

## E-ALERT | Government Contracts

September 27, 2013

### NEW PROPOSED RULES TO ENHANCE CONTRACTORS' RESPONSIBILITIES IN THE FIGHT AGAINST HUMAN TRAFFICKING

On September 26, 2013, the FAR Council published a [new proposed rule](#) in the Federal Register to amend the Federal Acquisition Regulation ("FAR") to strengthen protections against human trafficking in the federal supply chain. The Department of Defense (DoD) also published a [new proposed rule](#) in the Federal Register to amend the Defense Acquisition Regulations System ("DFARS") to further implement DoD's trafficking in persons policy and to supplement Governmentwide changes. These proposed rules come in response to President Obama's September 25, 2013 [Executive Order](#), on which we have [previously reported](#).

The new requirements set forth in the proposed amendment to the FAR will significantly expand the substantive and reporting obligations of all federal contractors, subcontractors, and the agents of contractors, and the rule will also require certain federal contractors and subcontractors to provide detailed compliance plans. We summarize below the new obligations that apply to all federal contracts, and the additional obligations that apply only to federal contracts and subcontracts where a portion to be performed outside the United States exceeds \$500,000 and is not a contract exclusively for commercially-available-off-the-shelf-items.

The proposed amendment to the DFARS would also create supplementary requirements to ensure that all employees of DoD contractors are aware of their labor rights and have a means of reporting suspected labor violations directly to the DoD's Inspector General's office.

#### NEW FAR OBLIGATIONS APPLICABLE TO ALL FEDERAL CONTRACTS

The proposed rule would amend FAR parts 22 and 52 to provide new requirements applicable to all federal contracts, including those performed outside the United States. In addition to existing requirements [summarized previously](#), all contractors, contractor employees, subcontractors, and subcontractor employees would be prohibited from engaging in certain labor-related conduct that might facilitate trafficking, including:

1. Destroying, concealing, confiscating, or otherwise denying access to employee identity or immigration documents;
2. Using misleading or fraudulent recruiting practices;
3. Charging employees recruitment fees;
4. Providing or arranging housing that fails to meet the host country housing and safety standards;
5. Failing to provide in writing an employment contract or similar paperwork in the employee's native language prior to the employee departing from his or her country of origin, which should provide information such as wages, the work description, living accommodations, and information about laws and regulations related to trafficking.

Absent certain limited exceptions, all contractors would also be required to provide or pay for the cost of return transportation upon the end of employment for:

1. an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a U.S. Government contract or subcontract; or
2. an employee who is not a United States national and who was brought into the United States for the purpose of working on a U.S. Government contract or subcontract if the payment of such costs is required under existing temporary worker programs or pursuant to a written agreement with the employee.

Contractors would additionally be required to protect and interview all employees suspected of being victims of or witnesses to prohibited activities, prior to returning to their country of origin. Contractors would be prohibited from preventing or hindering these employees from cooperating fully with government authorities. Contractors and subcontractors would also be required to fully cooperate with audits and investigations by giving contract and enforcement agencies “reasonable access” to ascertain compliance with any applicable law or regulation establishing restrictions on human trafficking.

A contracting officer would be required to notify the agency Inspector General, the agency debarring and suspending official, and—if appropriate—law enforcement officials, of any “credible violations,” by which it appears that the proposed rule means credible evidence of violations of applicable trafficking in persons requirements. The proposed rule would also amend FAR 9.104-6 to require the contracting officer to include in the Federal Awardee Performance and Integrity Information System (FAPPIIS) any allegations substantiated in an Inspector General report in which the contractor violated trafficking in persons prohibitions.

### **NEW FAR OBLIGATIONS APPLICABLE TO CONTRACTS NOT EXCLUSIVELY FOR COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEMS WITH A PORTION EXCEEDING \$500,000 TO BE PERFORMED OUTSIDE THE UNITED STATES**

Contractors performing under a contract or subcontract not exclusively for commercially available off-the-shelf items where it is possible that at least \$500,000 may be performed outside the United States must conform with some significant additional requirements.

First, a contractor must certify, upon receiving an award and annually thereafter, that it has developed a “compliance plan” to prevent prohibited activities and to monitor, detect, and terminate any subcontractor engaging in prohibited activities. Contractors must also certify that, after having conducted due diligence and to the best of their knowledge and belief, 1) neither it nor any of its agents, subcontractors, or subcontractors’ agents are engaged in trafficking in persons activities, or 2) if abuses were found, the contractor or contractor has taken the appropriate remedial measures. A prime contractor must obtain these certifications upon award and annually thereafter from each qualifying subcontractor.

The compliance plan must include the following minimum elements:

1. an awareness program to inform contract employees about
  - a. the United States Government’s zero-tolerance policy with regard to trafficking in persons,
  - b. trafficking-related activities in which the contractor is prohibited from engaging, and
  - c. actions that will be taken against employees for violations;

2. a reporting process for employees to use, without fear of retaliation, to report any activity inconsistent with the zero-tolerance policy;
3. a recruitment and wage plan that
  - a. only permits the use of recruitment companies with trained employees,
  - b. prohibits charging recruitment fees to the employee, and
  - c. ensures that wages meet applicable host country legal requirements unless the variance is explained;
4. a housing plan that ensures housing meets the host country's housing and safety standards if the employer plans to provide housing;
5. procedures to prevent subcontractors or agents *at any tier and at any dollar value* from engaging in trafficking in persons, and to monitor, detect, and terminate any agents, subcontractors, or subcontractor employees engaged in such activities.

If a compliance plan is required of either a contractor or subcontractor, the plan must be maintained during the performance of the contract and be appropriate to the nature and scope of activities performed, including the risk that the contract will involve services or supplies susceptible to trafficking. This compliance plan need only be provided to a contracting officer upon request, and need not be automatically submitted to the Government. However, contractors would be required to post the relevant contents of the compliance plan in the workplace and on the company's website (if one exists) no later than the initiation of the of contract performance.

## NEW DFARS REQUIREMENTS

Under the new proposed rule, DFARS clause 252.203-7004 would be amended to add a hotline posting for trafficking in persons and whistleblowing for non-commercial contracts above a \$5 million threshold performed both within and outside the United States. If a substantial portion of the workforce does not speak English, then contractors must also post the notices in the language(s) spoken by a substantial portion of the workforce. This requirement must be flowed down to all non-commercial subcontracts exceeding \$5 million.

In addition, all solicitations exceeding the simplified acquisition threshold would be required to include a new representation that the offerors' hiring practices address Combating Trafficking in Persons and that their companies are complying with these requirements. This representation would include requirements to notify employees and subcontractors regarding their obligation to report trafficking in persons violations and that they will be afforded whistleblower protection.

Finally, the proposed rule would integrate an employee bill of rights in DFARS clause 252.225-7040 and require that employees be made aware of it, that their employers enforce it, and that it be posted in employee workspaces in English and any foreign languages spoken by a significant portion of the workforce. The bill of rights would specify employees' rights to

1. Hold their own identity or immigration documents, such as passport or driver's license;
2. Receive agreed upon wages on time;
3. Take lunch and work-breaks;
4. Elect to terminate employment at any time;
5. Identify grievances without fear of reprisal;
6. Have a copy of their employment contract in a language they understand;

7. Receive wages that are not below the legal in-country minimum wage;
8. Be notified of their rights, wages, and prohibited activities prior to signing their employment contract; and
9. If housing is provided, live in housing that meets host-country housing and safety standards.

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Public comments have been invited on both of these rules on or before November 25, 2013, to be considered in the formation of the final rules.

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 these proposed rules and their 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 following members of our Government Contracts group:

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