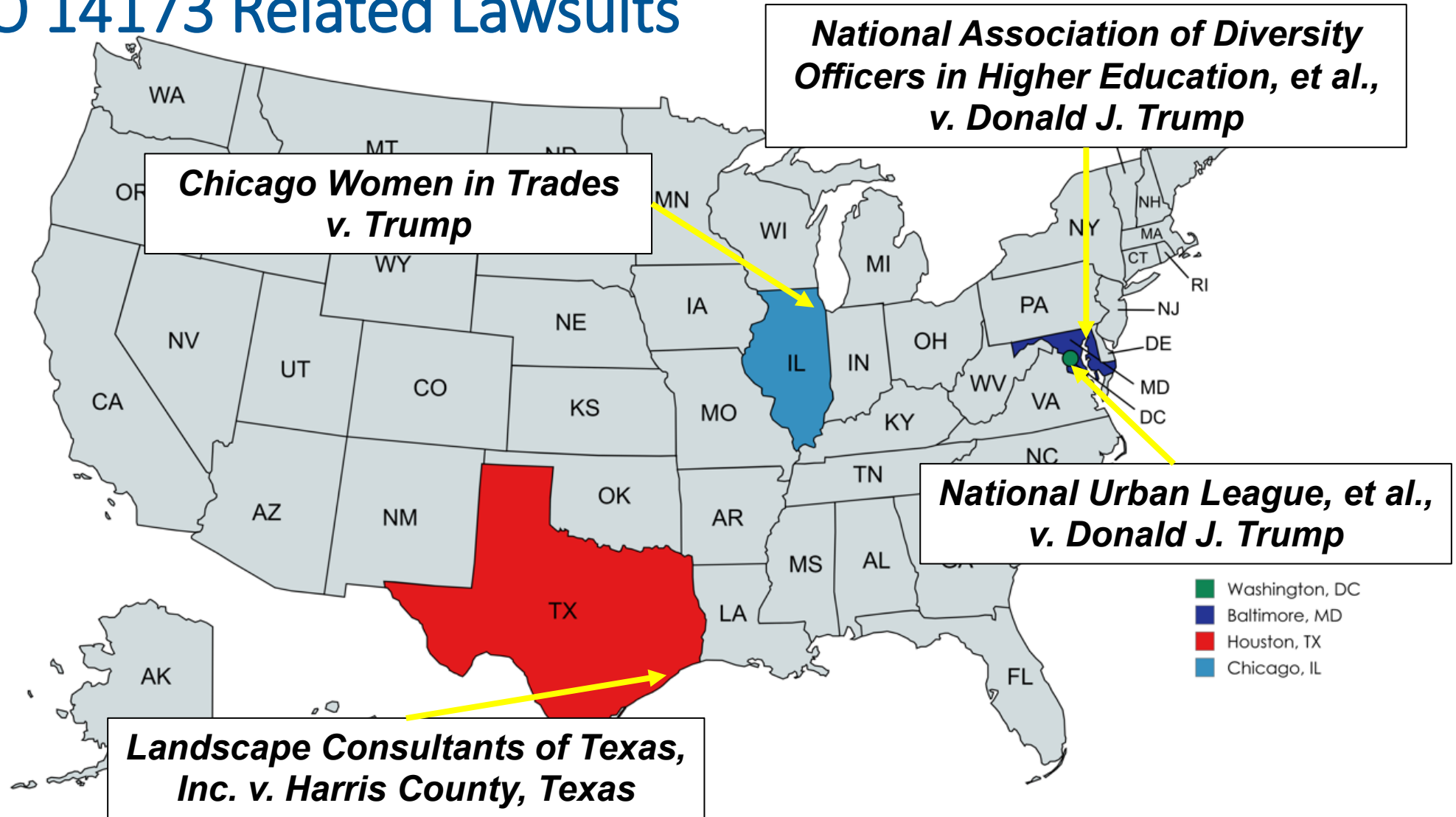
The breadth of
the Government
awareness
campaign will
make it harder
to prove no
scienter

Damages?

Government
may be able to
pursue a
penalties-based
FCA case
without actual
damages

Litigation Update

EO 14173 Related Lawsuits



Litigation Update: D. Md. Injunction

- **Constitutional Challenges**

- 1st Amendment
- 5th Amendment

- **Preliminary Injunction Issued February 21, 2025**

- Prohibiting the Federal Government from requiring DEI certifications;
- Prohibiting the Federal Government from bringing any enforcement action stemming from the EOs; and
- Prohibiting the Federal Government from impeding in any way any awards, contracts or obligations in connection with “equity-related” grants or contracts as required under EO 14151.

“Indeed, the Certification Provision was likely designed to induce, and certainly has been shown to have the effect of inducing, federal contractors and grantees to apply an overinclusive definition of illegal DEI to avoid risking liability. This is exactly what [Supreme Court precedent] prohibits—the government leveraging its funding to restrict federal contractors and grantees from otherwise exercising their First Amendment rights outside the scope of the federal funding.”

“‘Vague laws invite arbitrary power.’ Sessions, 584 U.S. at 175 (Gorsuch, J., concurring). And Plaintiffs here have shown substantial evidence of the risks of such arbitrariness here. By threatening the ‘private sector’ with enforcement actions, [EO 14173], based on those vague, undefined standards, the Enforcement Threat Provision is facially unconstitutional under the due process clause of the Fifth Amendment.”

Litigation Update: 4th Circuit Decision

On March 14, a three-judge panel ruled on the appeal. Key quotes:

- **Chief Judge Diaz**: “despite the vitriol now being heaped on DEI, people of good faith who work to promote diversity, equity, and inclusion deserve praise, not opprobrium . . . From boardrooms to courtrooms to operating rooms to classrooms, previously marginalized Americans are thriving in spaces long closed to them. And we are the better for it.”
- **Judge Harris**: “What the Orders say on their face and how they are enforced are two different things. Agency enforcement actions that go beyond the Orders’ narrow scope may well raise serious First Amendment and Due Process concerns, for the reasons cogently explained by the district court.”
- **Judge Rushing**: “Any individual judge’s view on whether certain Executive action is good policy is not only irrelevant to fulfilling our duty to adjudicate cases and controversies according to the law, it is an impermissible consideration. A judge’s opinion that DEI programs ‘deserve praise, not opprobrium’ should play absolutely no part in deciding this case.”

Despite what these quotes might lead you to believe, all three judges voted to stay the preliminary injunction pending a decision on the merits...

Post-4th Circuit Decision Landscape

All provisions of the two DEI-focused EOs are back in play, including the Certification, Termination, and Enforcement provisions of EO 14173.

The Government can move forward with its plans, for now at least, to incorporate the new certification provision into government contracts and grants.

The Government can move forward with its plans to incorporate the new “materiality” acknowledgement in government contracts and grants.

The Government can move forward with its plans to investigate and bring enforcement actions against contractors and grantees (and any other organization, for that matter) believed to be engaging in “illegal DEI.”

A Tale of Two Courts

Chicago Women in Trades v. Trump (N.D. Ill.)

- Decision issued March 27, 2025
- Held EO 14173 constituted a “coercive threat” to suppress disfavored speech otherwise protected under the First Amendment.
- “[contractors/grantees] must either take steps now to revise their programmatic activity so that none of it ‘promote[s] DEI’ (whatever that is deemed to mean), decline to make a certification and thus lose their [contracts/grants], or risk making a certification that will be deemed false and thus subject the grantee to liability under the False Claims Act.”
- *Limited Scope Preliminary Injunction*

National Urban League v. Trump (D.D.C.)

- Decision issued May 2, 2025
- Found Plaintiffs lacked standing on 4 of 8 claims
- Held Plaintiffs unlikely to succeed on the merits of the remaining 4 claims
 - “Presidential directives to subordinates that inflict no concrete harm on private parties—or at least not on these parties—do not present a justiciable case or controversy.”
 - “The government need not subsidize the exercise of constitutional rights to avoid infringing them.”
 - “The Constitution does not provide a right to violate federal antidiscrimination law.”

Life After EO 11246

March 19, 2025 EEOC Guidance

- **Disparate Treatment.** Discrimination against applicants or employees on the basis of sex or race, including “hiring, firing, promotion, demotion, compensation, fringe benefits, exclusion from training, exclusion from mentoring or sponsorship programs, exclusion from fellowships, [and] selection for interviews (including placement on candidate slates).”
- **Harassment.** Situations when an employee is subjected to “unwelcome remarks or conduct based on race, sex, or other protected characteristics.” The EEOC notice provides that “depending on the facts, DEI training may give rise to a colorable hostile work environment claim.”
- **Limiting, Segregating, and Classifying.** Limiting membership in workplace ERGs to certain specified groups, or “separating employees into groups based on race, sex, or another protected characteristic when administering DEI or other trainings”
- **Retaliation.** Retaliation against an individual because he/she has objected to or opposed DEI activities. “Reasonable opposition to a DEI training may constitute protected activity if the employee provides a fact-specific basis for his or her belief that the training violates Title VII.”

How Should I Think About My Employee Resource Groups?

- OPM guidance to Government officials provides some insight
 - OPM seems okay with affinity group events that allow “employees to come together, engage in mentorship programs, and otherwise gather for social and cultural events”
 - But OPM cautions that discretion must be exercised to ensure such events do not cross the line into “illegal DEI”
 - Agencies must make sure activities are consistent with the goal of “creating a federal workplace focused on individual merit”
 - “Agencies must ensure that attendance at such events is not restricted (explicitly or functionally) by any protected characteristics, and that attendees are not segregated by any protected characteristics during the events”

Can I Still Host Recognition Events?

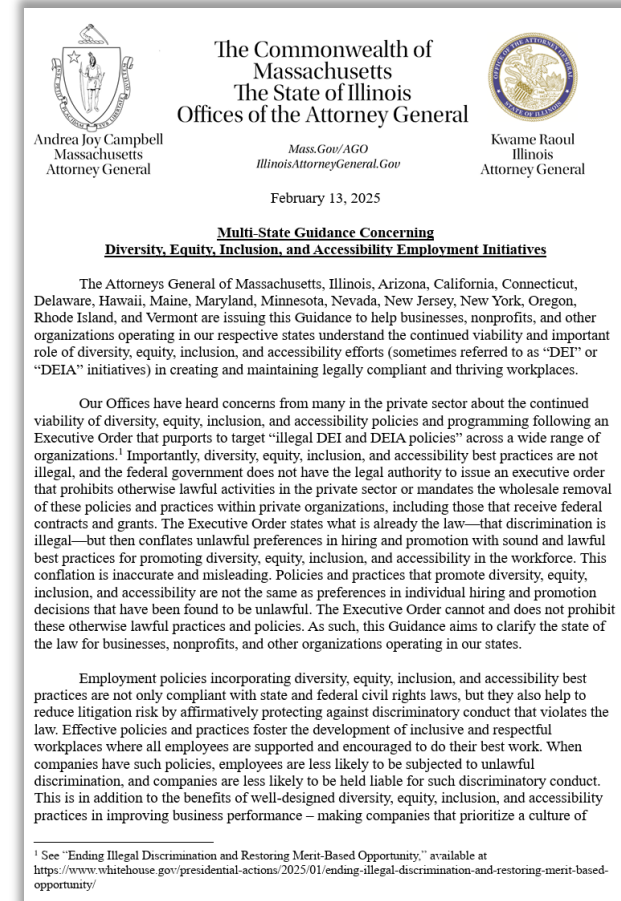
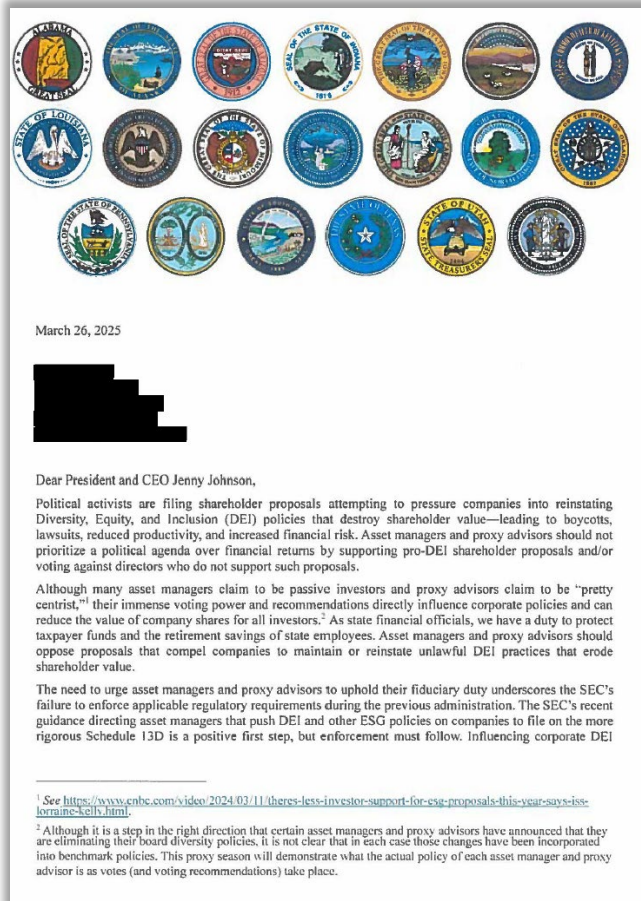
- Recognition events should not be deemed “illegal DEI” if implemented in a non-discriminatory manner
- DOD/DIA approach
- Presidential Proclamation
 - “February 2025 as National Black History Month”
 - “Public officials, educators, librarians, and all the people of the United States [should] observe this month with appropriate programs, ceremonies, and activities”
- DOJ February 5th Directive
 - “This memorandum is intended to encompass programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race or sex. It does not prohibit educational, cultural, or historical observances-such as Black History Month, International Holocaust Remembrance Day, or similar events-that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination”



Enforcement After EO 11246...

- The OFCCP is still getting its “sea legs” but, to date, we have not seen any enforcement activity related to Affirmative Action Plans (AAPs)
- Moving forward, the OFCCP’s enforcement will only focus on disabled employees and veterans
- AAPs related to disabled employees and veterans *are* required – and don’t forget the job posting requirements!
- The rescission of EO 11246 does not eliminate all EEO requirements – there’s still Title VII, ADA, ADEA, Section 1981....

One State, Two State, Red State, Blue State



State Affirmative Action Programs

- Catch-22
 - Federal law prohibits affirmative action programs
 - Some state laws requires affirmative action programs
- Reporting of statistics remains legal
 - In fact, Federal EEO-1 Reports require reporting diversity data
- Narratives detailing affirmative actions to employ and advance women and minorities, more problematic
- Where does this leave us?
 - The lesser of the evils probably is to continue submitting required state/local reports
 - It's a far thornier question if the state requires hiring preferences
 - In that case, contractors would comply with the state rule at great federal risk
 - Where possible, consider caveating state/local submissions

Statement of Former Equal Employment Opportunity Commission (EEOC)
Officials on Employer Diversity, Equity, and Inclusion Efforts
April 3, 2025

Dear Legal Community:

On March 19, 2025, EEOC Acting Chair Andrea Lucas issued a document entitled "What You Should Know About DEI-Related Discrimination at Work" ("Acting Chair's document").¹

The Acting Chair's document seems designed to convey the message that initiatives to advance diversity, equity, and inclusion ("DEI"), which the document does not define, are fraught with legal peril. This document ignores important aspects of applicable law, as well as the reality that proactive efforts are still needed in America's workplaces to provide equal opportunity for all employees and applicants. To the extent the Acting Chair's document chills such efforts, we believe it does a grave disservice to employers, their employees, and America's economy.

Under well-established legal principles discussed below, employers lawfully may – and indeed should – take proactive steps to identify barriers that have limited the opportunities of applicants and employees based on any protected characteristic. Properly constructed, such efforts are not discriminatory. To the contrary, they can help prevent and address the discrimination that continues to deny equal employment opportunities to qualified workers and applicants and prevents employers from utilizing the full talent of our communities.

An Employer's "Interest in Diversity"

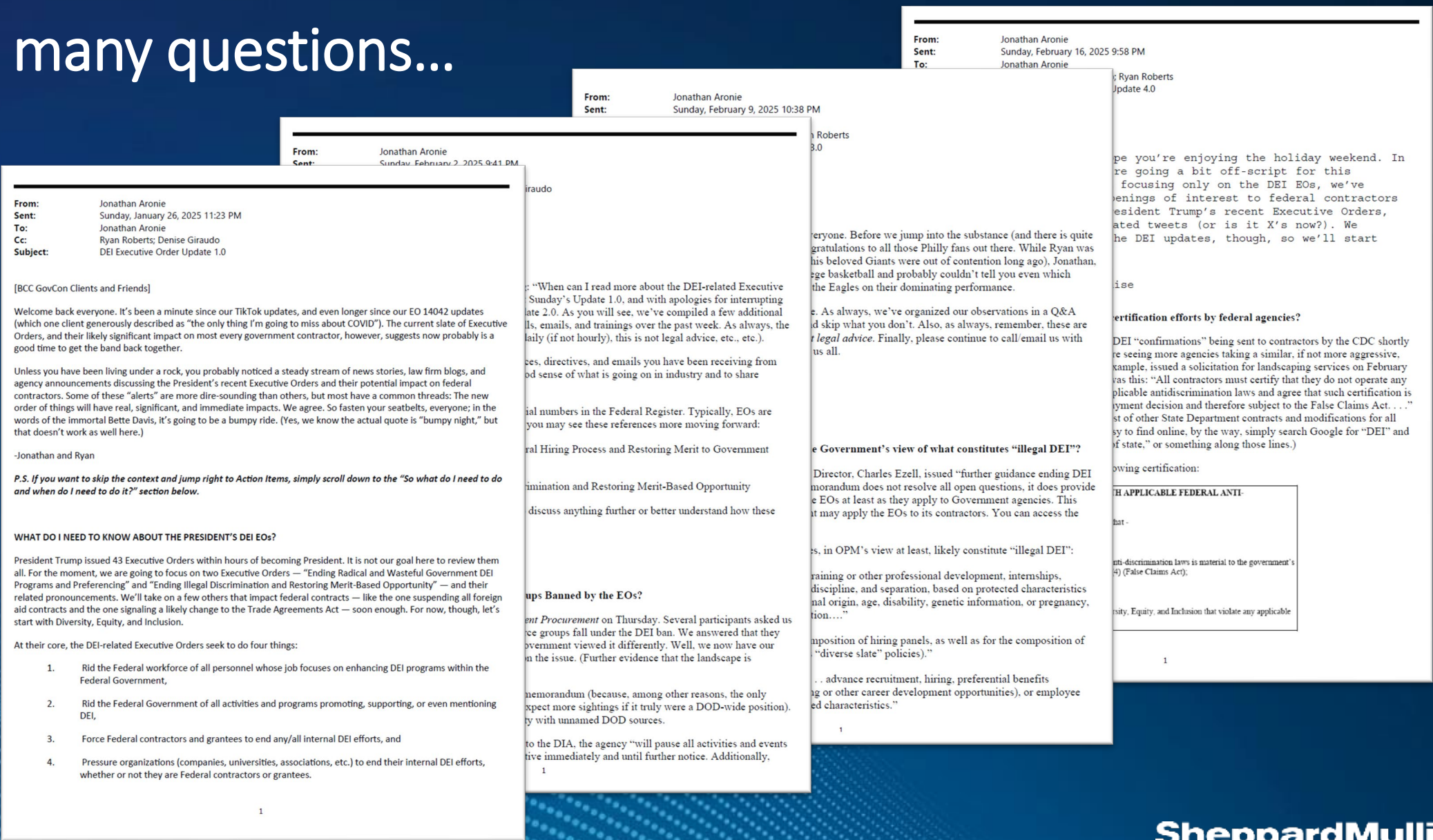
Many employers recognize the importance of having a diverse and inclusive workforce. Research is clear that such workforces can increase the economic bottom line for companies and can enhance productivity and innovation across the board for all organizations.² In addition, it is well-established law that employers may express their interest in providing equal opportunity by having a policy that embraces diversity and by working to address barriers.³

¹ This document was issued by the Acting Chair without a Commission vote and thus represents her views. We therefore describe this document as the Acting Chair's Document.

² Examples include Katherine W. Phillips, *How Diversity Makes Us Smarter*, Scientific American (2014) (summarizing research on positive aspects of diversity on innovation, decision-making and productivity); McKinsey, *Diversity Matters Even More* (2023) (global data shows that companies with the largest representation of women and the highest level of ethnic diversity in executive leadership were nearly 40% more likely to financially outperform compared with the companies with the lowest levels of diversity – and that this gap has grown over time).

³ *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (goal of diversity policy to reduce sexual orientation discrimination is consistent with goals of civil rights laws); *Bernstein v. St. Paul Companies, Inc.*, 134 F. Supp. 2d 730, 739 (D. Md. 2001) ("A company's (or its CEO's) commitment to 'diversity,' if expressed in terms of creating opportunities for employees of different races and both genders, or fostering workplace tolerance, is not proof of discriminatory motive with respect to any specific hiring decision."); *Lutes v. Goldin*, 62 F. Supp. 2d 118, 131 (D.D.C. 1999) (concern for ensuring equal

So, so many questions...



Path Forward Recommendations

Review and catalog your various DEI and DEI-related programs and initiatives.

Carefully evaluate existing DEI programs DEI-related affiliations, sponsorships, speaking engagements, and marketing materials.

Review policies, Code of Conduct, CSR/ESG reports, hiring materials, website, etc.

Review and catalog contracts and grants that incorporate DEI performance requirements.

Prepare for the elimination of EO 11246-based Affirmative Action obligations.

Retain programs focused on non-discrimination.

Keep a close eye on your inbox for CO/GO notices regarding modifications to your contracts and grants.

Once your federal agreements are modified, be sure to modify YOUR subcontracts.

Path Forward Recommendations

Catalog and re-assess your diversity-based partner/vendor alliance initiatives.

Ensure your internal affinity groups are not afforded opportunities unavailable to non-members.

If you are involved in pending audits or investigations relating to EO 11246 or DEI matters, consider reaching out to the investigating agency to confirm they will be terminating their efforts.

If you have a contract that could be suspended or terminated, take immediate steps to record and track all costs incurred relating to the stop work, suspension, or termination.

Ensure your internal hotline reporting and investigation plans are up to date.

Be careful not to over-correct in a manner that creates collateral risks.

GovCon Potpourri

Elsewhere in the Procurement Sphere...

FAR 2.0 Rewrite

GSA Consolidation

Preference for Commercial Products/Services

DoD Modernization

Tariffs

Consulting Contracts

Grant Terminations

High Ed. Enforcement

Thank You!



Nayna M. Diehl
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Denise Giraudo
Sheppard Mullin



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Sheppard Mullin