

## Federal Acquisition Regulation: Amendments to Strengthen Prohibitions Against Trafficking

February 2, 2015

### Overview

#### Background

On January 29, 2015, the U.S. Government released a final rule amending the Federal Acquisition Regulation (“FAR”). The final rule reflects changes to proposed amendments originally released in September 2013.<sup>1</sup>

The final rule is intended to implement Executive Order 13627 (“Strengthening Protections Against Trafficking in Persons in Federal Contracts”) and Title XVII of the National Defense Authorization Act for Fiscal Year 2013 (“Ending Trafficking in Government Contracting”).

As discussed below, the new amendments seek to strengthen the FAR’s existing prohibitions and requirements related to trafficking in persons.<sup>2</sup>

The new rule goes into effect on **March 2, 2015**.<sup>3</sup>

#### Existing Requirements

FAR subpart 22.17 already prohibits federal contractors and subcontractors from:

- Engaging in severe forms of trafficking in persons during the period of performance of a contract;
- Procuring commercial sex acts during the period of performance of a contract; and
- Using forced labor in the performance of a contract.

FAR subpart 22.17 also requires federal contractors and subcontractors to notify employees of prohibited activities and the actions that may be taken against them for violations.

Finally, FAR subpart 22.17 requires that government contract shall impose suitable remedies, including termination, on contractors that fail to comply with the FAR’s prohibitions and notification requirements with regard to trafficking.

#### Definitions

Severe trafficking is defined under existing federal law as:

- The recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery; and
- The recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act in circumstances in which the commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained 18 years of age.

For the purposes of the regulation, the final rule defines the following:

- “**Agent**” means any individual, including a director, an officer, an employee or an independent contractor, authorized to act on behalf of the organization;
- “**Subcontract**” means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract; and
- “**Subcontractor**” means any supplier, distributor, vendor or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

## New Requirements

### Amendments Applicable to All Contracts

Certain requirements in the final rule are applicable to all federal contracts.

Specifically, the final rule amends the FAR to prohibit any of the following activities in connection with federal solicitations and contracts, including those performed in the United States:

- Destroying, concealing, confiscating or otherwise denying access by an employee to his or her identity or immigration documents;
- Using misleading or fraudulent practices during the recruitment of employees or when offering employment;<sup>4</sup>
- Using recruiters that do not comply with local labor laws in the countries in which recruiting takes place;
- Charging employees recruitment fees;
- Providing or arranging housing that fails to meet host country housing and safety standards; or
- If required by law or contract,<sup>5</sup> failing to provide an employment contract, recruitment agreement or similar work paper in writing in the employee’s native language prior to the employee departing from his or her country of origin.<sup>6,7</sup>

In addition, the final rule requires all contractors to:<sup>8,9</sup>

- Provide return transportation, or payment for the cost of return transportation, at the conclusion of an employee’s period of employment for all employees who are not nationals of the country in which work took place and who were brought to the country for the purposes of working on a U.S. Government contract, subcontract or portion(s) of a contract; or
- For work performed in the United States, provide return transportation or pay for the cost of return transportation, upon the conclusion of an employee’s period of employment if the payment of such costs is required under existing temporary worker programs or pursuant to a written agreement with the employee.<sup>10</sup>

These requirements are applicable to contracts or subcontracts for commercially available off-the-shelf items.

### Amendments Applicable to Contracts Where the Portion Performed Outside the United States Exceeds \$500,000

The final rule establishes additional requirements for contracts, including any portion of a contract, for which the estimated value of the supplies acquired, or the services required to be performed, outside the United States exceeds \$500,000.

These heightened requirements do not apply to contracts or subcontracts for commercially available off-the-shelf items.

For contracts covered by these amendments, contractors must:

- Develop a **compliance plan** applicable to the portions of a contract performed outside the United States; and
- Submit a **certification** to the Contracting Officer on an annual basis stating that a compliance plan has been implemented.

### COMPLIANCE PLAN

The required compliance plan must include, at a minimum:

- An awareness program to inform contractor employees about:
  - ▶ The U.S. Government’s zero tolerance policy with regard to trafficking in persons;

- ▶ The trafficking-related activities in which the contractor is prohibited from engaging;
- ▶ The actions that will be taken against employees for violations;
- A reporting process for employees to use, without fear of retaliation, to report any activity inconsistent with the zero-tolerance policy;<sup>11</sup>
- A recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees to the employee and ensures that wages meet applicable host country legal requirements or explains any variance;
- A housing plan, if the contractor intends to provide or arrange housing, that ensures that housing meets host country housing and safety standards;
- Procedures to prevent agents and subcontractors at any tier and at any dollar level from engaging in trafficking in persons, and to monitor, detect and terminate any agents; and subcontractors, or subcontractor employees that have engaged in such activities.

The final rule states that contractor should maintain the compliance plan during the performance of the contract and that the compliance plan should be:

- Appropriate to the size and complexity of the contract;
- Appropriate to the nature and scope of activities to be performed for the U.S. Government, including consideration of:
  - ▶ The number of non-U.S. citizens expected to be employed; and
  - ▶ The risk that the contract or subcontract will involve services or supplies susceptible to trafficking.

Contractors are expected to post the relevant contents of the compliance plan at the workplace(s) where work on the covered contracts will be performed and on the contractor's website (either a public site or an internal site accessible to covered employees). If such posting is impracticable, the contractor must provide the relevant contents of the compliance plan to each employee in writing.

The compliance plan must be provided to the relevant agency contracting officer upon request.

#### CERTIFICATION OF COMPLIANCE PLAN AND DUE DILIGENCE

A contractor covered by these provisions must submit an annual certification stating that it has implemented the required compliance plan in order to:

- Prevent prohibited activities; and to
- Monitor, detect, and terminate any agent or subcontractor engaged in prohibited activities.

In addition, a covered contractor must certify that that:

- After having conducted **due diligence**, to the best of the contractor's knowledge and belief:
  - ▶ Neither it nor any of its agents, subcontractors or their agents is engaged in any trafficking activities; or
  - ▶ If abuses related to any prohibited activities have been found, the contractor or subcontractor has taken the appropriate remedial and referral actions.

The certification would be required from the apparent successful offeror prior to the award of a contract, and annually from the contractor.

#### Subcontracts

Contractors are required to include the requirements established in the final rule in all subcontracts and contracts with agents.

Commentary in the final rule states that "the responsibilities of the prime contractor to prevent subcontractors at any tier from engaging in trafficking in persons and to monitor, detect and terminate any subcontractors or subcontractor employees that have engaged in such activities at any tier [are] *one of the key contractual requirements to ensuring compliance.*" (emphasis added)

Contractors must obtain a certification regarding a subcontractor's compliance plan and due diligence efforts from each subcontractor prior to the award of a subcontract, and annually thereafter, if any portion of the subcontract is for supplies, other than commercially

available off-the-shelf items, to be acquired outside the United States, or services to be performed outside the United States; and the estimated value exceeds \$500,000.

### Potential Penalties for Non-Compliance

The final rule states that a contractor's failure to comply with the FAR's requirements may result in:

- Requiring the contractor to remove a contractor employee or employees from the performance of the contract;
- Requiring the contractor to terminate a subcontract;
- Suspension of contract payments;
- Loss of award fee, consistent with the award fee plan, for the performance period in which the U.S. Government determined contractor non-compliance;
- Declining to exercise available options under the contract;
- Termination of the contract for default or cause; or
- Suspension or debarment.

These remedies are applicable "in addition to other remedies available to the Government."

### MITIGATING AND AGGRAVATING FACTORS

In considering whether to impose penalties for non-compliance, the contracting officer may consider:

- Mitigating factors, such as whether a contractor had a compliance plan or awareness program in place at the time of the violation and whether the contractor was in compliance with the plan and whether the contractor has taken appropriate action such as reparation for victims of such violations; and
- Aggravating factors, such as whether a contractor failed to abate an alleged violation of a compliance plan or whether it failed to enforce the compliance plan.

### Reporting Credible Information Regarding Violations

The final rule requires contractors to inform the relevant agency contracting officer and the agency Inspector General immediately of:

- Any credible information it receives from any source (including host country law enforcement) that alleges conduct on behalf of a contractor employee, subcontractor, subcontractor employee or their agent has engaged that violates the trafficking provisions of the FAR; and
- Any actions taken against a contractor employee, subcontractor, subcontractor employee or their agent in response to the alleged conduct.

If the alleged conduct is associated with more than one contract, the contractor shall inform the contracting officer for the contract with the highest dollar value.

### Agency Response to Reports of Violations

The final rule provides that a contracting officer, upon receipt of credible information regarding a violation of the FAR's trafficking requirements, shall:

- Notify the agency Inspector General, the agency debarring and suspending official, and if appropriate, law enforcement officials with jurisdiction over the alleged offense.

A contracting officer, upon receipt of credible information regarding a violation, may:

- Direct the contractor to take specific actions to abate the alleged violation or to enforce the requirements of its compliance plan.

### ADMINISTRATIVE PROCEEDING

A contracting officer who receives a report from the agency Inspector General that provides support for allegations shall delegate to an

authorized agency official the responsibility to:

- Exeditiously conduct an administrative hearing at which the contractor will have the opportunity to respond to the report; and
- Make a final determination as to whether the allegations are substantiated.

#### POSTING IN THE FEDERAL AWARDEE PERFORMANCE AND INTEGRITY INFORMATION SYSTEM

After a final determination that allegations are substantiated, the contracting officer shall enter a report regarding the substantiated allegation in the Federal Awardee Performance and Integrity Information System (“FAPIS”).

Substantiated allegations about a subcontractor will be posted to the record of the prime contractor.

The prime contractor will have an opportunity to post any mitigating factors in FAPIS.

#### AUTHORITY OF THE AGENCY SUSPENDING AND DEBARRING OFFICIAL

The final rule states that an agency suspending and debarring official has the authority, at any time before or after a final determination as to whether allegations are substantiated, to suspend, propose for debarment, or debar the contractor, if appropriate.

In making such a determination, the agency suspending or debarring official may consider mitigating and aggravating factors.

#### Cooperation

Contractors and subcontractors are required to:

- Disclose to the relevant contracting officer and agency Inspector General information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct;
- Provide timely and complete responses to requests for documents;
- Cooperate fully in providing reasonable access to its facilities and staff, both inside and outside of the United States, to allow contracting agencies and other responsible enforcement agencies to conduct audits, investigations, or other actions to ascertain compliance with the Trafficking Victims Protection Act of 2000, Executive Order 13627, or any other applicable law or regulation establishing restrictions on trafficking, the procurement of commercial sex acts, or the use of forced labor.

The requirement for cooperation does not:

- Require a contractor to waive its attorney-client privilege, its Fifth Amendment rights, or the protections afforded by the attorney work product doctrine; or
- Restrict the contractor from conducting an internal investigation or defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

Contractors and subcontractors must also protect all employees suspected of being victims of or witnesses to prohibited activities, prior to returning to their country of origin. Contractors and subcontractors shall not do anything to prevent or hinder the ability of these employees from cooperating fully with government authorities.

## Key Questions and Considerations for Compliance

### Gap Analysis of Existing Policies and Standards

#### INTERNAL COMPLIANCE STANDARDS

The amendments establish a number of specific requirements for all federal contractors, including:

- **Specific prohibitions** on activities such as the charging of recruitment fees and the provision of housing that fails to meet host country housing and safety standards;
- **Specific affirmative requirements** such as the provision of return transportation for certain employees and the protection and of employees suspected of being the victims of human trafficking.

As a first step in preparing for compliance with the amendments, companies should consider the extent to which they already have

internal policies and procedures in place that address the new requirements.

As part of this review, companies should evaluate existing internal standards meant to ensure compliance with current U.S. Government requirements that prohibit federal contractors from engaging in severe forms of trafficking during the period of performance of a contract. Companies should evaluate any internal guidance that exists to effectuate these prohibitions and identify the extent to which such guidance already explicitly addresses the specific activities prohibited by the FAR. This review should be mindful that the FAR amendments establish both prohibitions and affirmative requirements.

To the extent that specific prohibitions and requirements are not already reflected in existing requirements, companies should begin a process of amending all necessary documentation to reflect the new requirements.

Special attention should be paid to:

- The extent to which existing prohibitions on “forced labor” can be augmented to clearly prohibit all forms of trafficking;
- Internal guidance regarding recruitment and wages, including standards applicable to labor recruiters;
- Internal guidance regarding housing plans for employees; and
- Internal guidance regarding the treatment of employees that may have been subject to prohibited activities.

#### INTERNAL CAPACITY

Companies should also evaluate the extent to which prohibitions and requirements, including any new prohibitions or requirements that may be necessary in light of the amendments, are supported by sufficient:

- Guidance materials and training;
- Grievance procedures and non-retaliation policies; and
- Processes to evaluate and monitor contractors’ and subcontractors’ compliance with the company’s requirements.

Notably, a company does not need to establish trafficking-specific processes if existing mechanisms are sufficient to address the new requirements. For example, existing grievance mechanisms may be sufficient if supported by clear corporate standards prohibiting trafficking. Similarly, a company’s existing systems for evaluating and monitoring contractor and subcontractor compliance with the company’s standards may not need modification if the standards themselves address the prohibited activity.

#### Review of Existing Management Systems and Development of Compliance Plans

##### MANAGEMENT SYSTEMS FOR CONTRACTS PERFORMED OUTSIDE THE UNITED STATES

The amendments applicable to federal contracts in which the value of portion performed outside the United States exceeds \$500,000 establish more onerous requirements.

For these contracts, and as stated above, a company will need to develop a compliance plan that is:

- Appropriate to the size and complexity of the contract(s); and
- Appropriate to the nature and scope of activities to be performed.

In preparing to develop its compliance plan, a company should first evaluate the nature of the contracts that will likely be covered by these provisions. Key questions include:

- What entities within the company, including subsidiaries, perform these contracts?
- What is the nature of the work? Have third parties identified the relevant industry or sector as having a relatively high risk exposure to trafficking activities?
- What is the nature of the workforce? Does the contract depend upon temporary or migrant workers?
- In what countries does the covered work take place? What legal protections exist with regard to trafficking activity in those countries?
- What types of entities are involved in conducting the work for these contracts? Does the company make extensive use of

subcontractors?

- Does the company use labor recruiters for the contracts?
- What types of goods or services does the company acquire from subcontractors?

Based on the answers to these questions, a company should identify particular areas of risk for the company. For example:

- The company should closely review its use of labor recruiters, especially for contracts in which large numbers of low-skilled workers may be the subject of recruitment efforts.
- The company should conduct a review of the countries in which work is performed for the U.S. federal government. The company should review available information, including information provided by the U.S. Government itself, regarding the risks of human trafficking in each of the countries in which work for the U.S. federal government is performed.<sup>12</sup>
- For contracts involving substantial use of subcontractors, especially in countries at higher risk for trafficking, the company should carefully review the policies and practices of those contractors with regard to trafficking. The company should pay particular attention to subcontractors that supply goods that have are associated with the use of forced labor.<sup>13</sup>

Based on this review, a company should be able to develop a relative risk profile for its federal contracts with regard to trafficking. Specifically, a company should understand which activities, in which countries, create the highest potential risk exposure for violations of the U.S. Government's requirements. Based on this analysis, a company should prioritize its efforts to conduct due diligence, develop awareness platforms, and carry out other activities that are consistent with requirement that the company establish a compliance plan to address the risks of trafficking.

As part of this effort, a company should also carefully consider the extent to which existing compliance mechanisms and risk-mitigation efforts may already address trafficking-related risks. For example, a company should consider the extent to which:

- Existing efforts to conduct human rights due diligence may be leveraged to help identify trafficking-related risks;
- Existing efforts to review corruption-related risks and/or compliance with existing corruption statutes may be leveraged to help identify trafficking-related risks; and
- Existing efforts to review and enforce agent and subcontractor compliance with the company's standards may be leveraged to address trafficking-related risks.

Based on these assessments, a company should be able to develop compliance plan(s) that:

- Leverage the existence of existing policies, mechanisms and communication platforms;
- Augment existing policies, mechanisms and communication platforms, as necessary; and
- Focus on the countries and entities in which the risk of trafficking activity is the greatest.

Ultimately, a company's compliance plan(s) should articulate:

- The steps that the company has taken to meet the requirements set forth in the FAR; and
- The steps taken to implement, and the rationale behind, a risk-based approach to ensuring compliance with the company's standards on trafficking; and
- The steps taken to conduct appropriate due diligence on the company's agents and subcontractors to ensure that no prohibited activity is taking place.

## Conclusion

This memorandum is intended to provide an overview of FAR amendments on human trafficking. As companies consider their plans to comply with these new requirements, Foley Hoag LLP would be happy to provide further guidance, as requested.

---

1. Proposed Rule (September 26, 2013), available here.<sup>↔</sup>

2. On the same day, the Department of Defense released a final rule establishing several additional human trafficking-related requirements for defense

contractors.↵

3. The rule was published in the Federal Register on January 29, 2015 and goes into effect 30 days after publication. *See here.*↵

4. Such practices could include failing to disclose basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment. Key terms and conditions of employment include: wages and fringe benefits, location of work, living conditions, housing (if employer provided or arranged), any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work.↵

5. The final rule states that contracting officers shall consider the risk that the contract or subcontract will involve services or supplies susceptible to trafficking in persons, and the number of non-U.S. citizens expected to be employed, when deciding whether to require work documents in the contract.↵

6. The amendments state that the employment contract should include information about: the work that is to be performed; wages; prohibitions on recruitment fees; work location(s); living accommodations and associated costs; leave; roundtrip transportation arrangements; grievance processes; and the content of applicable laws and regulations that prohibit trafficking in persons.↵

7. If the employee must relocate to perform the work, the final rule requires that the work document shall be provided to the employee at least five days prior to the employee relocating.↵

8. These requirements do not apply if: an employee is legally permitted to remain in the country of employment and chooses to do so; if the contracting agency has provided an exemption; an employee is a victim of trafficking and is seeking victim services or legal redress in the country of employment; or an employee is a witness in a trafficking-related enforcement action.↵

9. Such transportation, or payment for transportation, shall be provided in a way that does not obstruct any victim services, legal redress, or witness activity.↵

10. This provision applies to employees who are not U.S. nationals and who were brought to the United States for the purposes of working on a U.S. Government contract, subcontract, or portion(s) of a contract.↵

11. This reporting process shall include a means to make available to all employees the hotline phone number of the Global Human Trafficking Hotline at 1-844-888-FREE and its email address ([help@befree.org](mailto:help@befree.org)).↵

12. One key resource for this review should be the U.S. Government's annual Trafficking in Persons ("TIP") report. The TIP report places each country onto one of three tiers based on the extent of the government's efforts to comply with the "minimum standards for the elimination of trafficking" found in Section 108 of the U.S. Trafficking Victims Protection Act.

13. One potential reference is the U.S. Department of Labor's List of Goods Produced by Child or Forced Labor. *See here.*↵

## RELATED PRACTICES

- [Corporate Social Responsibility](#)
- [International Business](#)
- [Labor & Employment](#)

---

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.