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# New Human Trafficking Rule Imposes Compliance Obligations on All Government Contractors and Subcontractors Starting March 2015

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Government Contracts

On January 29, 2015, the Federal Acquisition Regulation ("FAR") Council published the long-awaited final rule ("the Final Rule") implementing Executive Order 13627 and title XVII of the National Defense Authorization Act of 2013, significantly augmenting existing human trafficking-related prohibitions for Federal contractors and subcontractors.[1] The Final Rule is similar to the previously summarized proposed rule, with a few notable changes discussed below. Though the Final Rule's aim of preventing human trafficking is undoubtedly praiseworthy, it addresses few of the ten lingering questions that we raised in November 2013.

Despite these remaining questions, starting March 2, 2015, *all* new solicitations, including those for low-value or commercial item acquisitions, will impose new human trafficking-related requirements on *all* contractors and subcontractors, regardless of tier. Failure to comply may result in financial penalties, termination for default, suspension or debarment, and potential litigation, including false claims suits. Because of its breadth and severe penalties, the Final Rule may necessitate fundamental risk assessments about contractors' business practices and the practices within their supply chains.

## Summary of the Final Rule

The Final Rule splits compliance requirements into two categories: (1) obligations on *all* contractors and subcontractors, regardless of tier, contract type, and contract value; and (2) additional obligations on those contractors and subcontractors providing supplies acquired abroad or performing services abroad.

### Obligations on All Contractors and Subcontractors, Regardless of Tier, Contract Type, or Contract Value

The Final Rule adds the following policies to existing human trafficking-related prohibitions in FAR 22.1700 and FAR 52.222-50, which must be flowed down to all subcontractors:

[1] The Department of Defense ("DOD") also issued a final rule for its Defense Federal Acquisition Regulation Supplement ("DFARS"). The DFARS final rule is unchanged from the proposed rule and adds a few noteworthy requirements to the FAR Final Rule, as we discussed here.

1. ***Establishing minimum disclosures to all employees.*** Contractors and subcontractors may not use "misleading or fraudulent" practices during the recruitment of employees, and must disclose all information regarding the "key terms and conditions of employment," including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if housing is provided or arranged), any significant costs to be charged to the employee, and information about the hazardous nature of the work (if applicable).
2. ***Limiting use of recruiters and charging recruitment fees***. Contractors and subcontractors may not use recruiters that do not comply with local labor laws, and may not charge employees "recruitment fees."
3. ***Requiring return transportation.*** Contractors and subcontractors must typically provide or reimburse return transportation for non-national employees brought into the host country to perform a U.S. Government contract or subcontract.
4. ***Mandating housing standards***. Any housing provided or arranged must meet host-country housing and safety standards.
5. ***Requiring written agreements with minimum disclosures when mandated by law or contract***. If required by law or contract, contractors and subcontractors must provide written agreements to employees that include certain minimum information about the work, wages, and rights under the Final Rule.

Importantly, the Final Rule imposes significant self-reporting and compliance obligations apparently intended to increase compliance with the policies above, including the following:

- ***"Immediate" notification to Contracting Officers.*** Contractors must notify the Contracting Officer and relevant agency Inspector General "immediately" if they receive any "credible information" alleging that an employee, subcontractor, subcontractor employee, or subcontractor agent has violated the policies above.
- ***"Full Cooperation" with the Government.*** Contractors must also "fully cooperate" with investigating agencies or agencies charged with enforcing compliance, including by providing "reasonable access to its facilities and staff."
- ***Notice to and protection of reporting employees.*** Contractors must notify employees of the human trafficking policies above, provide a hotline number for employee reporting, and ensure that reporting employees are protected from retaliation.

Although a compliance plan is not required for all contractors, the Final Rule expressly states that a compliance plan or awareness program may be considered a "mitigating factor" when determining remedial actions for violations.

**Compliance Plan and Certification Required for Contractors and Subcontractors Providing Supplies Acquired Abroad or Services Performed Abroad**

In addition to complying with the requirements above, contractors and subcontractors providing supplies acquired abroad or providing services outside the United States must implement new compliance plans and complete a compliance certification prior to accepting an award starting March 2, 2015. The requirements flow down to subcontractors at any tier. Suppliers of

commercially available off-the-shelf ("COTS") items,[2] even when acquired abroad, and contracts in which the applicable supplies or services are valued under $500,000, are exempt from these additional requirements.

The compliance plan must, at minimum, include the following:

1. ***Awareness program.*** Employees must be notified about human trafficking policies and actions that will be taken for violating the policies. Compliance plans must be posted in the workplace, on the contractor's Web site, or provided in writing to each worker.
2. ***Reporting process.*** Employees must be able to report, without fear of retaliation, activity inconsistent with the policies, including through a hotline number and e-mail address provided in the Final Rule.
3. ***Compliant recruitment and wage plans***. Plans may only permit the use of recruitment companies with trained employees, must prohibit recruitment fees charged to the employee, and ensure wages meet host-country legal requirements.
4. ***Housing plan***. Plans must ensure housing meets host-country housing and safety standards, if housing will be provided or arranged.
5. ***Procedures to prevent violations by agents and subcontractors***. Plans must include procedures to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in prohibited acts *at any tier and at any dollar amount*.

Before accepting an award, and annually after receiving an award, the prime contractor must certify that it has implemented a compliance plan meeting the minimum requirements above. Further, the prime contractor must certify that after conducting "due diligence," it believes that neither it, nor any of its agents, subcontractors, or their agents is engaged in prohibited activities, or that if abuses have been found, the contractor or subcontractor has taken appropriate remedial and referral actions. Contracting Officers may also request a copy of the compliance plan at any time.

## Changes and Clarifications in the Final Rule

Some changes implemented in the Final Rule appear to address a few of the concerns that we raised when the proposed rule was first released. For example, the proposed rule mandated that Contracting Officers must include "any allegations" merely "substantiated in an Inspector General" report in the Federal Awardee Performance and Integrity Information System ("FAPIIS"), a publicly available database containing findings of fault or liability by contractors. The Final Rule, however, requires agencies to establish an administrative process under which a presiding official (such as a suspension and debarment official, or "SDO") may decide whether

[2] A COTS item is a subset of "commercial items" as defined in FAR 2.101. Specifically, it is a commercial item that is "sold in substantial quantities in the commercial marketplace" and offered "without modification, in the same form in which it is sold in the commercial marketplace," and excludes bulk cargo as defined in 46 U.S.C. § 40102(4).

allegations are "substantiated." The Contracting Officer may only enter information into FAPIIS or take remedial action after this process is complete.[3]

Other noteworthy changes and clarifications include the following:

1. ***Removal of interview requirement***. Under the proposed rules, contractors were required to interview employees suspected of being victims or witnesses of trafficking. This requirement was removed in the Final Rule.
2. ***Clarification of recruiter qualifications***. Under the proposed rules, contractors were required to retain only "trained" recruiters. The Final Rule instead specifies that recruiters must comply with local labor laws of the country in which recruiting takes place. The revised requirement may still impose significant verification costs on contractors.
3. ***Distinction between recruitment fees and program fees***. Under the proposed rule, it was unclear whether certain program fees for J nonimmigrants were prohibited as improper recruitment charges to employees. In the preamble to the Final Rule, the FAR Council stated that certain fees for students, exchange visitors, and their dependents are not prohibited by the rules. However, the Final Rule does not include a definition of "recruitment fee."
4. ***Subcontractors' compliance plans***. Under the proposed rules, subcontractors were required to submit their compliance plans prior to subcontract award. That requirement has been removed in the Final Rule.
5. ***Reporting to Contracting Officers***. In the proposed rule, it was unclear whether a contractor would be required to notify every potentially relevant Contracting Officer of an allegation, if the allegation was arguably associated with more than one contract. The Final Rule clarifies that if an allegation may be associated with more than one contract, the contractor should inform the Contracting Officer for the contract with the highest dollar value.
6. ***Pre-award certification applicable only to "proposed subcontracts***." In the preamble to the Final Rule, the FAR Council stated that the pre-award certification required for some contracts applies "to the proposed subcontracts [the prime] has at the time" of the certification. If a prime contractor adds a subcontractor after award, the certification is required at the time of subcontract award. However, the FAR Council refused to relax the requirement despite concerns that prime contractors would be unable to obtain information to make a pre-award certification, which is typically required before the prime contractor has secured a subcontract.
7. ***Audit access limited to Federal agencies***. The proposed rule required contractors to allow contracting agencies and "other responsible enforcement agencies" to conduct audits, investigation, or other actions to ascertain compliance with the rule. In light of concerns that the proposed rule allowed access to an undefined and broad set of organizations, the Final Rule expressly limits access to "other responsible Federal

[3] However, the SDO may suspend or debar a contractor at any time pursuant to separately established procedures.

agencies" removing the risk that contractors and subcontractors would have audit obligations with regard to local governmental enforcement authorities abroad.

## Pitfalls and Issues to Watch

Contractors conducting risk assessments in light of the Final Rule and implementing potential risk mitigation strategies should be mindful of at least the following unresolved issues and pitfalls:

1. ***Potential liability for acts of subcontractors or their agents for all contracts***. Contractors subject to the compliance plan and certification requirements (Section I.B, *supra*) may be held liable for the acts of their subcontractors and subcontractor employees, even though prime contractors typically have limited visibility into subcontractors' business practices. Indeed, in the preamble to the rule, the FAR Council emphasized that "vigilance by the prime contractor is necessary" because "subcontractor employees [that] take kickbacks from traffickers. . .will not report their own violations or those of their agents or lower tier subcontractors." Moreover, even under the rules applicable to *all* contractors (Section I.A, *supra*), contractors may indirectly be held liable for the acts of their subcontractors if they fail to identify subcontractor violations and take disciplinary action. Indeed, the Final Rule requires *all* contractors to take appropriate disciplinary action against subcontractors that violate the policies in the human trafficking rule, and provides for a variety of penalties against the contractor if they fail to do so.
2. ***What is "credible information" and when must it be reported?*** The Final Rule requires all contractors to "immediately" report "any credible information" from any source that alleges any violation by the contractor or a subcontractor. The FAR Council expressly declined to harmonize the "credible information" standard with the known "credible evidence" standard in FAR subpart 3.10, "Contractor Code of Business Ethics and Conduct." The FAR Council's view appears to be that the meaning of the term "credible information" is self-evident, and that all "believable information" must be reported. Furthermore, the FAR Council underscored that the "timely" notification requirement in FAR subpart 3.10 for "credible evidence" is different than the "immediate" notification requirement in the Final Rule. These statements suggest that contractors may have little or no time to conduct their own investigation into the credibility of the information received, and may have little basis to withhold allegations of misconduct until they have adequate opportunity to investigate the credibility of any claims or information reported.
3. ***Is there a "one-size-fits-all" solution?*** The Final Rule appears to provide no definitive safe harbor for contractors—contractors may be liable even if they implement a compliance plan, notify the Government, and take appropriate remedial action. Although such acts may be "mitigating factors," there appears to be no "one-size-fits-all" solution to insulate contractors from the acts of employees, subcontractors, or agents. Further, the FAR Council emphasized that the level of subcontractor and supply chain "due diligence" required for overseas contracts subject to certification requirements "depends on the particular circumstances." Similarly, the compliance plan requirements can vary depending on "the size and complexity of the contract and the nature and scope of its activities." These statements suggest that contractors subject to the compliance plan and certification requirements will need to make case-by-case human trafficking risk assessments for each new procurement opportunity.

4. ***Who will pay for this?*** As we previously discussed, significant investments are required to comply with the Final Rule. There is still no clear guidance indicating whether contractors will be reimbursed for the costs to comply.

The Final Rule will be effective on March 2, 2015. The FAR Council urged Contracting Officers to include the Final Rule in Indefinite Delivery/Indefinite Quantity ("ID/IQ") contracts with task orders remaining after March 2 through bilateral modification, so both new and existing contracts will be subject to the Final Rule after that date.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our Government Contracts practice group:


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