

Executive Orders, DOJ Enforcement, & the Growing Importance of Ethics Programs



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Learning Objectives

- ✓ Identify the changes in affirmative action and DEI requirements following EO
- ✓ Differentiate between “illegal” DEI and programs which would likely not violate the new requirements
- ✓ Identify potential risks of exposure for whistleblower complaints and FCA claims
- ✓ DOJ’s Civil Rights Fraud Initiative
- ✓ DOJ’s Whistleblower Program
- ✓ Importance of Ethics Programs / Best Practices

Executive Order 14173 – Status of AA & DEI

Executive Order Revokes EO 11246!

- January 21, 2025 – President Trump signed Executive Order 14173
- [Ending Illegal Discrimination And Restoring Merit-Based Opportunity – The White House](#)
- This Order revokes EO 11246 and gives covered contractors and subs until April 21, 2025, to continue complying “with the regulatory scheme in effect on January 20, 2025.”
- This EO does NOT relieve contractors of their responsibilities to comply with VEVRAA and Section 503 (see next slides)
- This EO also does not remove the requirement for most contractors to gather race and sex self-identification for EEO-1 reporting under TITLE VII and its regulations.

EO Ending Illegal Discrimination and Restoring Merit-Based Opportunity

- On January 21, 2025, President Trump signed EO 14173, which among other things, revoked several other Executive Orders.
- Termination: Requires all departments and agencies to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements.
- Rescinds executive orders and Presidential memoranda related to federal actions and initiatives to promote diversity and inclusion, including Executive Order 11246 (Equal Employment Opportunity) and Executive Order 13672 (which amended EO 11246).
- Directs the Office of Federal Contract Compliance Programs to 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.

EO Ending Illegal Discrimination and Restoring Merit-Based Opportunity

- **Certification:** Requires each agency head to include in every contract or grant award a term requiring compliance with all applicable Federal anti-discrimination laws material to the government's payment decisions and a certification that the contractor/recipient does not operate any DEI programs that violate any applicable Federal anti-discrimination laws.
 - Discussion later on possible FCA violations if certification is inaccurate!
- **Enforcement:** Directs federal agencies to encourage the private sector to advance the policy of individual initiative, excellence, and hard work and to identify potential civil compliance investigations.
- This EO does NOT impact Section 503 or VEVRAA
 - More on these laws later

Status of EO 14173

- Challenges to EO 14173
 - February 21, 2025 - A federal Judge in Maryland issued a preliminary injunction in *National Ass'n of Diversity Officers in Higher Education, et al. v. Trump, et al*, blocking significant portions of EO 14173 and EO 14151.
 - March 14, 2025 - The US Court of Appeals for the Fourth Circuit issued an Order staying the Maryland District Court's preliminary injunction. The Court ordered the parties to respond to a March 24th briefing schedule. This case is pending.
 - March 27, 2025 – A federal judge for the Northern District of Illinois granted a temporary restraining order against the DEI Certification & Termination Provisions authorized by EOs 14151 and 14173. The Certification provision applies nationwide to DOL grant recipients, but the Termination provisions only apply to the actual plaintiff and related subcontractors/grant recipients.
- At this time, EO 14173 is enforceable, and the appellate courts are considering whether it and other DEI-related EOs signed by President Trump are lawful.
 - Revocation of EO 11246 is not being challenged.

Since the Signing...

- OFCCP quickly issued letters to those under audit informing them that the compliance evaluation related to EO 11246 was closed and that the Section 503 and VEVRAA portions of the evaluation are “being held in abeyance until further notice.”
- OFCCP’s acting director, Michael Schloss, outlined a plan to reduce the OFCCP workforce from 479 employees to 50 employees, including eliminating labor economists and statisticians. The plan involves a reduction in field offices from 55 to 4, which is clearly a huge decrease.
- The OFCCP website is, in essence, non-existent at this time – it now only contains a few tidbits related to EO 14173 and a statement letting us know they are working to update the website with new guidance.
- Some contractors have received guidance to review policies, handbooks, etc. and to ensure that all references to diversity, equity, and inclusion have been removed.

Since the Signing...

- On March 4, 2025, the Department of Defense issued Class Deviation 2025-O0003, *Restoring Merit-Based Opportunity in Federal Contracts*. This action clarifies that contracting agencies should not implement or enforce EO 11246 and instructs them to stop incorporating in new contracts and to modify contracts with greater than six months remaining in the period of performance to omit or exclude the following FAR clauses:
 - 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

What Does All This Mean?

As has been true for quite some time, “illegal discrimination” is not allowed, of course. This is true for all employment activities: hiring, terminations, promotions, transfers, pay, training opportunities, etc. Now is a good time for a refresher for all employers, including government contractors, on the civil rights laws referenced above. EO 14173 reminds us that “*workforce balancing based on race, color, sex, sexual preference, religion, or national origin*” is not allowed and that we “*shall not consider race, color, sex, sexual preference, religion, or national origin in ways that violate the Nation’s civil rights laws.*” Establishing hiring quotas, giving preferential treatment, or consideration as a “plus factor” to a particular protected group or characteristic is strictly forbidden.

OFCCP Proposed Rules to Revise Regs

- Since EO 11246 was revoked by EO 14173, DOL has issued proposals to rescind all regulations issued under the authority of EO 11246 as well as those which provide information on OMB-approved information collections relevant to the regulations.
- DOL is also proposing to revise its implementing regulations for VEVRAA to remove the cross-references to EO 11246 and add the administrative enforcement proceeding provisions to 41 CFR Part 60-300, except where duplicative of current Part 60-300 provisions (e.g., the severability clause). DOL proposes to add these regulatory provisions to 41 CFR 60-300.65.
- DOL is also proposing to revise its implementing regulations for Section 503 to remove the cross-references to EO 11246 and add the administrative enforcement proceeding provisions to 41 CFR Part 60-741, except where duplicative of current Part 60-741 provisions (e.g., the severability clause). DOL is proposing to add these regulatory provisions to 41 CFR 60-741.65.

What Do We Do Now?

- Review your notices, posters, and policies, and be prepared to issue revised versions that exclude any language related to affirmative action for anyone other than protected veterans (per VEVRAA) and those with disabilities (per Section 503).
 - Don't forget your subcontractor agreements, flow-down clauses, and purchase orders.
- Continue with your obligations under Section 503 and VEVRAA – for now.
- Consider AAPs previously submitted to OFCCP for potential risks in consideration of their new perspective.
- Continue casting the net wide with your recruitment efforts while ensuring you can justify and support your merit-based hiring and employment decisions.
 - Review your previous goals and outreach efforts.
- Stay abreast of the ever-changing landscape.

What Must You Do? Still Required!

- While affirmative action and illegal DEI programs are under fire, these laws remain firmly in place and enforceable:
 - **Title VII of the Civil Rights Act of 1964** prohibits employment discrimination based on race, religion, national origin, color, and sex, including gender, gender identity, pregnancy, and sexual orientation. The protections of Title VII apply equally to all applicants and workers as related to hiring, promotions, compensation, and other employment decisions.
 - The **Uniform Guidelines of Employee Selection Procedures (UGESP)** were created to assist employers in complying with Title VII and provide a legal basis when using tests and other selection procedures, ensuring decisions are based on merit. These requirements include the monitoring of selection differences by race, ethnicity, and sex.
 - The **Equal Pay Act of 1963** requires employers to provide equal pay for men and women. This requirement includes all forms of compensation and benefits: base pay, incentive comp, stock options, insurance, vacation, etc.

What Must You Do? Still Required!

- **The Americans with Disabilities Act (ADA)** protects qualified applicants and employees with disabilities from discrimination in employment activities (i.e., hiring, firing, training, compensation).
- **The Age Discrimination in Employment Act of 1967** protects workers over the age of 40 from discrimination.
- Covered federal contractors are still required to **comply with affirmative action and other obligations** as set forth in **Section 503 of the Rehabilitation Act** (which covers individuals with disabilities) and the **Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)** (which covers protected vets).

“Illegal” vs. “Legal” DEI Programs

What is DEI?

- Executive Order 14173 does not define “DEI”
- July 29, 2025 – DOJ issues a Memorandum to all Federal agencies with guidance on the application of federal discrimination laws to DEI programs and recommendations for compliance
- References to “Key Federal Antidiscrimination Provisions and Law”
- Provides a “non-exhaustive list of unlawful practices that could result in revocation of grant funding” and possible liability for recipients of federal funds
 - Grants preferential treatment based on protected characteristics
 - Prohibits use of proxies for protected characteristics
 - Segregation based on protected characteristics
 - Training programs that promote discrimination or a hostile environment
- Recommendations for Best Practices are included

EEOC & DOJ Guidance on DEI

- On March 19, 2025, the EEOC and Justice Department issued a joint warning “against unlawful DEI-Related discrimination,” reminding employers that “Under Title VII, DEI initiatives, policies, programs, or practices may be unlawful if they involve an employer or other covered entity taking an employment action motivated—in whole or in part—by an employee’s or applicant’s race, sex, or another protected characteristic.”
 - [What To Do If You Experience Discrimination Related to DEI at Work | U.S. Equal Employment Opportunity Commission](#)
 - [What You Should Know About DEI-Related Discrimination at Work | U.S. Equal Employment Opportunity Commission](#)

Reassess DEI Programs – Are They Lawful?

- What is the goal of your “diversity” and “inclusion” program? Does it advance candidates based on race or ethnicity?
 - If so, this may be discriminatory under Title VII or other civil rights laws
- Eliminate diversity “Quotas” – this has always been illegal!
- Prohibit Demographic-Driven Criteria and scrutinize neutral criteria for “proxy” effects.
- Focus on skills and qualifications – Evaluate experiences, background, know-how – NOT characteristics that would be considered a “protected class”
- Ensure your internal procedures regarding complaints, reporting, investigations, FAR required mandatory disclosures, and all related processes are up to date and compliant. Avoid exclusionary training programs.
- Ensure inclusive access to any in-house affinity groups you may have are not allowed privileges that are unavailable to non-members. Restrictions to participation must not be based on any protected characteristic.

Best Practices for Compliance

- Prepare to certify that you do not operate any programs promoting DEI that violate any applicable Federal anti-discrimination laws.
- Ensure you modify your subcontracts following mods to your federal agreement.
- Include nondiscrimination clauses in contracts to 3rd parties & monitor compliance.
- Review your Code of Ethics and Conduct as well as hiring documents and your website to remove any language that runs afoul of the Executive Orders.
 - Simply changing the names of programs will not accomplish this requirement. The government will be looking for companies continuing to promote DEI even if less obvious.
- Retain programs that are focused on NON-Discrimination, as is required by the equal employment opportunity / civil rights laws.
- Establish clear anti-retaliation procedures and create safe reporting mechanisms.

Other DEI-Related Executive Orders

- Executive Orders Rescinded
 - EO 13988 Executive Order on Preventing & Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
 - EO 14069 Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency
- New DEI-Related Executive Orders
 - EO Ending Radical and Wasteful Government DEI Programs and Preferencing (1/20/2025)
 - EO Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government (1/20/2025)

DOJ's Enforcement – FCA Risks

Reminder from EO 14173

Certification: Requires each agency head to include in every contract or grant award a term requiring compliance with all applicable Federal anti-discrimination laws material to the government's payment decisions, and a certification that the contractor/recipient does not operate any DEI programs that violate any applicable Federal anti-discrimination laws.

Modification of Contracts

- Monitor communications from the Contracting Officer regarding modifications to grants and contracts. The EOs are very clear that the OMB and DOJ must act to implement them and remove all DEI elements. Contractors who do not comply could face a claim under the civil False Claims Act.
- Contracting officers are expected to modify existing contracts to remove specific Federal Acquisition Regulation (FAR) clauses that implemented affirmative action requirements under the old EO 11246, including FAR 52.222-26 and FAR 52.222-27.
- Most Prime contractors have not immediately revised their subcontracting templates and processes. If you are a subcontractor, it is advised that you closely review any flow-down clauses that reference AAPs for minorities or women or other FAR clauses that should be removed. ASK your customer in writing rather than blindly accepting an improper flow-down clause, which could lead to unnecessary legal and administrative burdens.

Modification of Contracts

- Discuss and negotiate the removal of outdated or irrelevant clauses with the prime contractor. Subcontractors do not need to accept provisions that are no longer mandatory.
- While racial and gender-based AAPs are gone, federal contractors (including subcontractors) must still comply with all federal anti-discrimination laws, such as Title VII, the Americans with Disabilities Act (ADA), and the new certification requirements under EO 14173.
- Given the complexity and newness of the changes, consulting legal counsel is the safest approach to ensure compliance and understand a company's rights regarding flow-down clauses.

Civil Rights Fraud Initiative

- In May 2025, DOJ launched a new Civil Rights Fraud Initiative showing its commitment to enforcement of the False Claims Act with regard to DEI preferences and mandates.
- DOJ intends to hold recipients of federal funds accountable for certifying compliance with civil rights laws when they actually engage in practices violating them.
- This initiative supports the intent of EO 14173 and requires the Attorney General to identify and report the following to the Assistant Director for Domestic Policy:
 - Key sectors of concern within each agency’s jurisdiction; and
 - The “most egregious and discriminatory DEI practitioners within each sector of concern.”

Civil Rights Fraud Initiative

- The FCA imposes liability for defrauding the federal government – significant penalties and fines.
- Criminal liability for any individual or company that knowingly submits a false claim to the government (up to 5 years in prison in addition to fines).
- DOJ emphasizes they will target DEI programs that are “camouflaged” via their description (in name only) but still implemented the same way.
- DOJ encourages whistleblowers to come forward.
- Assess your DEI programs to determine if you are at risk for any FCA claims.

Civil Investigative Demands (CIDs)

- DOJ has begun issuance of CIDs to federal contractors and grant recipients seeking information on their DEI practices.
- What is a CID? An investigative “tool” that DOJ uses to demand information and documentation related to a potential investigation into a false claim allegation **BEFORE** the DOJ brings a formal FCA action against the contractor **as part of** an investigation brought by a whistleblower under the qui tam provisions.
- Aim – to force compliance with the FCA

DOJ's Whistleblower Program



52.203-17 Contractor Employee Whistleblower Rights

- (a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies established at [41 U.S.C. 4712](#) and Federal Acquisition Regulation (FAR) [3.900](#) through [3.905](#).
- (b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under [41 U.S.C. 4712](#), as described in FAR [3.900](#) through [3.905](#).
- (c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts.

Requirements

- Contractors are required to inform employees in writing of employee whistleblower rights and protections under the laws, using the predominant language of the workforce.
- More importantly, contractors need to determine how they will document and maintain the notification so they can demonstrate compliance with the clause. Whistleblower statutes contain strong protections against retaliation, harassment, or discrimination against whistleblowers by firing or taking adverse actions.
- Some potential remedies for whistleblowers include reinstatement of employee, payment of lost wages, and attorneys' fees.
- Contractors should also review any confidentiality agreements to ensure there are no restrictions in reporting waste, fraud, or abuse under a government contract to an appropriate law enforcement or federal agency.

DOJ Whistleblower Program

- On March 7, 2024, DOJ announced a new pilot program to pay whistleblower rewards for individuals who report corporate misconduct.
- The intent is clearly to encourage more companies to make voluntary self-disclosures.
- Payments to individuals who provide information about “significant corporate or financial misconduct.”
- “Reward” to be paid from asset forfeiture funds.
- Intended to “fill gaps” not covered by other whistleblower programs.
- Pilot program effective August 1, 2024.

DOJ Whistleblower Program

- August 1, 2024, DOJ issued guidance on its Pilot Program:
 - A whistleblower providing original and truthful information about corporate misconduct that results in a successful forfeiture may be eligible for an award.
 - The information must relate to the following:
 - 1) certain crimes involving financial institutions, from traditional banks to cryptocurrency businesses
 - 2) foreign corruption involving misconduct by companies
 - 3) domestic corruption involving misconduct by companies
 - 4) health care fraud schemes involving private insurance plans

DOJ Whistleblower Program - Guardrails

- Whistleblower rewards are offered only:
 - After all victims have been properly compensated
 - For truthful information not already known to the government
 - For those not involved in the underlying criminal activity
 - When information is provided voluntarily
 - Where there is not an existing financial disclosure incentive, such as a qui tam or another applicable whistleblower program
- Also note – there is a total bar on payments to those who are involved in the underlying criminal activity.

DOJ Whistleblower Program Recommendations

1. Companies should evaluate whether their compliance programs include effective measures to identify potential misconduct, including ongoing monitoring and reporting. Adopt clear whistleblower policies.
2. Companies should ensure that they appropriately foster a speak up culture and have clear and accessible communication channels for employees to report misconduct easily and anonymously.
3. Companies should also evaluate the robustness of their internal reporting and investigating processes – including timely follow-up on all complaints – to promote employee reliance on the company's own internal mechanisms. Always encourage whistleblowers to report internally first!
4. Companies should continue to carefully evaluate whether voluntary self-disclosure is appropriate given the increased risk of whistleblower reports.
5. Be proactive with your ethics awareness training programs!

DPC Memorandum

- The Office of the Under Secretary of Defense, Defense Pricing and Contracting (DPC) issued a guidance memorandum dated March 18, 2024 to agencies based on the results of the Department of Defense (DoD) Inspector General (IG) Audit of DoD Compliance on Whistleblower Protection Requirements.
- While the DoD IG found, in most cases, that Contracting Officers included the DFARS 252.203-7002 Requirement to Inform Employees of Whistleblower Rights clause in contracts, they did not verify whether contractors were complying with the clause.

DPC Guidance

- The DPC guidance memorandum instructs contracting officers to implement the following actions:
 - Review existing contracts to ensure the whistleblower clause is included, or if appropriate, modify contracts to include the required clause;
 - Emphasize to contracting officials the value of the whistleblower program through training to address whistleblower compliance; and
 - Apply a risk-based approach to determine whether contractor compliance requirements should be verified and, as appropriate, address oversight of the requirement in the contract surveillance plan.

Whistleblower Policy Language (Example)

- The whistleblower protection laws protect federal employees and employees of a contractor, subcontractor, grantee, subgrantee, or personal services contractor from reprisal from their employer for disclosing information that the employee reasonably believes is evidence of:
 - Gross mismanagement of a Federal contract or grant;
 - Gross waste of Federal Funds;
 - An abuse of authority relating to a Federal contract or grant;
 - A substantial and specific danger to public health or safety; or
 - A violation of law, rule, or regulation related to a Federal contract or grant.
- The company prohibits any requirement for employees, subcontractors, subgrantees, or personal services contractors to sign non-disclosure or confidentiality agreements which would prohibit them in any way from reporting waste, fraud, or abuse related to the performance of a government contract.
- A “whistleblower” is a person, usually an employee, who exposes information or activity within a private, public, or government organization that is deemed illegal, illicit, unsafe, or a waste, fraud, or abuse of taxpayer funds.

Proactive Ethics Programs



Business Ethics

FAR 52.203-13: Contractor Code of Business Ethics and Conduct (CoBEC)



(b) Code of business ethics and conduct.

(1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall—

- (i) Have a written code of business ethics and conduct;
- (ii) Make a copy of the code available to each employee engaged in performance of the contract.

(2) The Contractor shall—

- (i) Exercise due diligence to prevent and detect criminal conduct;
- (ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Business Ethics

FAR 52.203-13: Mandatory Disclosure



(3)(i) The Contractor **shall timely disclose, in writing, to the agency Office of the Inspector General (OIG)**, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

Business Ethics

FAR 52.203-13: Compliance Program



(c) Business ethics awareness and compliance program and internal control system. ...The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:

(1) An ongoing business ethics awareness and compliance program.

(i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

FAR 52.203-13

Contractor Code of Business Ethics and Conduct



(2) An internal control system

(i) The Contractor's internal control system shall—

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.

Business Ethics – Best Practices

- ✓ Tone at the Top – Promote ethical culture committed to compliance with the code and all laws
- ✓ Establish a written Code of Business Ethics and Conduct and appoint a Compliance Officer
- ✓ Establish an Awareness/Training Program and ensure dissemination of information appropriate per each individual employees' respective roles and responsibilities
- ✓ Conduct periodic reviews of the company's business practices and procedures to ensure ongoing compliance
- ✓ Ensure procedures/internal control systems are in place to facilitate timely discovery of potentially improper conduct

Business Ethics – Best Practices

- ✓ Establish protocols for the intake and processing of allegations of potential misconduct – include documentation that investigation of allegations will be conducted at the express direction of counsel
- ✓ Conduct a neutral, timely investigation of any allegations or potential issues
- ✓ Track the status of effective corrective measures through completion
- ✓ Make mandatory disclosures as required
- ✓ Maintain full cooperation with any government agency responsible for audit, investigations, or corrective action
- ✓ An internal hotline or other anonymous reporting mechanism is recommended

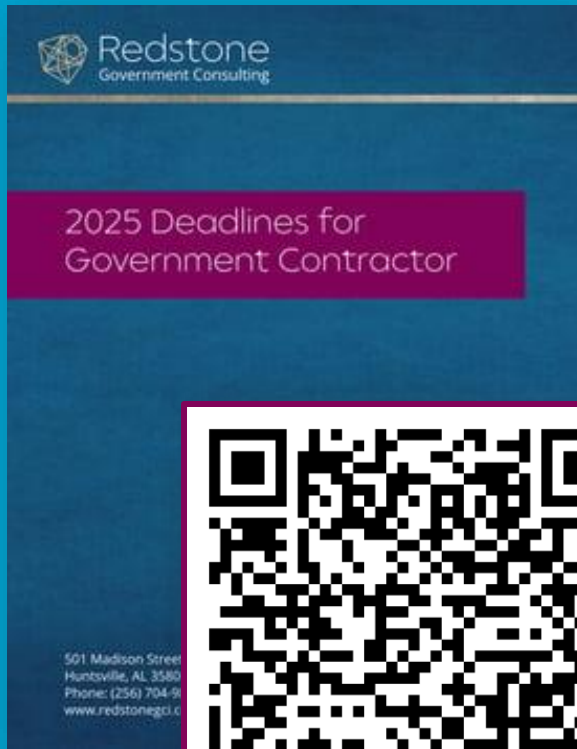
Questions and Discussion



2025 Critical Deadlines for Government Contractors

This guide provides you with all of the essential information and dates you need to know, including:

- Important deadlines for your internal departments
 - Accounting,
 - Human Resources,
 - Contracts & Subcontracts, and
 - Government Compliance
- Contract performance and delivery deadlines
- Deadlines for reporting and compliance requirements
- Deadlines for audits and reviews



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