LEGAL UPDATES

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Impact of New Executive Actions on Local Governments: Key Updates on Minority and Women Contracting Programs

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President Trump's Executive Order "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" has potential for wide ranging impacts on local government policies and programs related to diversity, equity, and inclusion (DEI).

The order seeks to "terminate all discriminatory and illegal preferences" by revoking numerous previous executive orders, including President Lyndon B. Johnson's 1965 Executive Order 11246 establishing non-discriminatory hiring practices for federal contractors, placing new requirements on federal contract and grant award recipients, and discouraging private sector DEI efforts.

In alignment with this executive order, the Trump administration also signaled its intent to freeze and potentially cancel federally funded programs that conflict with the administration's priorities. Trump's initial funding freeze, the "Temporary Pause of Agency Grant, Loan, and other Financial Assistance Programs," quickly faced legal challenges, and following the issuance of a temporary restraining order by a federal court in the District of Columbia, Office of Management and Budget (OMB) rescinded the pause.

Despite this reversal, the administration continues to indicate that it intends to freeze federal funds for certain programs. As of January 28, OMB has also identified approximately 2,600 federal financial assistance programs that could be discontinued for being inconsistent with the Trump policy objectives related to DEI and the "Green New Deal."

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For local governments that receive substantial federal funding for a variety of activities, the recent and potential future actions present numerous challenges and require proactive preparation for future changes to public contracting, DEI programs, and project administration.

Primary considerations for local governments

Review and proactively plan for federally funded programs

While no blanket freeze of federal funds is currently in place, eliminating federal financial assistance for certain programs subject to recent executive orders appears to remain a priority. In anticipation of possible future funding freezes, local governments should review current programs to identify those receiving federal financial assistance from one of the identified 2,600 programs. Preparing to address potential new restrictions, requirements, or full revocation of the funding source will be essential to dealing with future uncertainties.

Federal contracting terms and certification requirements

Local governments should similarly anticipate new required terms for federal grants and other contracts. Federal agencies will be required to include two provisions in every contract or grant:

1) **Contract provision**: All contracts and grants will require a clause advising all grant recipients, including local governments, that compliance with federal anti-discrimination laws is material to the government's payment decisions for purposes of the False Claims Act (potentially exposing local governments to liability, damages, and penalties under the Act). The applicability of and immunity from the FCA is entity specific and will require individualized review.

2) **Compliance certification**. The local government contracting party or grant recipient will now be required to certify that it "does not operate any programs promoting DEI that violate applicable federal anti-discrimination laws." Federal agency heads are tasked with drafting the exact terms of this future certification.

Existing local MWBE/DBE/HUB programs

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Local governments should ensure that any existing minority and women owned business enterprise and similar programs are currently compliant with any constitutional, state, or local requirements. While such programs remain legal, contracts that incorporate a local MWBE component and also rely on federal funding may face additional scrutiny by the federal government. Conducting a compliance review of your current diversity-related contracting program now will facilitate the ability to comply with future certifications and contract terms.

Vendor contract terms

Require that all federal contracts include a non-appropriation clause that identifies the source of funding as federal funding that may be subject to cancellation. Also consider terms related to allocating responsibilities and liabilities between the contracting parties for potential federal reviews, audits, termination, revocation, or claw backs.

Local governments should continue to comply with 2 CFR § 200 et al, “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.”

Contact us

If you have questions regarding the impact of federal actions on local governments, please contact Sandy Hellums-Gomez, Ben Stephens, or your Husch Blackwell attorney.

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