

## E-ALERT | Government Contracts

October 12, 2012

### EXECUTIVE ORDER ENHANCES GOVERNMENT CONTRACTORS' RESPONSIBILITIES IN THE FIGHT AGAINST HUMAN TRAFFICKING

On September 25, President Obama issued an Executive Order to strengthen protections against human trafficking in federal government contracts. The Order instructs the FAR Council to amend the Federal Acquisition Regulation ("FAR") within 180 days of the Order. This has significant implications because the amended anti-trafficking and training provisions will expand the substantive and reporting obligations of all federal contractors (working as a prime or a subcontractor) and, in some cases, will require detailed compliance plans. We summarize below the current obligations of federal contractors, the additional obligations to be imposed as a result of the Order, and potential future government efforts in the fight against human trafficking.

#### I. THE CURRENT REQUIREMENTS

Since 2006, the FAR has included provisions reflecting the Government's zero tolerance policy regarding human trafficking. FAR Subpart 22.17 and 52.222-50, Combating Trafficking in Persons, together implement a statutory provision contained at 22 U.S.C. § 7104 aimed at preventing and deterring trafficking as defined broadly in the statute. FAR 52.222-50 is required in all U.S. Government contracts (including those for commercial items, and regardless of the place of performance), and it must be flowed down in all subcontracts. The clause prohibits contractors, subcontractors, and their employees from:

1. Engaging in severe forms of trafficking in persons;
2. Procuring commercial sex acts; or
3. Using forced labor in the performance of the contract.

Contractors must immediately inform the Contracting Officer of any information suggesting that there has been prohibited conduct, and of any actions taken against such conduct. A Contracting Officer may pursue a number of remedies for violations, including suspension of contract payments, termination of the contract for default or cause, or suspension or debarment of the contractor.<sup>1</sup>

#### II. ADDED REQUIREMENTS UNDER THE ORDER

The Executive Order builds on FAR 52.222-50 in a number of ways that have important implications for contractors.

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<sup>1</sup> The Department of Defense has adopted guidelines regarding human trafficking in DFARS PGI 222.1703, and in November 2011, the Department of Defense amended DFARS 242.302 to require surveillance over contractor compliance with FAR 52.222-50 as part of contract administration functions.

First, the list of prohibited activities will be expanded for all contractors and their employees to include labor-related conduct that might facilitate trafficking. The new additional substantive prohibitions are:

1. Using misleading or fraudulent recruiting practices;
2. Charging employees recruitment fees;
3. Destroying or denying access to employee identity documents; and
4. Failing to pay return transportation costs for certain employees who have finished employment outside that employee's nation of residence.

Second, contractors will be required to create "compliance plans" pertaining to the portion of any non-commercial contract that is to be performed outside the United States, if the value of performance outside the United States exceeds \$500,000. A compliance plan must include procedures to prevent employees and subcontractors at any tier from engaging in trafficking in persons, an employee "awareness program," whistleblower-type protections, and plans to ensure that wages and housing meet applicable host country legal requirements and standards. For these contracts, prime contractors and subcontractors must also submit annual certifications that they and their employees have not engaged in any trafficking activities, and that any identified violations resulted in appropriate remedial and referral actions.

Third, full cooperation with audits and investigations will be contractually mandated. In particular, a contractor must give contract and enforcement agencies "reasonable access" to ascertain compliance with any applicable law or regulation establishing restrictions on human trafficking.

Finally, human trafficking violations will be tied more explicitly to potential suspension and debarment. A contracting officer must notify the agency's inspector general and its suspension and debarment official if he or she becomes aware of any activities that are inconsistent with any applicable law or regulation establishing restrictions on human trafficking, and the responsible official will be required to consider whether such activities warrant suspension or debarment.

### III. POTENTIAL FUTURE EFFORTS TO PREVENT HUMAN TRAFFICKING

The September 25th Order follows recent increasing focus by the Federal government on preventing human trafficking. In particular, a bipartisan bill, the End Human Trafficking in Government Contracting Act (H.R. 4259), has been the subject of months of work in Congress. That legislation, which awaits passage in the Senate, would further strengthen the protections against human trafficking. For example, the legislation as drafted would revise the criminal code to sanction (with imprisonment of up to five years) anyone who intentionally engages in foreign labor bondage for work performed on a government contract outside the United States. The legislation would also make the significant change of expanding the scope of application to grants and grantees as well as contractors.

Additional obligations are also possible at the state level. For example, effective January 1, 2012, California enacted the Transparency in Supply Chains Act of 2010, which requires certain companies doing business in the state to disclose the efforts they have taken to eradicate slavery and human trafficking from their supply chains. Unlike FAR 52.222-50, the California statute does not impose substantive obligations beyond disclosure of efforts, but future state legislation may well attempt to do so.

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After the FAR Council implements the Executive Order, the new FAR provisions will apply to solicitations issued on or after the effective date of the FAR revisions (no later than March 24, 2013). Prime and subcontractors should begin now, however, to prepare internal procedures to ensure compliance with these new obligations. If contractors have not yet developed robust procedures in light of existing responsibilities under FAR 52.222-50, doing so should be a priority, particularly given the additional obligations and increasing government focus on the fight against human trafficking. Contractors with existing policies and procedures addressing human trafficking should revisit those documents to ensure that they appropriately reflect the added requirements.

Attorneys at Covington & Burling LLP are experts in advising companies on matters relating to government contracts at the federal, state, and local level, and also with grants and other nonprocurement transactions. We are closely monitoring these matters, and we would be pleased to discuss the Executive Order and its potential impact on your industry, company, and customers.

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If you have any questions concerning the material discussed in this client alert, please contact the attorneys listed below:

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