

E-ALERT | Government Contracts

November 5, 2013

PROPOSED FAR HUMAN TRAFFICKING RULE: TEN LINGERING QUESTIONS

On September 26, 2013, the Federal Acquisition Regulatory (FAR) Council published a [proposed rule](#) that would impose significant new requirements on contractors and subcontractors related to the prevention of human trafficking. As described in our previous [e-alert](#) on this topic, the proposed rule comes just over a year after President Obama issued Executive Order 13627—which aims to eliminate human trafficking by government contractors and subcontractors—and less than nine months after the 2013 Defense Reauthorization Act was enacted with similar provisions. Although the proposed rule’s aim of preventing human trafficking is undeniably laudable, questions remain about how certain provisions of the rule will be interpreted and what contractors’ and subcontractors’ ultimate obligations will be. Indeed, some of the language of the rule is ambiguous and could be interpreted in a way that imposes unreasonable compliance obligations on contractors and subcontractors across various industries, some of which would apply to all contracts, including contracts for commercially available off-the-shelf (“COTS”) items. We highlight below ten key issues that contractors may wish to consider and comment on before the comment period ends on November 25, 2013.

- 1. Compliance Plans.** The proposed rule would require certain contractors with non-COTS contracts to implement and maintain a compliance plan, which should be tailored to the characteristics of each particular contract and must be “appropriate to the size and complexity of the contract and to the nature and scope of the activities performed.” The current language of the proposed rule leaves ambiguity on such issues as: whether contractors need to develop a compliance plan for each contract they hold (which could be particularly burdensome for contractors with multiple government contracts or subcontracts); what the government would consider to be an “appropriate” compliance plan; and what, if any, safe harbor from liability exists for contractors that implement and follow a compliance plan.
- 2. Procedures to Prevent and Monitor.** One of the minimum requirements of a compliance plan would be that a contractor have “[p]rocedures to prevent agents and subcontractors *at any tier and at any dollar value* from engaging in trafficking in persons . . . and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.” On its face, this provision would appear to require contractors to extend compliance procedures and monitoring all the way down their supply chains, which could be extremely burdensome for contractors with large and varied supply chains. Further, it is unclear how strenuous these procedures must be, and what type of liability would be imposed if subcontractors or agents do engage in trafficking in persons despite a contractor’s compliance procedures and monitoring.
- 3. Certification and Due Diligence.** Certain contractors with non-COTS contracts would also be required to certify prior to the award, and annually thereafter, that the contractor has (1) implemented a compliance plan (as discussed above), and also (2) 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 have engaged in prohibited activities, or if abuses have been found, that the contractor or subcontractor has taken appropriate remedial and referral

actions. This clause must be flowed down to subcontractors who must also make this certification. The certification requirement raises a number of questions and concerns, such as the scope of due diligence contractors must undertake, and whether contractors must conduct due diligence and monitoring throughout their entire supply chain, or whether they may rely on the certifications of subcontractors below the first tier as to compliance efforts. In addition, there are significant timing concerns with this requirement. The contracting offer would be required to verify that the apparent successful offeror has made this certification *before* awarding the contract. Thus, it appears that a prime contractor would need to make the required inquiries into subcontractors' or agents' practices prior to the contract award, which is a significant burden for contractors who may not end up performing under the contract, or an impossibility for those who may not have awarded all of their subcontracts yet.

4. **Contractor Liability for Violations.** The proposed rule would allow the Government to impose a number of remedies, including suspension of contract payments, termination of the contract, or suspension and debarment, on any "contractor, contractor employee, subcontractor, subcontractor employee, or their agents" that engages in activities prohibited by the rule. This rule would apply to all contracts, including contracts for COTS items. It is not clear, however, whether a prime contractor could be held responsible for violations committed solely by a subcontractor, subcontractor's employee, or agent. Such an interpretation could result in a contractor being penalized merely for the actions of a subcontractor's employee, despite a contractor's due diligence and/or acceptable compliance procedures.
5. **Stricter FAPIIS Reporting Requirements.** The current Federal Awardee Performance and Integrity Information System (FAPIIS) contains information about certain criminal convictions, civil judgments, and other instances in which there are conclusive findings or acknowledgements of fault or liability. However, under the proposed rule, contracting officers would be required to include in FAPIIS "any allegations" merely "substantiated in an Inspector General report" that any contractor, including a COTS manufacturer, violated the trafficking in persons prohibitions. As contracting officers are required to review the information in FAPIIS when making responsibility determinations, and the FAPIIS database is available for public review, contractors should consider whether more than inclusion in an IG report should be required for this information to be included in FAPIIS.
6. **Reporting Obligations.** The proposed rule would require all contractors, including contractors for COTS items, to inform the Contracting Officer and the agency Inspector General "immediately" of "any credible information it receives from any source that alleges a [c]ontractor employee, subcontractor, or subcontractor employee, or their agent" has engaged in any prohibited activities. This new reporting requirement could be read to require a new mandatory disclosure regime that is different, and more burdensome, from existing reporting and investigating requirements. In particular, the language in the proposed rule raises questions as to the meaning of "immediately" and "credible information" (particularly as compared to the existing "credible evidence" standard under the Contractor Code of Business Ethics and Conduct), and whether any allowances will be made for a contractor's right to attorney-client privilege or right against self-incrimination (e.g., by allowing a contractor to conduct an internal investigation prior to disclosure). Moreover, under the proposed rule, 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." This additional reporting standard raises concerns similar to those above as to the meaning of "credible violation" as well as an additional concern regarding the identity of "law enforcement officials" to whom such violations must be reported (i.e., are these foreign law enforcement officials?), and the consequences that would flow from such reporting. The FAR Council has specifically requested contractor input on the benefits or drawbacks of harmonizing the requirements of the proposed rule with the Contractor Code of Business Ethics and Conduct.

7. **Cooperation with the Government.** Similar questions arise from the proposed rule's requirement that all contractors and subcontractors provide "reasonable access" to contracting agencies and other responsible enforcement agencies conducting audits, investigations, or other actions to ascertain the contractor's compliance with human trafficking requirements. This rule would apply to all contracts, including those for COTS items. Further clarity is needed on a number of issues, including: what constitutes "reasonable access;" who makes this determination (i.e., the contractor or the government); whether such access could be required before a contractor performs its own investigation; and whether a contractor's rights to attorney-client privilege and against self-incrimination would still be protected.
8. **Reporting Burden Estimates.** The government has estimated that the annual public reporting and recordkeeping burden for the proposed rule would be 28 hours per recordkeeper—24 hours for the compliance plan and 4 hours for the certification. Both numbers appear to be drastically low—particularly for contractors who may have multiple contracts with the Federal government and/or a complex supply chain. Both activities would likely take significantly longer to complete, particularly given the multi-faceted and contract-specific requirements of the compliance plan and the need for the prime contractor to certify as to (and conduct due diligence on) the activities of their subcontractors and agents. The proposed rule has specifically requested comment on the issue of the burden that this rule will impose on contractors and which compliance requirements will be the most significant drivers of cost.
9. **Allowability of Compliance Costs.** Related to the above-mentioned issues is the unanswered question of whether and how the costs of complying with the new certification and compliance plan requirements will be covered under cost-reimbursement, fixed price, or other types of contracts.
10. **Subcontractor Requirements.** The prohibitions and compliance requirements of the proposed rule must be flowed down to subcontractors, who must then flow down the requirements to their subcontractors, and so on. The proposed rule does not provide guidance as to particular obligations beyond simply flowing down the requirements and potential penalties for violations that occur despite the flowdown. In addition, the proposed rule does not address the continuing obligations of prime and subcontractors for subcontractor and subcontractor employees who cease working on the relevant contract.

Again, the prevention of human trafficking is unquestionably a worthwhile goal and steps taken toward that goal are important. However, the requirements imposed on contractors and subcontractors performing government contracts should be clear and reasonably related to achieving the stated goal to avoid imposing unnecessary burdens on contractors and subcontractors. Contractors and subcontractors should consider taking action to ensure that the ambiguities and questions noted above are resolved in the formulation of the Final Rule.

We are well positioned to advise clients on the impact of these new requirements and the filing of comments on the proposed rule. If you have any questions concerning the material discussed in this e-alert, please contact the following members of our Government Contracts practice group:

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