

Trump 2.0 – A Brave New World for Government Contractors

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Agenda

- I. Recent Executive Orders and Policy Changes
- II. Best Practices for Responding to Stop-Work Orders
- III. Best Practices for Responding to Terminations for Convenience
- IV. New Provisions, Clauses, and Certifications



Recent Executive Orders and Policy Changes

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Reevaluating and Realigning U.S. Foreign Aid

Executive Order 14169

- In a January 20 [executive order](#), President Trump directed a 90-day pause in U.S. foreign development assistance, pending an assessment of programmatic efficiencies and consistency with U.S. foreign policy.
 - Some exceptions were available – lifesaving assistance
- In response, the State Dept. and USAID suspended thousands of contracts and grants.
- In addition, USAID has largely been shuttered, and thousands of workers dismissed.
- Subsequent guidance provided that the focus of U.S. foreign policy under the administration would look to answer three questions – Does it make America: 1) safer, 2) stronger, and 3) more prosperous?
- There has been much litigation over the shuttering of USAID, the pause, and the failure to pay; however, despite court orders:
 - Contractor/grantee awards have been suspended or stopped;
 - Most contractors/grantees are still awaiting payments for costs incurred prior to suspensions and stop work orders;
 - Many contracts and grants have since been terminated; and
 - Most recently, contractors and grantees have been requested to complete a questionnaire that asks a series of questions, the evaluation of which may justify the continuation of a program.

Gender Identity Executive Order

Executive Order 14168

- The administration issued EO “**Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government,**” mandating the federal government to recognize only two sexes (male and female) and directing agencies to:
 - Eliminate gender ideology from forms, communications, and messages;
 - End federal funding of gender ideology; and
 - Review grant conditions and preferences to ensure funds do not promote gender ideology.
- ***Revokes EOs aimed at advancing gender equity:***
 - [EO 14075](#) (2022): Directed HHS to protect LGBTQI+ medical care from restrictive state and local laws, sought to limit federal funding for entities supporting conversion therapy, and aimed to eliminate regulatory barriers to federal benefits for LGBTQI+ individuals.
 - [EO 13988](#) (2021): Directed agencies to address discrimination based on gender identity and sexual orientation.
 - [EO 14020](#) (2021): Established the White House Gender Policy Council to promote gender equality, combat violence, and challenge stereotypes.
 - [EO 13672](#) (2014): Expanded federal nondiscrimination protections to include sexual orientation and gender identity.

Ending Illegal Discrimination and Restoring Merit-Based Opportunity

Executive Order 14173

- In a January 21 **executive order**, President Trump directed agencies, with the assistance of the attorney general, to develop a plan to deter DEI programs in the private sector.
- The order prevents federal contractors and grantees from considering “race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation’s civil rights laws in their employment practices.”
- The order directs agencies to begin requiring contractors and grant recipients to **affirmatively certify** “that [they do] not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.”
- Any contractor or grant recipient who continues to engage in prohibited discrimination or maintains certain affirmative action programs or DEI policies (i.e., “illegal DEI”)—contrary to the new contract terms and affirmative certifications—will risk liability under the False Claims Act by virtue of submitting invoices to the government for payment.
 - The administration is encouraging whistleblowers to come forward and requiring agencies to report contractors, grantees, and even industries for investigation.
- Contractors cannot be forced to comply with affirmative action requirements, including “[a]llowing or encouraging Federal contractors and subcontractors to engage in workforce balancing based on race, color, sex, sexual preference, religion, or national origin.”
- While contractors may continue with the current “regulatory scheme,” they may do so only until April 19, 2025, but there is no apparent safe harbor for activities outside the current regulatory scheme.

Legal Challenge to DEI EOs

Nat'l Ass'n of Higher Educ. v. Trump

- On February 14, the City of Baltimore and three higher education organizations filed **a lawsuit in the District Court of Maryland** to block enforcement of the executive orders. The plaintiffs argued that the DEI executive orders:
 1. Exceed the President's authority because there is no statutory or regulatory authority that authorizes the President to usurp Congress's spending powers;
 2. Violate Due Process because they are unconstitutionally vague; and
 3. Constitute viewpoint discrimination abridging the Free Speech Clause of the First Amendment.
- On February 21, the court issued a preliminary injunction (PI) enjoining, among other provisions, the certification requirement and the threat of enforcement.
- The defendants sought to stay the PI pending its appeal to the Fourth Circuit, which the district court rejected.
- The administration appealed the rejection of stay to the Fourth Circuit, and on March 14 the Fourth Circuit ruled in defendants' favor, which imposes a stay on the PI pending the merit-based

What Can an Organization Be Doing?

It should not sit idle while waiting for clarity

- Notwithstanding the injunction, prepare for a changing landscape:
 1. Ensure it does not certify to ceasing DEI activities without a thorough legal review of the certification request and any proposed certification language;
 - This includes reviewing RFP and RFQ documents to ensure no explicit reference to complying with or certifying compliance with the new administration's EOs;
 2. Catalog its DEI and DEI-related programs;
 3. Consider staff communication(s);
 4. Begin to determine its risk tolerance as it relates to potential scrutiny and inquiry by the administration/DOJ:
 - Assess legality of current programs with existing anti-discrimination law and *SSFA* decision.
 - Consider whether to mitigate certain programs – rescind, revise, or rebrand programs?
 - Consider where the company draws the line – areas it will not rescind or revise.



Best Practices for Responding to Stop-Work Orders

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Stop-Work Order Clause

FAR 52.242-15 Stop-Work Order

- Applicable to fixed price, cost reimbursement supply, service, or R&D contracts
- Limited in duration (90 days but can be extended by agreement of the parties)
- Requires immediate cessation of covered work and steps to mitigate costs
- Entitles contractors to adjustment for reasonable costs resulting from the stop-work order

Best Practices for Contractors

- Carefully review stop-work order language
- Review subcontracts
- Segregate and track allocable costs
- Keep complete cost records
- Submit prompt and detailed request for equitable adjustment



Best Practices for Responding to Terminations for Convenience

The Bleakness of T4Cs for Contractors

- Cibinic, Nagle, and Nash, *Administration of Government Contracts*, 5th Ed., ch. 11 (Apr. 2016):
 - “The Termination for Convenience of the Government clause is one of the most unique provisions contained in government contracts.”
 - “In no other area of contract law has one party been given such complete authority to escape from contractual obligations.”
 - “This clause gives the government the broad right to terminate without cause and limits the contractor’s recovery to costs incurred, profit on work done, and costs of preparing the termination settlement proposal.”
 - “Recovery of anticipated profit is precluded.”
 - “Thus, this mandatory provision confers a major contract right on the government with no commensurate advantage to the contractor.”

Narrow Limits on Government Right to T4C

- Multiple Non-Commercial T4C Clauses ... Example of T4C Right
 - FAR 52.249-2(a): “The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is **in the Government’s interest**.”
- Commercial Clause T4C Right
 - FAR 52.212-4(l): “The Government reserves the right to terminate this contract, or any part hereof, **for its sole convenience**.”
- A T4C may be a breach of contract where it was motivated by **bad faith** or constituted an **abuse of discretion**.
 - If shown, contractor can receive breach damages (i.e., **lost anticipated profits**).
- Uncertainty remains regarding how to meet these standards, but contractor’s burden is “very weighty.” *ACLR, LLC v. United States*, No. 2023-1190, 2024 WL 4315111, at *5 (Fed. Cir. Sept. 27, 2024).

Narrow Limits on Government Right to T4C (cont.)

- Bad Faith
 - “Because government officials are presumed to carry out their duties in good faith, ‘clear and convincing’ evidence of ‘a **specific intent to injure**’ the contractor is required to establish they acted in bad faith.” *Satterfield & Pontikes Constr., Inc.*, ASBCA No. 59980, 21-1 BCA ¶ 37,873.
 - “[T]he clear and convincing standard most closely approximates ... the ‘**well-nigh irrefragable**’ proof standard.” *Optimum Servs., Inc.*, CBCA No. 4968, 19-1 BCA ¶ 37,383.
 - “One prominent commentator has described a bad faith termination for convenience as ‘**almost impossible to prove**.’” *Exceed Res., Inc.*, ASBCA No. 61652, 20-1 BCA ¶ 37,634 (quoting Ralph C. Nash, Jr.)
- Abuse of Discretion
 - CBCA “will consider— ‘(1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official’s decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation.’” *Optimum*, 19-1 BCA ¶ 37,383; see also *Charitable Bingo Assocs., Inc.*, ASBCA No. 53249, 05-1 BCA ¶ 32,863 (similar).

Termination Settlement Proposals

- General Principles for Both Non-Commercial and Commercial-Type Federal Contracts
 - “The overall purpose of a termination for convenience settlement is to fairly compensate the contractor and to **make the contractor whole for the costs incurred** in connection with the terminated work.” *SWR, Inc.*, ASBCA No. 56708, 15-1 BCA ¶ 35,832 (citing *Nicon, Inc. v. United States*, 331 F.3d 878, 885 (Fed. Cir. 2003)).
 - A “contractor is **not supposed to suffer** as the result of a termination for convenience of the Government, nor to underwrite the Government’s decision to terminate.” *Id.* (quoting *Jacobs Eng’g Group, Inc. v. United States*, 434 F.3d 1378, 1381 (Fed. Cir. 2006)).
 - FAR Part 49 recognizes that fair compensation “cannot be measured exactly” and emphasizes that the “use of **business judgment, as distinguished from strict accounting principles**, is the heart of a settlement.” *Id.* (quoting FAR 49.201(a)).
 - The “requirements of part 49 do not apply when terminating contracts for commercial products or commercial services,” but the government “may continue to use part 49 as guidance to the extent that part 49 does not conflict with this section and the language of the termination paragraphs in 52.212-4.” FAR 12.403(a).

Termination Settlement Proposals (cont.)

- Non-Commercial Federal Contracts
 - FAR Part 49 and FAR 52.249-X clauses
 - Immediate Obligations – **TRACK COSTS OF EACH!**
 - Stop work, place no further subcontracts, and terminate subcontracts
 - Begin process of settling subcontractor claims and delivering items listed in clause to government (work in progress, completed work, etc.)
 - Preserve government property in contractor's possession
 - Start developing termination inventory schedules
 - Termination Settlement Proposal (TSP)
 - **Certification** is required (as directed by CO)
 - Must be submitted “promptly” and **no later than one year** after T4C is effective
 - If contractor and CO agree, amount may include reasonable profit on work done, but cannot exceed [total contract price] – [prior payments] – [price of work not terminated] + [settlement costs]
 - If contractor and CO do not agree, clause and FAR Part 49 prescribe amount...

Termination Settlement Proposals (cont.)

- Non-Commercial Federal Contracts (cont.)
 - Termination Settlement Proposal (TSP)
 - If contractor and CO do not agree, TSP amount is as follows (basically amounts to a cost-reimbursable contract ... should follow FAR Part 31 Cost Principles):
 - Contract price for completed supplies or services accepted by Government;
 - Costs incurred in performance terminated work (including initial costs/preparatory expenses, but excluding costs attributable to supplies or services paid), plus fair and reasonable profit (unless contractor would have had loss on entire contract);
 - Cost of settling/paying TSPs from terminated subcontractors;
 - Costs of settlement (including accounting, legal, clerical expenses in preparing TSP; terminating subcontracts; preserving inventory).
 - Government can deduct unliquidated advances, government claims, proceeds of sales not credited to government.
 - Maintain records from termination/TSP for three years after final settlement.

Termination Settlement Proposals (cont.)

- Commercial-Type Federal Contracts
 - FAR 12.403 and FAR 52.221-4(l) clause (but may look to FAR Part 49 for guidance)
 - Immediate Obligations
 - Similar to non-commercial: stop work and cause subcontractors to stop work, **track costs**
 - Termination Settlement Proposal (TSP)
 - No express certification requirement, mandatory submission timeline, or specific requirements for content of TSP. FAR 12.403(d)(2) says parties should “**mutually agree**” based on “Government’s need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.”
 - Two types of recovery are available:
 - A **percentage of the contract price** reflecting the percentage of work performed.
 - Reasonable **charges resulting from** the termination.

Termination Settlement Proposals (cont.)

- Commercial-Type Federal Contracts, Cont'd.
 - Termination Settlement Proposal (TSP)
 - A percentage of the contract price reflecting the percentage of work performed.
 - Note that this calculation may differ from non-commercial/FAR Part 49 method of transforming the agreement into a cost reimbursable contract.
 - The contractor must identify the percentage of work completed (e.g., deliverables submitted, milestones reached, hours performed) by the contract price, rather than calculate its actual costs incurred in performance.
 - Reasonable charges resulting from the termination.
 - “[U]navoidable, reasonable charges incurred other than those relating to contract work completed ... that should be paid to fairly or justly compensate a contractor whose contract has been terminated.” *SWR*, 15-1 BCA ¶ 35,832.
 - Include “settlement costs or costs reasonably incurred in anticipation of contract performance”, provided such costs are not adequately reflected as a percentage of the work performed, and provided such costs could not have been reasonably avoided.” *Id.*
 - Can include indirect costs and profit on such costs, but not lost anticipated profit. *See id.*



New Provisions, Clauses, and Certifications

Class Deviations Addressing the Revocation of Equal Opportunity EO

- GSA Supplement to CAAC Consultation to Issue a Class Deviation From the Federal Acquisition Regulation (FAR) Regarding Executive Orders 14173 and 14168 - February 18, 2025
- DHS Deviation (CD) No. 2025-01 from the Federal Acquisition Regulation (FAR) Regarding Executive Order (EO) 14173 and EO 14168 (CAAC Letter 2025-01 Supplement 1), February 19, 2025
- Millennium Challenge Corporation Class Deviation to Implement the President's Executive Orders 14173, 14168, 14148, and 14208 in accordance with CAAC Letters 2025-01 Supplement 1 and 2025-02 Supplement 1, February 19, 2025
- Homeland Security Federal Acquisition Regulation Class Deviation (Number 25-01) - Executive Orders 14173 (Ending Illegal Discrimination and Restoring Merit-Based Opportunity) and 14168 (Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government), February 21, 2025

Class Deviations Addressing the Revocation of Equal Opportunity EO

- Department of Commerce Federal Acquisition of Regulation (FAR) Class Deviation Regarding Executive Orders 14173 and 14168, February 21, 2025
- Nuclear Regulation Commission Class Deviation from the Federal Acquisition Regulation (FAR) regarding Executive Orders 14173, 14168, Section 2 of Executive Order 14148, and Section 2 of Executive Order 14208, March 3, 2025
- Department of Defense Class Deviation - Restoring Merit-Based Opportunity in Federal Contracts, March 4, 2025
- Department of Justice - Federal Acquisition Regulation (FAR) Class Deviation Implementing Executive Orders 14173 and 14168, March 4, 2025
- Department of Transportation Class Deviation regarding the revocation of Executive Order (E.O.) 11246, *Equal Employment Opportunity*, and updates terminology based on E.O. 14168, *Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, issued on January 20, 2025

GSA and DoD Class Deviations Addressing the Revocation of Equal Opportunity EO

The class deviations issued by GSA and DoD are substantially similar. The deviation states, effective immediately, contracting officers shall:

- Not take any action to implement or enforce Executive Order 11246, Equal Employment Opportunity, as implemented in FAR subpart 22.8;
- Not use the solicitation provisions and contract clauses prescribed at FAR 22.810 or 22.407(a)(4);
- Not review the representations in SAM that are based upon those solicitation provisions; and
- Not follow the procedures in DFARS subpart 222.8 or DFARS Procedures, Guidance, and Information subpart 222.8.

GSA and DoD Issue Class Deviations Addressing the Revocation of Equal Opportunity EO

It also prohibits contracting officers from including the following clauses in new solicitations and contracts, and requires contracting officers to remove them from open solicitations via solicitation amendments and from existing contracts through contract modifications:

- 52.222-21, Prohibition of Segregated Facilities.
- 52.222-22, Previous Contracts and Compliance Reports.
- 52.222-23, Notice of Requirement for Affirmative Action To Ensure Equal Employment Opportunity for Construction.
- 52.222-24, Preaward On-Site Equal Opportunity Compliance Evaluation.
- 52.222-25, Affirmative Action Compliance.
- 52.222-26, Equal Opportunity.
- 52.222-27, Affirmative Action Compliance Requirements for Construction.
- 52.222-29, Notification of Visa Denial.

GSA and DoD Issue Class Deviations Addressing the Revocation of Equal Opportunity EO

The deviation also requires that contracting officers reserve (i.e., remove) references to the above clauses in the following clauses:

- FAR 52.204-8, Annual Representations and Certifications
- FAR 52.212-3, Offeror Representations and Certifications—Commercial Products and Commercial Services
- FAR 52.212-5, Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services
- FAR 52.213-4, Terms and Conditions—Simplified Acquisitions
- FAR 52.244-6, Subcontracts for Commercial Products and Commercial Services

Furthermore, the GSA deviation clarified that all FAR subparts based on statute or those not covered by EO 11246 are not affected, including:

- FAR subparts 22.13, Equal Opportunity for Veterans and its related clauses and provisions and
- FAR subpart 22.14, Employment of Workers and Disabilities

Certification Regarding Compliance with Applicable Federal Anti-Discrimination Laws

None of the funds awarded under this contract may be used for any initiatives or programs, or any activities that do not comply with **Executive Order 14173** titled Ending Illegal Discrimination and Restoring Merit-Based Opportunity.

The Contractor shall submit, *prior to award or upon request from the Contracting Officer*, a certification that confirms:

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

U.S. Department of State

The purpose of this modification is to ensure that all deliverables and work to be completed on this award will be done so in accordance with all executive orders issued to date. The only changes are administrative in nature and will not change the value of the award. This modification is separate from the existing stop-work order (SWO) and doesn't authorize any additional costs to be incurred.

Foreign Assistance Review – Questions

1. Can you confirm if your agency has not collaborated with, had any accusations or investigations of working with, an entity on the terrorism watch list, cartels, or narco/human traffickers, organized or [groups that promote mass migration] in the last ten years?
2. Does your organization conduct regular counterterrorism vetting of its employees, sub-awardees, etc.?
3. Does the organization encourage partners [to adopt policies and take action to respect their national sovereignty and culture, strengthen patriotic values, and reduce dependence on external institutions]?
4. Does your organization have a clear policy prohibiting any collaboration with, funding for, or support for entities that [advocate or implement policies contrary to U.S. government interests, national security, and sovereignty]?
5. Can you confirm that your organization does not work with entities associated with communist, socialist, or totalitarian parties [or any party that espouses anti-American beliefs]?



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