



CLIENT ALERT

EXECUTIVE ORDER 14398:

SMALL BUSINESS FEDERAL CONTRACTING

On March 26, 2026, President Trump issued Executive Order 14398 (EO 14398) under the Federal Property and Administrative Services Act (FPASA). EO 14398, which builds upon a prior executive order that was issued in January, 2025 (EO 14173), governs contractor compliance with anti-DEI requirements and is further detailed below.

1. What is Executive Order 14398 (EO 14398)?

EO 14398 (“Addressing DEI Discrimination by Federal Contractors”), requires that, by April 25, 2026, all federal contracts include a clause (the “Clause”) prohibiting federal contractors, their subcontractors, and lower tier subcontractors from engaging in “racially discriminatory DEI activities.” By the language of the required Clause, federal contractors and subcontractors must consent to the six requirements below:

- The contractor will not engage in any racially discriminatory DEI activities, as defined in section 2 of EO 14398;
- The contractor will furnish all information, records, and accounts, as required by the contracting agency, for purposes of ascertaining compliance with this clause;
- If the contractor or subcontractor fails to comply with this clause, the contract may be canceled, terminated, or suspended in whole or in part, and the contractor or subcontractor may be subject to debarment;
- The contractor will report any subcontractor’s known or reasonably knowable conduct that may violate this clause to the contracting federal agency and implement any remedial actions as directed by such agency;
- The contractor will inform the contracting federal agency of any subcontractor suit against the contractor which, in any way, challenges the validity of this clause; and
- The contractor recognizes that compliance with the requirements of this clause are material to the government’s payment decisions for purposes of the False Claims Act (FCA).

2. How Does EO 14398 Define Racially Discriminatory DEI Activities?

EO 14398 defines “racially discriminatory DEI activities” as “disparate treatment based on race or ethnicity in the recruitment, employment (e.g., hiring, promotions), contracting (e.g., vendor agreements), program participation, or allocation or deployment of an entity’s resources.”

3. How Is EO 14398 Different From The Prior Issued EO 14173?

Although EO 14398 is narrower in scope than EO 14173, it significantly expands contractor risk through mandatory contract language, reporting obligations, and enhanced enforcement mechanisms. Unlike EO 14173 which broadly relies on the protected classes (race, color, sex, sexual preference, religion, or national origin) as the basis of illegal DEI activity, EO 14398 only prohibits federal contractors from considering race in employment, procurement, or contracting practices. Notably, despite its broader basis for illegal DEI activities, EO 14173 merely required contractor certification of non-engagement in “illegal DEI programs” and failed to define the term, as opposed to EO 14398 which mandates specific contract language and requires contractors to report subcontractor violations. Further, beyond the FCA actions provided for in EO 14173, EO 14398 additionally directs prompt review of *qui tam* whistleblower suits, which allow private individuals to sue companies, on the government’s behalf, for defrauding the government, and provides remedies for noncompliance as drastic as debarment.

4. Does EO 14398 Apply Retroactively?

EO 14398 does not include any language that it applies retroactively. However, given the order’s direction to federal contracting agencies, it is likely that renewals or modifications of existing federal contracts will contain the Clause and require Clause compliance.

5. Are There Legal Challenges to the EO 14398?

As with EO 14173, on April 20, 2026, several organizations jointly filed a lawsuit in a Maryland federal district court, seeking to declare EO 14398 unconstitutional for exceeding President Trump’s authority and for violating the First Amendment, and to enjoin federal agencies from enforcing it.

WHAT DOES THIS MEAN FOR YOUR BUSINESS?

1. Implication on Contracting:

a. SBA 8(a) Program

At this time, no changes to the SBA 8(a) program have been implemented as a direct result of EO 14398. However, any future measures would likely expand upon the changes introduced in furtherance of EO 14173, as outlined in SBA Guidance issued on January 22, 2026 (the “ SBA Guidance”). In that guidance, the SBA noted that:

- The 8(a) program is a race-neutral program that will not give preference nor presumptively deny an applicant based solely on race

- The SBA will not approve applications using Biden Administration “social disadvantage narratives,” nor will SBA utilize in any way or refer applicants to the related Guidance for Demonstrating Social Disadvantage.”
- SBA employees shall treat all Americans fairly and equally in compliance with EO 14173 and related EO 14173 (Ending Illegal Discrimination and Restoring Merit-Based Opportunity).
- The SBA will consider whether an individual is “socially disadvantaged” based on “factors such as whether the individual has been the victim of illegal or radical DEI policies or illegal affirmative action policies or has otherwise been the the victim of discriminatory practices such as race-based quotas, set asides, or hiring targets, in each case, whether by governmental or non-governmental actors.”

b. Flowdown Requirements

In addition to consenting to comply with the Clause, prime contractors will have to ensure that this requirement is reflected as a flowdown provision for subcontractors and lower tier subcontractors to avoid the termination or suspension of contracts or debarment, and to avoid further enforcement actions under the FCA.

c. Increased Scrutiny

EO 14398 is sure to worsen the heightened scrutiny already established under EO 14173, both for prime contractors and subcontractors. Besides the pressure of contracting agency information requests to ensure compliance with the Clause, EO 14398 reinforces the significant risk, already posed by the SBA Guidance, that current 8(a) participants could have their 8(a) status suspended or terminated, either as a result of failure to show economic disadvantage or the now race-neutral eligibility requirements. Therefore, 8(a) participants must also keep detailed records in order to maintain SBA certification.

Separately, prime contractors are now likely to impose requirements on subcontractors to frequently certify compliance with EO 14398 and/or more stringent mechanisms of verifying such compliance to enable the prime contractors to meet their reporting obligations under EO 14398.



BUSINESS TO-DO LIST

Next Steps for Businesses:

1. Consult with legal counsel to assess existing DEI programs and policies to ensure compliance with EO 14398 and federal laws
2. Keep detailed and accurate records, accounts, and all information of your business' and subcontractor operations, especially as related to DEI and financial data
3. Review subcontractor agreements to ensure the Clause is included as a flowdown provision, in addition to language that ensures continuing subcontractor compliance

The SJS Law Firm will continue to monitor and keep you informed about the implementation of these executive orders, their consequences on your small business, legal ramifications thereof, and any further presidential action.

The S.J.S. Law Firm can help your small business navigate these new regulatory changes. For a complimentary consultation, please contact us at (202) 505-5309.