



Shifting Federal Procurement Landscape

Association of Corporate Counsel
National Capital Region

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The Times They Are a-Changin'

Procurement Mechanics

Procurement Policy

Current Events

On the Horizon...



Procurement Mechanics

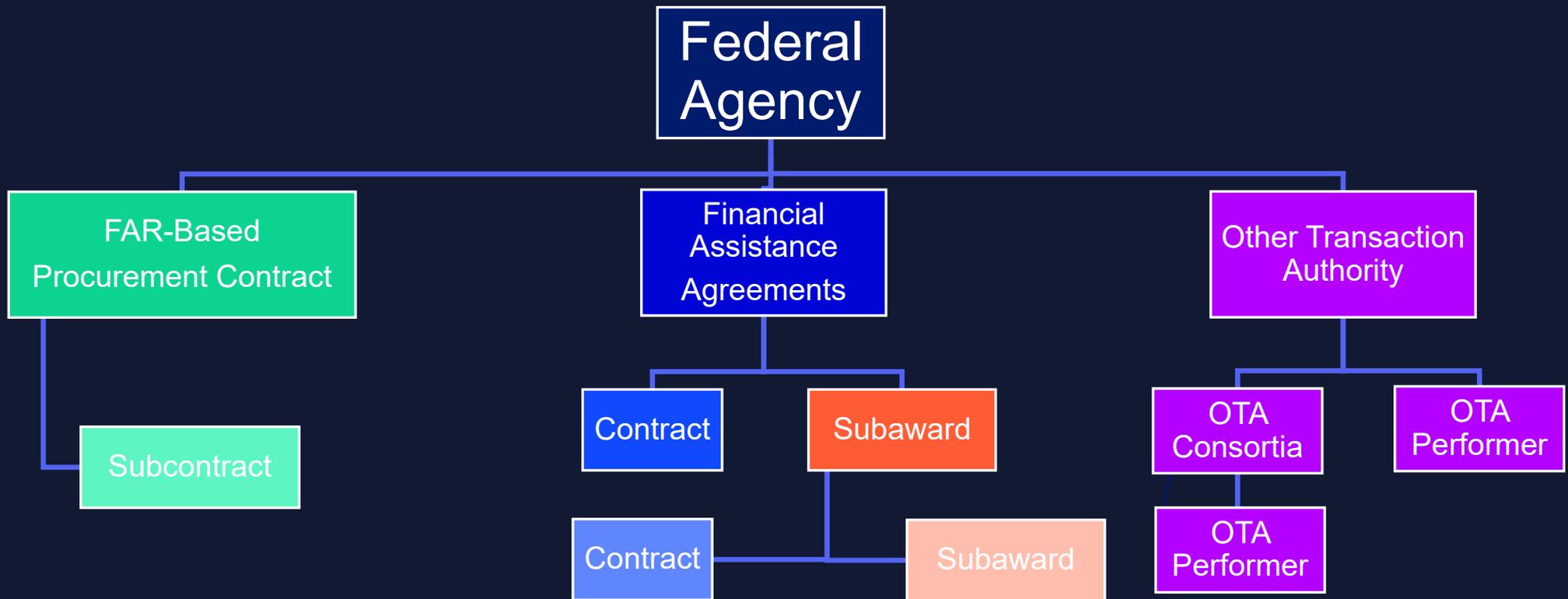
- **Non-Procurement Vehicles**
- **Competitions**
- **Revolutionary FAR Overhaul**

Procurement Policy

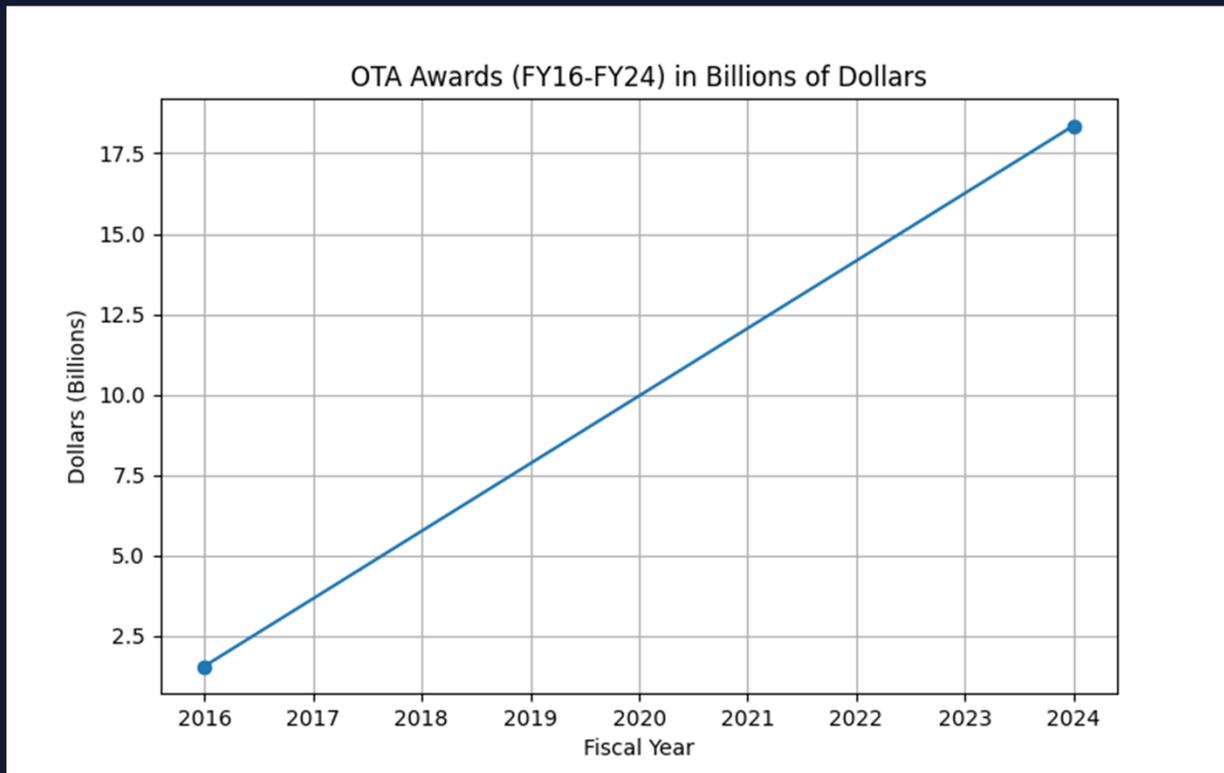
Current Events

What's Next?

Non-Procurement Vehicles

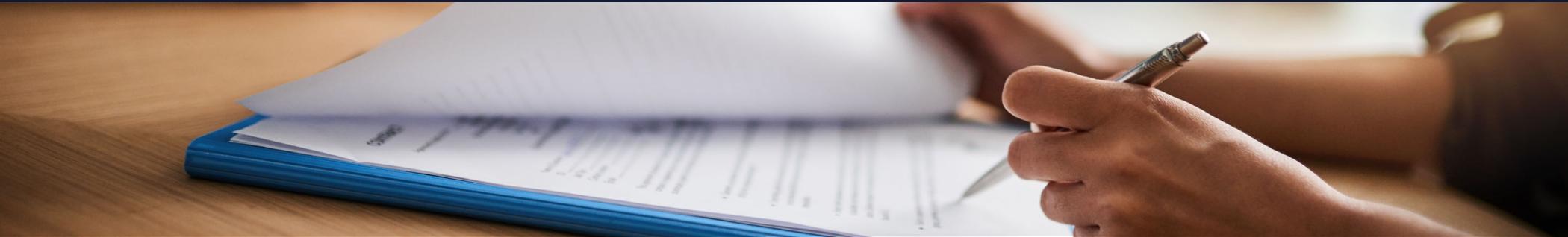


Other Transaction Authority Agreements



- Procurement Vehicle Created by Statute
 - Agencies with major OTA authority (DoD, NASA, DHS, DOE)
 - Congressional intent: innovation + nontraditional contractor participation
- Types of OTAs
 - Research
 - Prototype
 - Production

Other Transaction Authority Agreements



Key Differences

- Flexibility
- Unique Payment Structure
- Tailored IP Terms
- Limited Application of FAR
- Limited Competition
- Reduced Compliance Burden

Compliance Principles

- False Claims Act
- Export Controls
- Ethics & COI
- Security Requirements
- Cost Principles (if incorporated)

Common Pitfalls

- Treating OTAs Like FAR Contracts
- Ignoring Complexity of IP Terms
- Misunderstanding Consortium Structures
- Lack of Follow-on Planning

OTA Protest Developments

- *SpaceX (2019)*
 - No COFC jurisdiction; OTAs ≠ Contracts
- *Hydraulics International (2022)*
 - COFC jurisdiction; OTA could lead to a follow-on production procurement
- *Raytheon (2025)*
 - COFC “de facto forum” for OTA protests
- *Telesto Group (2025)*
 - No COFC jurisdiction for prototype OTAs; jurisdiction exists only when the protest alleges:
 - a violation of statute or regulation, and
 - a connection to a procurement or proposed procurement



Competition Awards



- Golden Dome Initiative
 - Objective: multi-layered missile defense architecture
 - Components: HBTSS, space-based interceptors, SDA custody layer
 - Funding: \$25B (Congress), \$175B claim (Trump), long-term est. \$252B–\$3.6T
- Governing Authorities
 - 10 USC 4022: OTA
 - 10 USC 4025: Prize competitions
- Managed by USSF Space Systems Command & PEO Space Combat Power

Golden Dome Vehicles



Space-Based Interceptor (SBI) Competition Awards

- Four milestone-based prize awards
- Initial awards: ~\$120K each
- Early awardees: Northrop, Lockheed, Anduril, True Anomaly



Missile Defense Agency's Scalable Homeland Innovative Enterprise Layered Defense (SHIELD) IDIQ

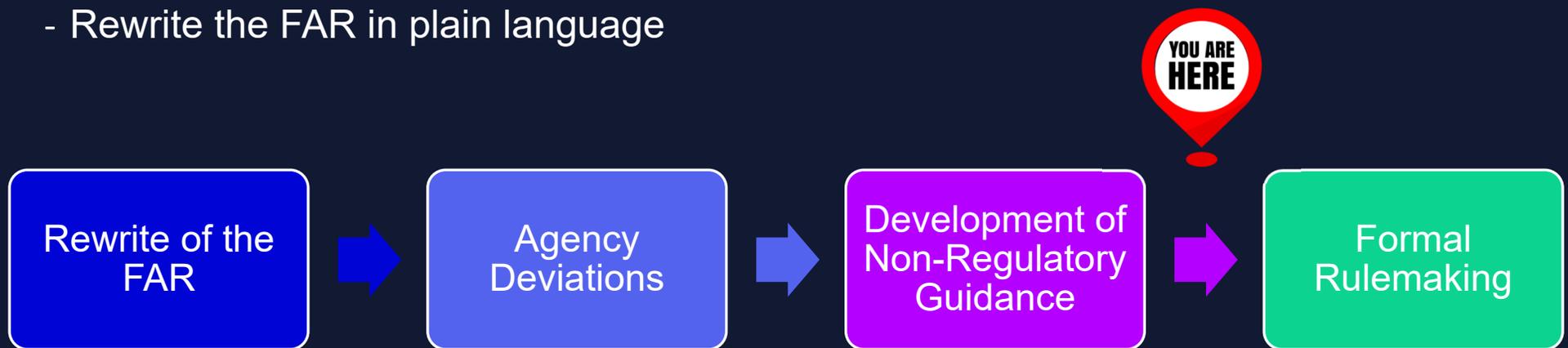
- \$151B IDIQ through 2035
- 19+ technical areas
- Thousands of proposals
- Over 1,000 awards to date

Key Features of Golden Dome Vehicles

| Feature | SBI OTAs | SHIELD IDIQ |
|--------------------|---------------------------------------|-------------------------------------|
| Authority | 10 USC 4022 | FAR-based IDIQ |
| Award Type | Competitive; Fixed-Price OTA + Prizes | Multiple-award IDIQ; Task Orders |
| Number of Awardees | Approx. 18 (boost-phase) | 2,400+ |
| Ceiling | Not publicly disclosed | \$151 billion |
| Focus | Hardware Prototypes | Broad R&D, Engineering, Sustainment |

Revolutionary FAR Overhaul

- First-ever comprehensive overhaul of the FAR
- Prompted by E.O. 14275, Restoring Common Sense to Federal Procurement
- Goals
 - Return the FAR to its statutory roots
 - Rewrite the FAR in plain language



RFO Progress to Date

- Plain language edits
- Elimination of duplicative language
- Removal of requirements not based in statutes/EOs
- Streamlining/Reorganization
- Removal of key concepts to non-regulatory resources
 - Practitioner Albums for each Part
 - Practitioner videos & Podcasts
 - FAR Companion Guides
 - GSA/Agency “Innovation Coaches”
- Not many substantive edits that materially change compliance obligations
 - *However, subcontractor flowdowns...*





Procurement Mechanics

Procurement Policy

- **Procurement Consolidation**
- **TDR for All**
- **Commercial Preference**
- **Updated Thresholds**

Current Events

What's Next?

Procurement Consolidation



DOD/DOW

- Concerted effort to reduce number of contracts being negotiated and performed by the same entity.
- **Example:** Anduril (120 separate procurement actions consolidated into a single, 10-year \$20 billion (ceiling) “enterprise” award



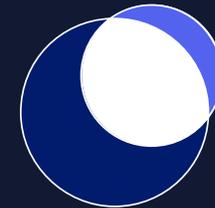
OneGov

- Federal Government negotiating new enterprise agreements with contractors
- **Example:** Microsoft negotiated enterprise agreement with GSA for a suite of Microsoft 365 products across Federal agencies.



GSA

- Executive Order 14240 mandated that agencies identify common products/services and shift procurement responsibility to GSA
- **Example:** GSA in the process of assuming responsibility for NASA SEWP



Best-in-Class

- FAR Part 8 updated to require agencies to prioritize BIC or other preferred government-wide contract vehicles for commonly purchased goods and services.
- **Example:** BIC vehicles now required for IT services, medical supplies, facilities, construction, and other high-volume categories

TDR for All!

Big differences: how pricing is negotiated and how contract sales are reported

| Non-TDR Offer and Contract Requirements | TDR Offer and Contract Requirements |
|---|---|
| Commercial Sales Practices (CSP) disclosures required, and pricing evaluated against what you charge commercial customers | Pricing evaluated against what other contractors charge for the same or similar products and services on GSA orders and other contract vehicles |
| Price Reductions Clause (PRC) triggers mandatory price decreases based on pricing/discounts offered to commercial customers | Alternate PRC allows GSA to request price decreases at any time based on prices paid data collected from TDR sales reporting |
| Must maintain the Basis of Award price discount relationship negotiated at the time of award throughout the life of the contract | No Basis of Award or price discount relationship tracking required |
| Quarterly sales reporting, aggregated by SIN | Monthly sales reporting with invoice line-item detail |
| Commercial pricing support (invoices, contracts, quotes, etc.) required to add new products and services or to increase pricing on the contract | Transactional data and market research used for pricing support when adding new products and services or increasing rates on the contract |

Commercial Preference

- 2025 Executive Orders
 - Multiple 2025 executive orders reinforce that agencies must prioritize commercial solutions and use acquisition pathways that accelerate access to commercial innovation
 - EO 14271, *Ensuring Commercial, Cost-Effective Solutions in Federal Contracts*
 - EO 14275, *Restoring Common Sense to Federal Procurement*
 - EO 14265, *Modernizing Defense Acquisitions and Spurring Innovation in the DIB*
 - Requirement to justify noncommercial solutions
 - Default presumption: commercial > custom development
- Expansion of Commercial Solutions Openings (2026 NDAA)
 - CSO use expanded to any commercial product/service
 - Follow-on production allowed to be sole-source after competed CSO
 - Awards may be issued as OTAs

§3453. Preference for commercial products and commercial services

(a) PREFERENCE.-The head of an agency shall ensure that, to the maximum extent practicable-

(1) requirements of the agency with respect to a procurement of supplies or services are stated in terms of-

- (A) functions to be performed;
- (B) performance required; or
- (C) essential physical characteristics;

(2) such requirements are defined so that commercial services or commercial products or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items other than commercial products, may be procured to fulfill such requirements; and

(3) offerors of commercial services, commercial products, and nondevelopmental items other than commercial products are provided an opportunity to compete in any procurement to fill such requirements.

(b) IMPLEMENTATION.-The head of an agency shall ensure that procurement officials in that agency, to the maximum extent practicable-

(1) acquire commercial services, commercial products, or nondevelopmental items other than commercial products to meet the needs of the agency;

(2) require prime contractors and subcontractors at all levels under the agency contracts to incorporate commercial services, commercial products, or nondevelopmental items other than commercial products as components of items supplied to the agency;

(3) modify requirements in appropriate cases to ensure that the requirements can be met by commercial services or commercial products or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items other than commercial products;

(4) state specifications in terms that enable and encourage bidders and offerors to supply commercial services or commercial products or, to the extent that commercial products suitable to meet the agency's needs are not available, nondevelopmental items other than commercial products in response to the agency solicitations;

(5) revise the agency's procurement policies, practices, and procedures not required by law to reduce any impediments in those policies, practices, and procedures to the acquisition of commercial products and commercial services;

(6) require training of appropriate personnel in the acquisition of commercial products and commercial services; and

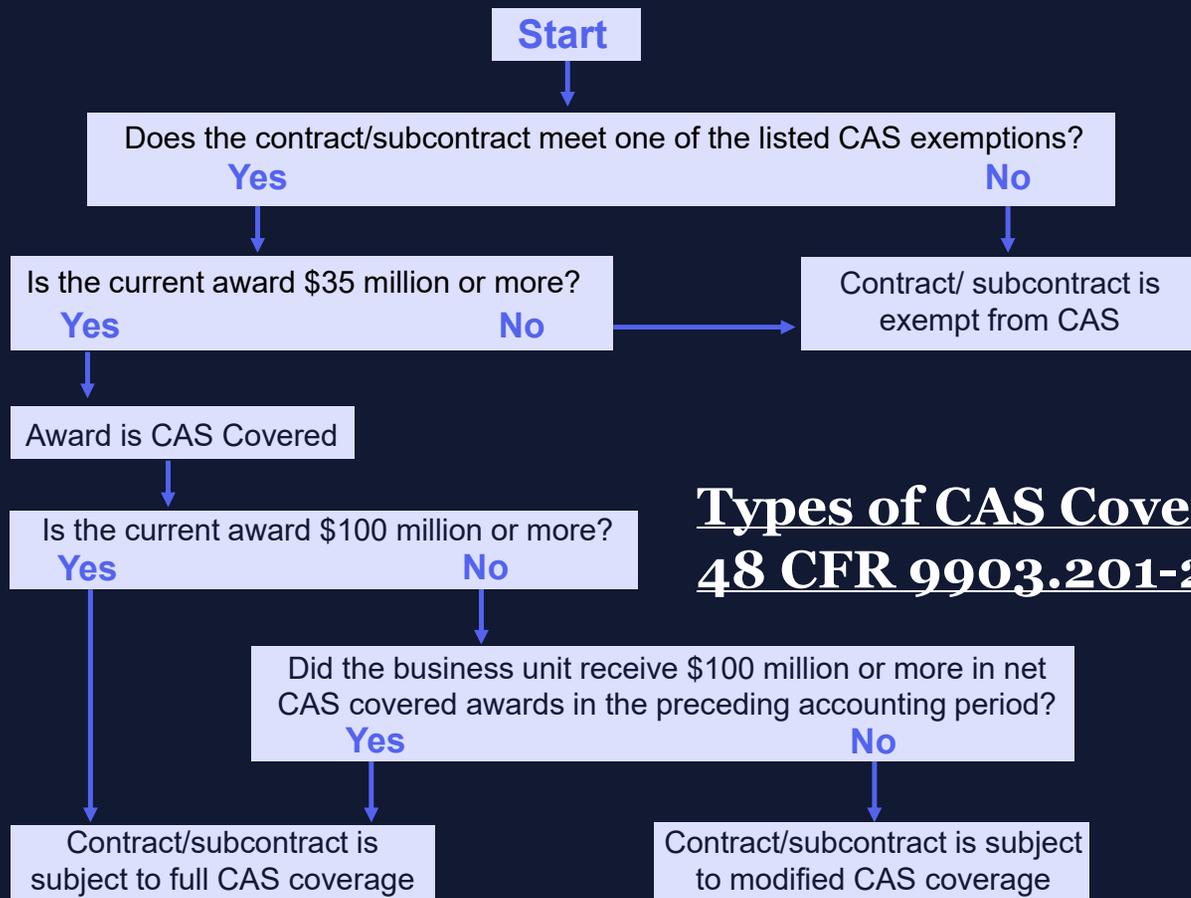
(7) establish criteria in performance evaluations for appropriate personnel to reward risk-informed decisions that maximize the acquisition of commercial products, commercial services, or nondevelopmental items other than commercial products.

2026 Threshold Increases

| Threshold Category | FY25 | FY26 |
|--|--------------|--------------|
| Major system | \$2,500,000 | \$3,000,000 |
| Micro-purchase Threshold (MPT) | \$10,000 | \$15,000 |
| MPT - Contingency Operations | \$20,000 | \$25,000 |
| MPT - Defense Support | \$35,000 | \$40,000 |
| Simplified Acquisition Threshold (SAT) | \$250,000 | \$350,000 |
| SAT - Contingency Operations | \$800,000 | \$1,000,000 |
| SAT - Defense Support | \$1,500,000 | \$2,000,000 |
| SAT - Humanitarian / Peacekeeping | \$500,000 | \$650,000 |
| Anti-Kickback Procedures | \$150,000 | \$200,000 |
| Contractor Code of Business Ethics and Conduct | \$6,000,000 | \$7,500,000 |
| First-tier Subcontract Reporting (First-tier Exec Comp Disclosure) | \$30,000 | \$40,000 |
| Public display of proposed contract action notices | \$15,000 | \$20,000 |
| Announcement of contract awards | \$4,500,000 | \$5,500,000 |
| 8(a) Competition Limitation Threshold | \$25,000,000 | \$30,000,000 |
| Simplified Procedures - Commercial Products/Services | \$7,500,000 | \$9,000,000 |

- **Micro-Purchase Threshold**
 - Increased by 50%
 - \$10,000 → \$15,000
- **Simplified Acquisition Threshold**
 - Increased by 40%
 - \$250,000 → \$350,000
- **TAA (WTO GPA)**
 - No change
 - \$174,000

CAS Coverage under the FY26 NDAA



Types of CAS Coverage 48 CFR 9903.201-2

CAS Exemptions 48 CFR 9903.201-1(b)

- Sealed bid contracts
- Contracts and subcontracts with small businesses
- Contracts and subcontracts with foreign governments or their agents or instrumentalities
- Contracts and subcontracts in which the price is set by law and regulation
- Contracts and subcontracts for the acquisition of commercial items
- Subcontractors under the NATO PHM Ship program to be performed outside the United States by a foreign concern
- Firm fixed-price contracts and subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data



Procurement Mechanics Procurement Policy

Current Events

- Anthropic
- GSA AI Regulation
- DEI Enforcement

What's Next?

Anthropic Timeline

February 27:

- The President and Secretary of Defense announced via social media that Anthropic was “blacklisted” from Federal procurements.
- The Secretary of Defense also stated that “Effective immediately, no contractor, supplier, or partner that does business with the United States military may conduct any commercial activity with Anthropic.”

March 3:

- DOD sent Anthropic a letter notifying them of their official designation as a supply chain risk under both 10 USC §3252 and the Federal Acquisition Supply Chain Security Act (FASCSA) (41 U.S.C. §§ 4711–4735).

March 9:

- Anthropic files suit both in the Northern District of CA and the D.C. Circuit

March 11:

- DOD issues internal Memo directing phase out of Anthropic tech

Legal Bases for Prohibition



10 USC 3252

A national security risk designation under 10 USC §3252 would prohibit contractors from using Anthropic as a subcontractor in connection with a DOD award, but does not prevent contractors from using Anthropic elsewhere in their business.



FASCSA

A FASCSA removal order has broader impact (though this particular FASCSA removal order appears limited to DOD procurements).

If officially implemented, the FASCSA removal order would prohibit contractors from providing or using as part of the performance of the contract any Anthropic products/services.

Anthropic Next Steps to Consider

- Do not hastily remove Anthropic products/services from existing systems, at least not yet.
- Don't stop using Anthropic products/services on DOD contracts until instructed to do so.
- Slow roll bids, proposals, negotiations, and contracts involving Anthropic technology, particularly if used as a subcontractor under a DOD award, if possible.
- Consider using non-Anthropic tools on federal projects if easy to do so and if it will not constitute a breach.
- Conduct a detailed inventory – through a privileged review, if possible – of all AI use internally, including, but not limited to, Anthropic.
- Alert (with careful wording) contracts and legal teams to notify the law department of any government outreach (or certification request) and consider conducting proactive outreach to any primes you work with to stay coordinated on customer inquiries.
- Prepare standard reply to government and prime contractor inquiries.
- Prepare standard language for early request for certification.



Proposed GSAR Prohibition

- GSA released a proposed GSAR clause (552.239-7001, “Basic Safeguarding of Artificial Intelligence Systems”) that GSA intends to incorporate into Schedule contracts either in late March or April.
- At this time, only GSA Schedule orders will be required to comply with the proposed clause. Orders placed through other contract vehicles are not subject to the proposed GSAR clause.
 - FY26 = \$50 billion in sales
- Though the GSAR clause will be incorporated into every Schedule order, by its terms, the prohibitions apply only to “AI Systems” as defined by the Advancing American AI Act (2022).
 - The definition of “AI System” in the statute specifically exempts “any common commercial product within which artificial intelligence is embedded, such as a word processor or map navigation system.”
- The corresponding 2025 OMB Memo discussing the policy specifically states that certain AI use cases are exempt from the more general AI prohibitions, including: “AI used incidentally by a contractor during performance of a contract (e.g., AI used at the option of a contractor when not directed or required to fulfill requirements).”



Non-Commercial AI Terms

The Government will own all Custom Development of the AI System (including modifications, customizations, configurations, or enhancements both to the AI System and any associated implementations or workflows).

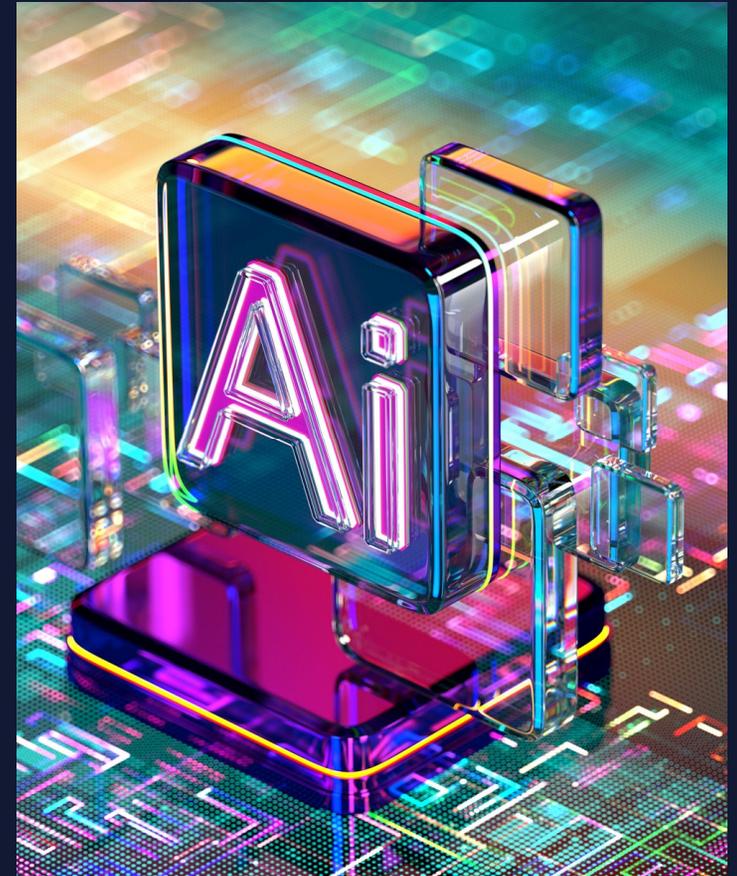
The contractor and Service Provider are prohibited from using Government Data to train or improve the AI/ML model.

The contractor must make “commercial efforts” to ensure the Service Provider’s AI System follows “Unbiased AI Principles.”

Government data must be segregated from commercial customers.

All Government data must be deleted upon contract completion and a certification of destruction provided.

The license provided to the Government must permit the Government the use of the AI System “for any lawful Government purpose.”



Proposed Compliance Obligations



Use only “American AI Systems” in the performance of any order



Disclose all AI systems used in performance (both American or foreign)



Enable oversight by human Government officials



Report any incident (as defined by FISMA) within 72 hours



Develop a mechanism through which the Government can provide feedback



Provide (upon Government request) documentation demonstrating compliance with the clause

GSAR Clause Next Steps

- **First Take**

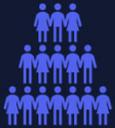
- Clause released publicly on March 6
- Comments were due on Friday, March 20 (via website or email)
- No formal notice and comment rulemaking
- Clause incorporated into all GSA Schedule contracts via Refresh 31 in April 2026

- **Second Take**

- Comments due Friday, April 3
- GSA to discuss with industry
- Considered for inclusion in Refresh 32 (summer 2026?)



DEI Executive Orders



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



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



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



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

DOJ Red Flags (July 2025)

- Preferential hiring or promotion practices
- Policies that set race- or sex-based benchmarks or mandates in candidate pools
- Race-based “diverse slate” policies in hiring or promotion
- Race-based scholarships or programs
- Race-exclusive opportunities, such as internships, mentorship programs, or leadership initiatives
- Access to facilities or resources based on race or sex
- Use of proxies for protected characteristics
- Race-based training sessions
- Segregation in facilities or resources
- Implicit segregation through program eligibility
- Race- or sex-based selection for contract awards
- Race- or sex-based program participation



One State, Two State; Red State, Blue State



March 26, 2025



Political activists are filing shareholder proposals attempting to pressure companies into reinstating Diversity, Equity, and Inclusion (DEI) policies that destroy shareholder value—leading to boycotts, lawsuits, reduced productivity, and increased financial risk. Asset managers and proxy advisors should not prioritize a political agenda over financial returns by supporting pro-DEI shareholder proposals and/or voting against directors who do not support such proposals.

Although many asset managers claim to be passive investors and proxy advisors claim to be “pretty centrist,”¹ their immense voting power and recommendations directly influence corporate policies and can reduce the value of company shares for all investors.² As state financial officials, we have a duty to protect taxpayer funds and the retirement savings of state employees. Asset managers and proxy advisors should oppose proposals that compel companies to maintain or reinstate unlawful DEI practices that erode shareholder value.

The need to urge asset managers and proxy advisors to uphold their fiduciary duty underscores the SEC’s failure to enforce applicable regulatory requirements during the previous administration. The SEC’s recent guidance directing asset managers that push DEI and other ESG policies on companies to file on the more rigorous Schedule 13D is a positive first step, but enforcement must follow. Influencing corporate DEI

¹ See <https://www.cnbc.com/video/2024/03/11/theres-less-investor-support-for-esg-proposals-this-year-says-iss-lorraine-elliott.html>.

² Although it is a step in the right direction that certain asset managers and proxy advisors have announced that they are eliminating their board diversity policies, it is not clear that in each case those changes have been incorporated into benchmark policies. This proxy season will demonstrate what the actual policy of each asset manager and proxy advisor is as votes (and voting recommendations) take place.



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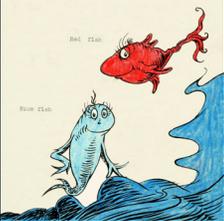
February 13, 2025

**Multi-State Guidance Concerning
Diversity, Equity, Inclusion, and Accessibility Employment Initiatives**

The Attorneys General of Massachusetts, Illinois, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Oregon, Rhode Island, and Vermont are issuing this Guidance to help businesses, nonprofits, and other organizations operating in our respective states understand the continued viability and important role of diversity, equity, inclusion, and accessibility efforts (sometimes referred to as “DEI” or “DEIA” initiatives) in creating and maintaining legally compliant and thriving workplaces.

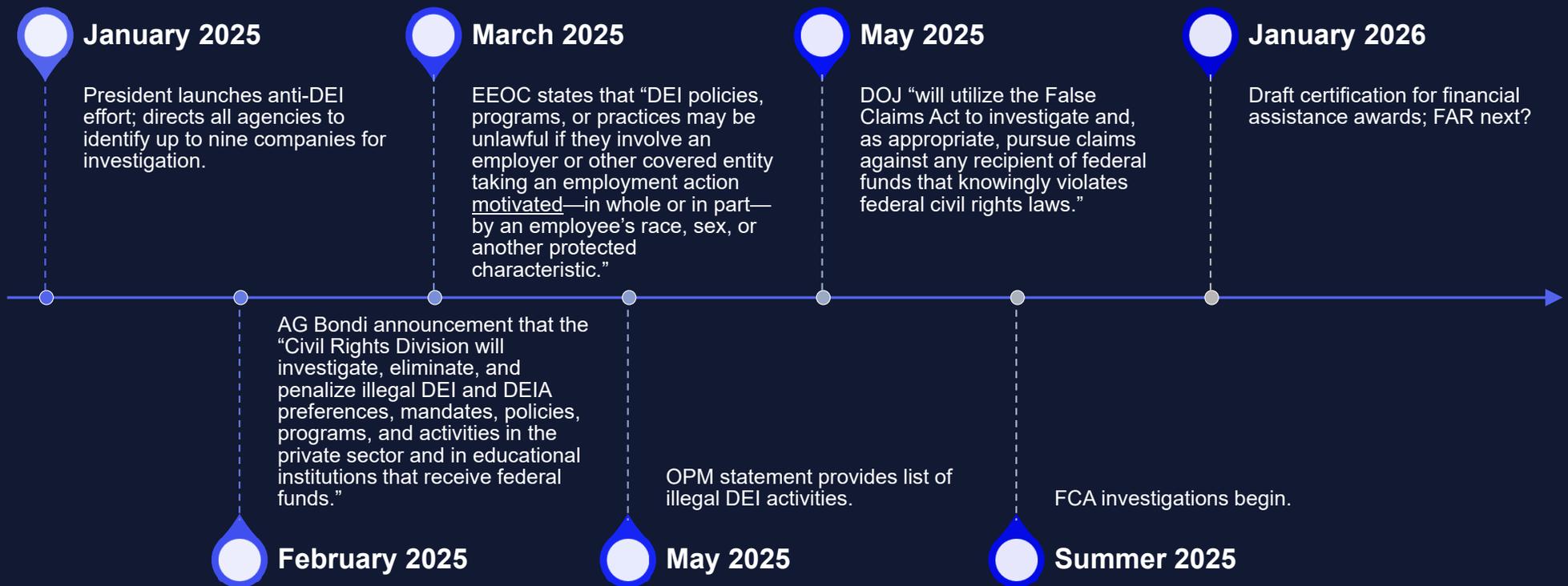
Our Offices have heard concerns from many in the private sector about the continued viability of diversity, equity, inclusion, and accessibility policies and programming following an Executive Order that purports to target “illegal DEI and DEIA policies” across a wide range of organizations.¹ Importantly, diversity, equity, inclusion, and accessibility best practices are not illegal, and the federal government does not have the legal authority to issue an executive order that prohibits otherwise lawful activities in the private sector or mandates the wholesale removal of these policies and practices within private organizations, including those that receive federal contracts and grants. The Executive Order states what is already the law—that discrimination is illegal—but then conflates unlawful preferences in hiring and promotion with sound and lawful best practices for promoting diversity, equity, inclusion, and accessibility in the workforce. This conflation is inaccurate and misleading. Policies and practices that promote diversity, equity, inclusion, and accessibility are not the same as preferences in individual hiring and promotion decisions that have been found to be unlawful. The Executive Order cannot and does not prohibit these otherwise lawful practices and policies. As such, this Guidance aims to clarify the state of the law for businesses, nonprofits, and other organizations operating in our states.

Employment policies incorporating diversity, equity, inclusion, and accessibility best practices are not only compliant with state and federal civil rights laws, but they also help to reduce litigation risk by affirmatively protecting against discriminatory conduct that violates the law. Effective policies and practices foster the development of inclusive and respectful workplaces where all employees are supported and encouraged to do their best work. When companies have such policies, employees are less likely to be subjected to unlawful discrimination, and companies are less likely to be held liable for such discriminatory conduct. This is in addition to the benefits of well-designed diversity, equity, inclusion, and accessibility practices in improving business performance – making companies that prioritize a culture of



¹ See “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” available at <https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/>

Enforcement Timeline



Draft SAM Certification Clause

(6) Will comply with the U.S. Constitution, all Federal laws, and relevant executive orders prohibiting unlawful discrimination on the basis of race or color in the administration of federally funded programs (See Titles VI and VII of the Civil Rights Act of 1964, the Equal Protection Clause of the Fourteenth Amendment, and 2 C.F.R. § 200.303 Internal controls). Federal antidiscrimination laws apply to programs or initiatives that involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion (DEI) or “diversity, equity, inclusion, and accessibility” (DEIA) programs. Entities that receive federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race or color. Examples of practices that may violate applicable Federal anti-discrimination laws include:

(i) Granting preferential treatment based on race or color, such as race-based scholarships or programs, preferential hiring or promotion practices, or access to facilities or resources based on race or ethnicity, including through the use of “cultural competence” requirements, “overcoming obstacles” narratives, or “diversity statements;”

(ii) Segregation based on race or color, such as race-based training sessions, segregation in facilities or resources, or implicit segregation through program eligibility;

(iii) Other unlawful use of race or color as criteria, such as race-based “diverse slate” policies in hiring, race-based selection for contracts, or race-based program participation or resource allocation;

(iv) Training programs that stereotype, exclude, or single out individuals based on protected characteristics or create a hostile environment; or

(v) Retaliation by taking adverse actions against employees, participants, or beneficiaries because they engage in protected activities related to opposing DEI practices they reasonably believe violate federal antidiscrimination laws. Protected activities include raising concerns or filing complaints about, or objecting to or refusing to participate in, discriminatory programs, trainings, or policies;

- Proposed text posted on January 30
- Revised version posted on February 18
- Comments Due March 30

- Only applicable to entities registered to receive financial assistance awards (grants, loans, subsidies)

- Check your SAM registration profile!



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Crystal Ball Time!



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Larry Allen

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Questions

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