THOMPSON HINE

Government Contracts Update

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FAR Council Announces Implementation Requirements for New FAR DEI Clause

The Federal Acquisition Regulatory Council (FAR Council) has issued a memorandum that sets forth a new Federal Acquisition Regulation (FAR) clause implementing the requirements of a March 2026 Executive Order prohibiting "racially discriminatory DEI activities" by federal contractors and subcontractors. The memorandum also establishes a timeline for incorporating the new FAR DEI clause into solicitations and existing contracts and provides guidance on reporting obligations under the clause. Contractors should be prepared to incorporate the new clause into their contracts and to comply with the obligations imposed by the clause, including oversight of subcontractors' duties under the clause.

New Clause Conditions

The memorandum includes the text of the new clause, FAR 52.222-90, Addressing DEI Discrimination by Federal Contractors. The clause sets forth the language in Section 3 of the Executive Order, which prohibits a contractor from engaging in racially discriminatory DEI activities, requires the contractor to furnish all information and reports required by the contracting officer for purposes of ascertaining compliance with the clause, and notes that noncompliance with the clause can result in contract cancellation, termination or suspension. The clause also includes a definition of "racially discriminatory DEI" and the requirement to flow down the clause to subcontracts at any tier (including those for commercial products and services) for performance or delivery in the United States. The memorandum provides contracting officers with limited discretion to use language that differs from the model clause, requiring FAR Council approval absent existing statutory authorization.

Implementation Timetable

The memorandum establishes a timetable for implementation of the new FAR clause. It directs contracting officers to insert the clause in new solicitations and resulting contracts over the micro-purchase threshold (currently $15,000), including those for commercial products or services and for which the place of delivery or performance is the United States, by April 24, 2026. The memorandum directs contracting officers to insert the clause in all existing contracts (including indefinite-delivery contracts and contracts for commercial products and services) valued above the micro-purchase threshold and for which the place of delivery or performance is the United States. The memorandum notes that contracting officers must make every effort to modify existing contracts to add the clause by bilateral modification no later than July 24, 2026. In cases where the contractor refuses to agree to a bilateral modification, the memorandum directs contracting officers to "consider whether, absent the modification, the contract no longer meets the agency's needs and should therefore be terminated for convenience." (The memorandum does allow contracting officers the discretion to decide whether to add the clause to contracts with an expiration date no later than December 31, 2026.)

Enforcement of Reporting Obligations

In addition to the implementation schedule, the memorandum states that the FAR Council is seeking clearance from the Office of Management and Budget (OMB) under applicable law for information obligations imposed on contractors under the new FAR clause. The clearance will provide coverage for agencies using the clause to enforce its reporting obligations for contractors to (i) furnish all information and reports (including providing access to books, records and accounts) for purposes of determining compliance with the clause; (ii) report any subcontractor's known or reasonably knowable conduct that may violate the clause; and (iii) inform the contracting officer if any subcontractor sues the contractor and the suit puts at issue in any way the clause's validity. The memorandum notes that prior to OMB approval, agencies still may enforce the requirement for contractors to submit existing records regarding compliance with the clause's requirements in connection with individual investigations (including those requested by the Department of Justice or Equal Opportunity Employment Commission as part of an investigation of an alleged violation).

Practical Steps

Now that the FAR Council has announced a timetable for implementing the FAR DEI clause, contractors should consider taking the following steps:

Review existing contracts. Prior to the July 24 deadline for adding the new clause to existing contracts, contractors should review their existing contracts to prepare for anticipated modifications issued by the contracting officer to implement the clause. For a contract with a performance period that expires prior to December 31, 2026, the contractor may be able to ask the contracting officer not to include the clause in the contract based upon the discretion the memorandum provides to contracting officers.

Be prepared to communicate with subcontractors. The memorandum obligates a contractor not only to flow down the new clause to all subcontracts, but also to report any known or reasonably knowable subcontractor conduct that may violate the clause and to take appropriate remedial actions. For contractors managing subcontractor performance under a prime contract, the new clause imposes both internal compliance obligations and increased subcontractor oversight duties. The contractor must be prepared to flow down the new clause once it is incorporated into a prime contract and determine reasonable actions to monitor subcontractors for potential violations of the clause.

Continue to audit internal policies and agreements. As outlined in our alert on the Executive Order, contractors should review their policies, programs and agreements that are relevant to equal opportunity and affirmative action requirements to assess the impact of the order and the new FAR DEI clause.

Our Government Contracts group is available to answer questions about compliance obligations and risks under the Executive Order and the new FAR DEI clause.

FOR MORE INFORMATION

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