



# CONSTRUCTION **SUPER**CONFERENCE

2025

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# Legal Whiplash: Managing Risk in a Shifting (and Competing) Policy Landscape

## Panelists:

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# Introduction

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# Navigating Legal Complexities

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- Federal and state guidelines often conflict in project regulations.
- Public and private projects face differing legal obligations.
- Competing requirements increase confusion in project management.
- Compliance risks grow as regulatory directions shift.
- Disputes are becoming more frequent due to legal uncertainties.



# Affirmative Action & DEI Policies

# Federal Policies

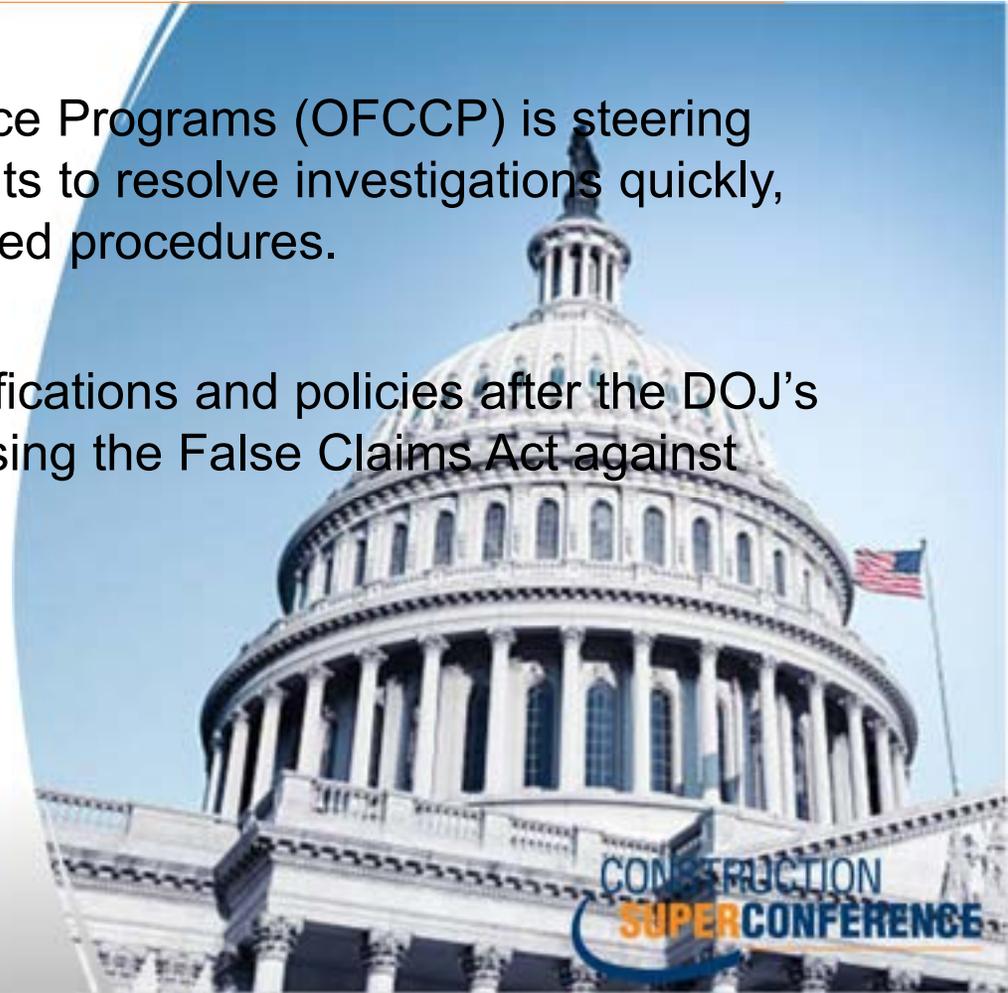
- Recent litigation has destabilized long-running affirmative action and supplier-diversity programs.
- In *Mid-Am. Milling Co., LLC v. United States Dep't of Transportation*, the court found that the Department of Transportation's Disadvantaged Business Enterprise (DBE) **likely violated the Equal Protection Clause** and granted a preliminary injunction. This led the USDOT to propose a consent order to **eliminate presumptions nationwide**. The case is scheduled for trial in January 2026.
- In *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, the SBA's 8(a) presumption was dismantled, requiring individualized showings of disadvantage.



# Federal Policies

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- The Office of Federal Contract Compliance Programs (OFCCP) is steering contractors toward conciliation agreements to resolve investigations quickly, reinforced by Directive 2024-01's expedited procedures.
- Contractors are rapidly auditing DEI certifications and policies after the DOJ's new Civil Rights Fraud Initiative began using the False Claims Act against misaligned disclosures.



# Federal Policies – USDOT Interim Final Ruling

- On September 30, 2025 the USDOT issued an interim final rule (IFR) requiring immediate changes to the Disadvantaged Business Enterprise (DBE) program regulations. This IFR went into effect on October 3, 2025.
- Key Changes:
  - Elimination of Race- and Sex-Based Presumptions of Social and Economic Disadvantage
  - Mandatory Recertification
  - Personal Narrative Requirement
  - Temporary Suspension of DBE Goals



## Slide 8

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PA1

Content added.

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# Federal Policies – USDOT Interim Final Ruling

- Due to significant changes to implementation of the DBE plans, the DBE recipient firms must submit their DBE plans to DOT for approval.
- DBE recipient firms can submit DBE plans **after** the Unified Certification Program (UCP) in their jurisdiction completes the reevaluation to reflect the changes in the IFR.
- UCP should complete the reevaluation process “as quickly as practice” but no deadlines are set.

**Source:** Official Frequently Asked Questions (FAQs) on the U.S. Department of Transportation’s Disadvantaged Business Enterprise (DBE) Program and Disadvantaged Business Enterprise in Airport Concessions (ACDBE) Program Implementation Modifications, Interim Final Rule (Effective Date October 3, 2025)

## Slide 9

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**PA1** Content Added.

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# Federal Policies – USDOT Interim Final Ruling

- Contracts Advertised (bids are not opened):
  - Recipients must issue amendments to the advertisements removing the DBE contract goals.
- Contracts Advertised, Let (bids opened, no contracts executed):
  - Recipients must take appropriate action to zero out the DBE goal.
  - Due to the changes in the IFR, USDOT will allow recipients to amend the contracts without re-advertising the projects.
  - Each Recipient should make its own determination on whether the contract needs to be re-competed under State law.

**Source:** Official Frequently Asked Questions (FAQs) on the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) Program and Disadvantaged Business Enterprise in Airport Concessions (ACDBE) Program Implementation Modifications, Interim Final Rule (Effective Date October 3, 2025)

## Slide 10

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PA1

Added Content

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# Federal Policies – USDOT Interim Final Ruling

- Contracts Advertised, Let, Awarded (executed before October 3, 2025):
  - Are not required to be modified.
  - DBE participants on such contracts cannot be counted toward the DBE contract goal or toward the recipients' overall DBE goal until the UCP in the recipient's jurisdiction completes the reevaluation process.
  - If all DBE participants are recertified under the new standards, then the contract will not need to be modified.
  - If one DBE participant is not certified during the reevaluation process, the recipient will be required to take appropriate action to discontinue the effect of the unconstitutional certification.
  - If a recipient does not take appropriate actions with respect to a contract, USDOT will not make any payments with respect to that contract.

**Source:** Official Frequently Asked Questions (FAQs) on the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) Program and Disadvantaged Business Enterprise in Airport Concessions (ACDBE) Program Implementation Modifications, Interim Final Rule (Effective Date October 3, 2025)

## Slide 11

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**PA1** Added Slide

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# GRANT PROGRAMS

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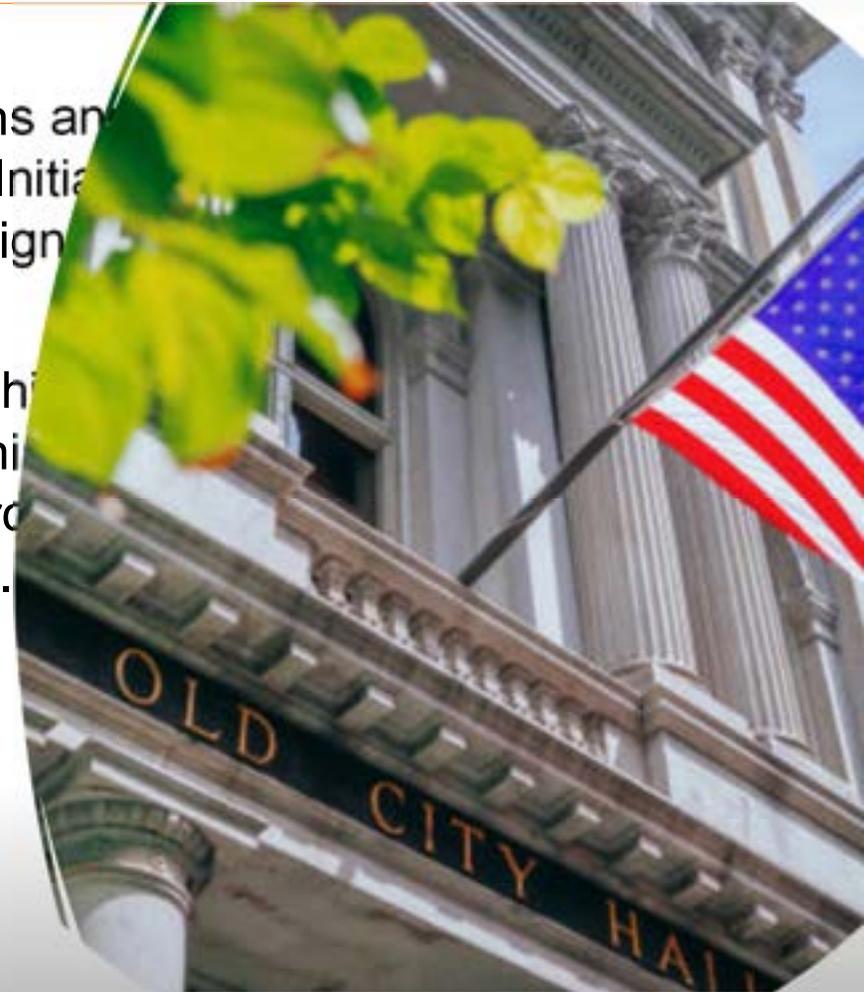
- Private DEI programs are affected as well, as shown in *Am. All. for Equal Rts. v. Fearless Fund Mgmt., L.P.*, where a grant program was enjoined as discriminatory under § 1981.



## State and Local

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- Contractors are rapidly auditing DEI certifications and policies after the DOJ's new Civil Rights Fraud Initiative began using the False Claims Act against misaligned disclosures.
- States are diverging, with Florida, Texas, and Ohio back DEI mandates, while Chicago and California to tie funding or permitting to diversity goals, forcing contractors to navigate conflicting requirements.



# Private Companies

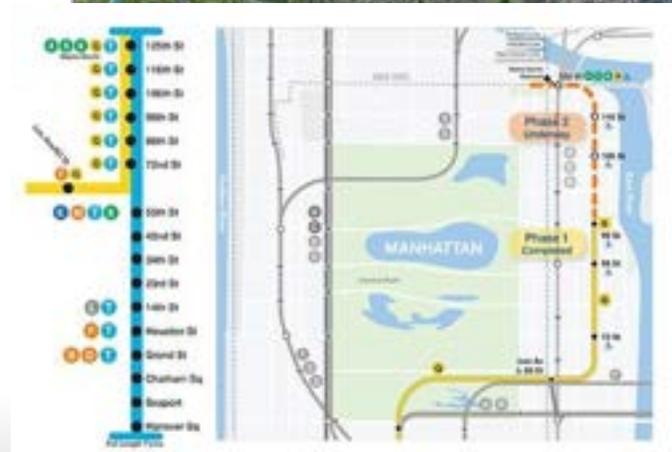
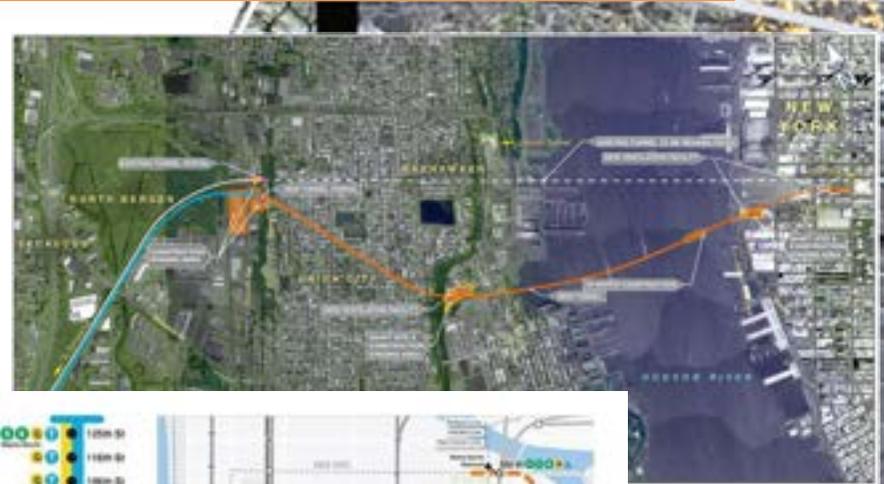
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- Must navigate conflicting state/federal requirements even if not government contractors.
- Increasing risk under § 1981 litigation for race-based programs.
- Many are modifying internal policies, keeping values-driven recruiting language but avoiding “DEI-specific” phrasing (e.g., Google dropped diversity hiring targets, KPMG removed DEI initiatives from its website).



# What Projects are Currently Affected?

- New York City Infrastructure Projects
  - Hudson River Tunnel Project
    - Tunnel and Associated Railroad Infrastructure between New York and New Jersey
    - \$16 Billion Project Cost
  - 2<sup>nd</sup> Avenue Subways Project, Phase 2
    - 8.5 miles, from 125<sup>th</sup> Street in Harlem to Lower Manhattan
    - \$7 Billion Project Budget



## Slide 15

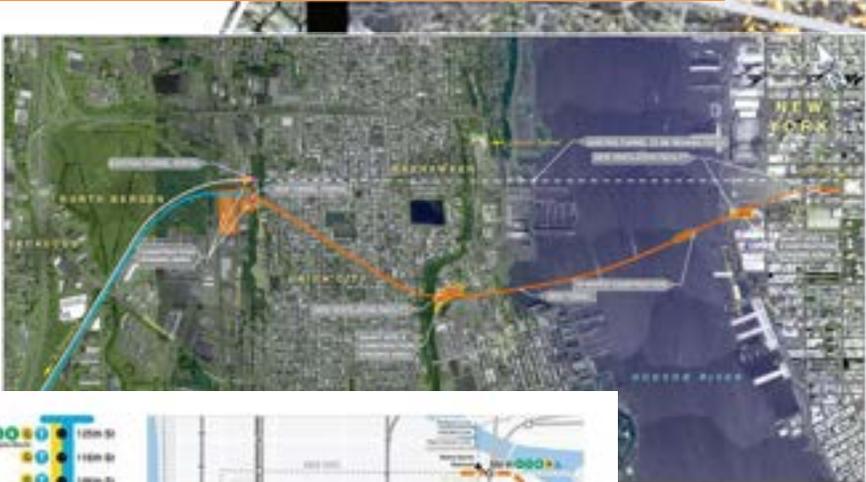
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# What Projects are Currently Affected?

- USDOT issued a statement on October 1, 2025 announcing:
  - Both projects are under USDOT’s administrative review to determine whether any unconstitutional practices are occurring (in connection with USDOT IFR).
  - Until USDOT’s administrative review is complete, project reimbursements cannot be processed, including **\$300 million** disbursement for the 2<sup>nd</sup> Avenue Subway.
- U.S. Government has been shut down since October 1, 2025.
- As of October 7, 2025, construction crews remained active on both projects.



Research as of November 7, 2025



## Slide 16

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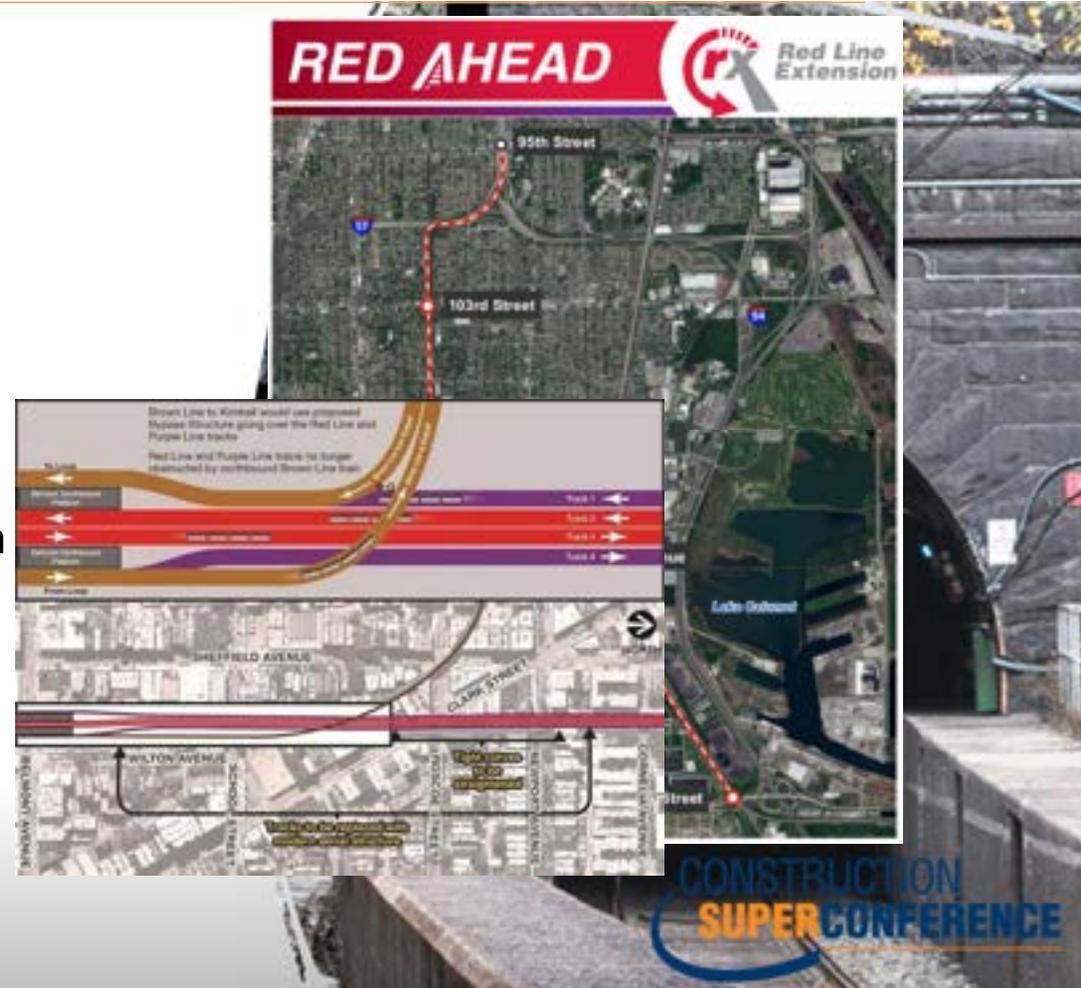
PA1

New Slide

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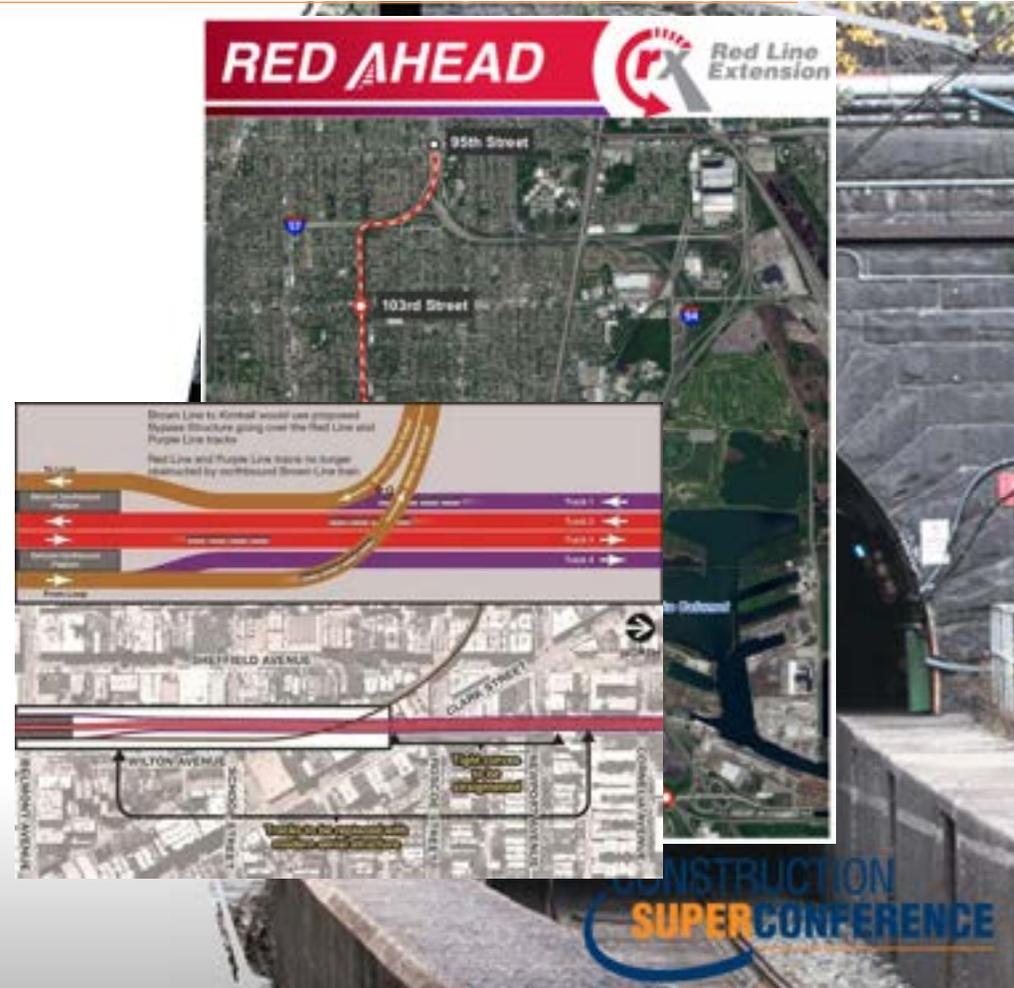
# What Projects are Currently Affected?

- Chicago Infrastructure Projects
  - Red Line Extension Project
    - Extend Red Line 5.5 miles from 95<sup>th</sup> St to 130<sup>th</sup> St
    - \$5.7 Billion Project Cost
  - Red and Purple Modernization Program
    - Multi-Phased Reconstruction of a New Bypass Structure, Multiple Stations and Installation of New Signal System
    - \$2.1 Billion Project Budget



# What Projects are Currently Affected?

- USDOT issued a statement on October 1, 2025 announcing:
  - Both projects are under USDOT's administrative review to determine whether any unconstitutional practices are occurring (in connection with USDOT IFR).
  - \$2.1 billion remaining in federal fundings.
- U.S. Government has been shut down since October 1, 2025.
- As of October 7, 2025, construction crews remained active on both projects.



Research as of November 7, 2025

# Guidance

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- The combined effect is a “strict scrutiny” era for DEI, requiring firms to rewrite internal policies, audit contract clauses for change-in-law risks, and prepare for cost inefficiencies in retraining, procurement, and turnover.
- Arbitration agreements should be built into dispute frameworks to avoid costly public litigation over these issues.
- Prepare for potential impacts such as direct cost impacts, increased administrative commitment, delayed construction completion, disrupted work (e.g. due to acceleration or out of sequence work).

# Environmental Regulation & Energy Policies

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# Federal Policies

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- Rapid Policy Reversals – Environmental & energy
- EPA Rollbacks – Repeal of carbon standard  
rescission of 2009 GHG finding → major co
- Executive Order (July 7, 2025) – Ended w  
tightened FEOC restrictions, removed ren  
ordered to act in 45 days.



# Federal Policies

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- One Big Beautiful Bill Act (2025) – Accelerated phase-out of clean energy credits; projects must begin by July 4, 2026 & be operational by Dec 31, 2027.
- IRS Notice 2025-42 – Stricter “beginning of construction” test requiring visible physical work for credit eligibility



# State and Local

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- Stricter State Rules – Some states (CA under CEQA, WA under SEPA) mandate greener construction, sustainability, and long-term emissions compliance.
- Local Government Leverage – Cities and counties may tie permitting or funding to environmental targets exceeding federal baselines.



# Private Sector

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- Project Reassessment – Renewable developers and investors delaying projects due to subsidy cuts and tighter IRS credit rules.
- Offshore Wind Challenges –
  - Empire Wind 1 (NY): Stop-work order later lifted; Equinor lost ~\$1B value.
  - Revolution Wind (Ørsted): Nearly complete project halted over national security concerns despite >4M labor hours invested.
- Financing Pressures – Investors and lenders now scrutinize FEOC risk and require contract safeguards for shifting compliance obligations.

# Guidance

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- For project stakeholders, these developments create fragmented compliance regimes, mid-project credit losses, and procurement crises
- Contracts should anticipate change-in-law impacts, reprice for supply-chain risk, and integrate escalation to ADR to resolve disputes over who bears new compliance costs.



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# Impacts on Labor Force and Human Resources Responses

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# Executive Orders (Jan 20, 2025)

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- Restricted birthright citizenship, expedited removals, expanded state/local immigration enforcement.
- Declared border emergency halting entries (incl. asylum seekers), banned family reunification, and threatened funding for sanctuary jurisdictions.



# Construction Industry Exposure

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- 25–30% of workforce are immigrants → policies hit sector disproportionately.
- Anticipated impacts:
  - More I-9 audits & ICE enforcement actions.
  - Worksite disruptions (safety, scheduling, quality).
  - Labor shortages from deportations.
  - Project delays → risk of liquidated damages & claims.



# Guidance

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- Review contract provisions relating to *force majeure*, labor disruptions and shortages, change in law (does it include Executive Orders and policy change), excusable delay, and no damage for delay.
- Prepare your workforce leadership by creating a rapid response plan and providing training on how to respond when ICE officers (or individuals posing to be enforcement officers) visit a job site

# Guidance

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- Employees need to be comfortable and confident in responding to ICE while also being cooperative and legally compliant.
- Site workers may want to keep documents reflecting their lawful status on their person or in a safe location nearby, e.g., job trailer, etc.

# Risk Management & ADR Strategies

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# Risk Management & ADR Strategies

- **Unpredictability** – DEI & environmental rules shift rapidly, leaving contracts outdated and costs unallocated.
- **Contract Safeguards** – Routine audits of change-in-law & force majeure clauses; use contingency pricing tied to regulatory triggers; embed ADR to avoid litigation.



# Risk Management & ADR Strategies

- **Proactive Management** – Train project managers to identify policy shifts early for negotiation vs. Litigation.
- **Insurance Watch** – Consider Political Risk Insurance and related coverage.
- **Collaboration** – Work creatively with clients to share and mitigate unpredictable risks.



# Guidance

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- The goal is not to stop policy shifts but to anticipate them by designing contracts and dispute frameworks that absorb shock while maintaining project execution.

# Conclusions

# Conclusions

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- **Regulatory Whiplash** – Court cases (*Mid-America Milling*, *Ultima*, *Fearless Fund*) narrow DEI; EPA rollbacks, July 2025 EO, and IP<sup>2</sup> guidance reshape environmental & tax-credit rules in real time.
- **Keys to Resilience** – Adaptive contracts, proactive compliance and robust ADR strategies.
- **Energy Shift** – Changing U.S. energy priorities drive major impacts on investment & development.

