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GOVERNMENT CONTRACTS

Two experts in supply chain compliance at Perkins Coie offer some guidance to contractors and subcontractors seeking to comply with the recently published final rule regarding human trafficking. Although more guidance from the government is likely on the way, the authors explain that case-specific, fact-driven analysis and a practical perspective are essential to preventing potentially business-ending pitfalls.

Significant Questions Remain Regarding Application Of Human Trafficking Rules for Federal Contractors

BY HARTMANN YOUNG AND T. MARKUS FUNK

President Barack Obama's Executive Order regarding human trafficking (E.O. 13627) and Title XVII of the National Defense Authorization Act for fiscal year 2013 both took aim at the global problem of human trafficking and made it clear that the U.S. government will not tolerate the presence of trafficked labor anywhere in the government contracting supply chain.

Some six months after the Federal Acquisition Regulation (FAR) Council's final rule regarding human trafficking became effective, significant questions remain regarding the rule's implementation and enforcement. Contractors are grappling with the practical issues that have arisen since the requirements have begun permeating contracts and solicitations. Among the changes introduced by the final rule are a revised version of FAR 52.222-50, ''Combating Trafficking in Persons,'' and a new provision, FAR 52.222-56, ''Certification Regarding Trafficking in Persons Compliance Plan.'' Both clauses include new certification requirements which generally apply to contracts, exceeding $500,000 in value, for supplies (other than commercially available off-the-shelf items) to be acquired outside the U.S. or for services to be performed outside the U.S. A contractor meeting the threshold requirements must certify that it has implemented an anti-trafficking compliance plan. It must also certify that after having conducted due diligence, neither it nor its agents, subcontractors, or their agents have violated the government's anti-trafficking regulations, or that it has taken corrective action in the instances where it found violations.

Among the key concerns that remain or have surfaced since promulgation of the rule appear below:

- Many contractors have questions regarding how far the requirements of due diligence—a term the drafters of the rule chose not to define—truly extend;
- Other contractors are struggling with what they find to be insufficiently defined terms relating to both the prohibitions of the rule and the scope of the compliance plans that many contractors must develop to prevent trafficking; and
- Some contractors are finding themselves at odds with their subcontractors over the rule's application.

Contractors are justifiably concerned regarding how much due diligence they must exercise over their supply chains, and how much control over their own subcontractor's diligence efforts they can insist upon. Under the final rule, due diligence not only requires that

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contractors police themselves, but also agents, subcontractors, and their agents.[1] These concerns are only heightened by the rule's lack of any *de minimis* or safe harbor provisions[2] and the rule's mandatory self-disclosure and prospective cooperation requirements.

The good news is that some government officials seem to accept the notion that compliance might have to follow a phased approach, and that some of the rules are in need of further elaboration—likely through written direction comparable to the Department of Justice's and Securities and Exchange Commission's 2012 guidance on the Foreign Corrupt Practices Act.

Summary of Basic Requirements

The final rule was published Jan. 29, 2015, and became effective on March 2, 2015. On the plus side, a number of the rule's requirements are relatively clear; and these are chiefly the requirements that apply to all contractors and subcontractors, regardless of tier. This subset of requirements also applies irrespective of contract type or contract value.

Prohibited Conduct. The key items of prohibited conduct are found at FAR 52.222-50(b)—''Policy.'' While items (1)-(3) already appeared in the clause prior to the most recent final rule, items (4)-(9) are new. The clause provides that contractors, contractor employees and agents may not:

(1) Engage in severe forms of trafficking in persons during the period of performance of the contract;

(2) Procure commercial sex acts during the period of performance of the contract;[3]

(3) Use forced labor in the performance of the contract;

(4) Destroy, conceal, confiscate or otherwise deny access by an employee to the employee's identity or immigration documents, such as passports or driver's licenses;

(5) Use misleading or fraudulent practices during the recruitment of employees or offering of employment (a number of examples are provided here); or use recruiters that do not comply with local labor laws of the country in which the recruiting takes place;

(6) Charge employees recruitment fees;

(7) Fail to provide return transportation or pay for the costs of return transportation upon the end of employment (a number of exceptions might apply);

(8) Provide or arrange housing that fails to meet the host country housing and safety standards; or

(9) If required by law or contract, fail to provide an employment contract, recruitment agreement, or other required work document in writing. (A number of more detailed requirements apply).

Also relatively clear are several requirements found at FAR 52.222-50(c)-(e)—''Contractor requirements,'' ''Notification,'' and (e) ''Remedies,'' respectively. A few of these requirements follow.

Disclosures to All Employees. Contractors must notify their employees and agents of the U.S. government's policy of prohibiting trafficking in persons and the ac-

[1] Under FAR 52.222-50(h)(5), contractors must submit a certification ''annually after receiving an award.'' The same clause, at 52.222-50(i)(2), provides that in the event a subcontractor is required to submit a certification, ''the Contractor shall require submission prior to the award of the subcontract and annually thereafter.'' Additionally, FAR 52.222-56(b) requires that apparent successful offerors submit their certification ''prior to award.'' Thus, contractors must not only exercise due diligence in relation to their own company, but also to subcontractors and proposed subcontractors, and must exercise due diligence at multiple stages, from the beginning of the acquisition process through contract completion.

[2] FAR 52.222-50(f)(1) provides that ''mitigating factors'' may be considered where ''[t]he Contractor had a Trafficking in Persons compliance plan or an awareness program at the time of the violation, was in compliance with the plan, and has taken appropriate remedial actions for the violation, that may include reparation to victims for such violations.'' It is unclear how these factors will apply in practice, particularly in those situations where the violation discovered is—as will often be the case—*not* in compliance with the plan.

[3] Although the language concerning commercial sex acts appeared in the prior version of the clause, we note that the scope of this requirement remains unclear. In other words, how far are prime contractors expected to go in monitoring both the on-and off-the-clock conduct of subcontractors and agents ''during the period of performance of the contract''? How broadly must they construe the term ''commercial sex acts''? Our sense is that the drafters of the rule recognize that the answers to these questions are not necessarily found in the rule's text, and that they will, therefore, have to provide the contracting community some additional guidance on what is actually expected. The need for additional guidance is especially pronounced given the final rule's new requirements for certifications, compliance plans and due diligence, which make it apparent that contractors will have to pay additional attention to what is going on throughout their supply chains.

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tions that will be taken against employees or agents for violations of this policy. Such actions for employees may include, but are not limited to, removal from the contract, reduction in benefits, or termination of employment. FAR 52.222-50(c)(1).

Actions Against Employees and Subcontractors. Not only must contractors provide the warning described above, they must also follow through and take prompt remedial action when they discover violations. Contractors must ''[t]ake appropriate action, up to and including termination, against employees, agents, or subcontractors'' that engage in the prohibited conduct contained in subparagraph (b) of the clause. FAR 52.222-50(c)(2).

Notification Regarding Violations. Contractors *must* inform the contracting officer and inspector general *immediately* of ''any credible information it receives from any source . . . that alleges a Contractor employee, subcontractor, subcontractor employee, or their agent has engaged in conduct that violates the policy [proscriptions contained in paragraph (b) of the rule].'' The addition of the term ''credible'' is an improvement over the prior version of the rule. Nevertheless, the rule stops short of providing the same opportunity and time to conduct an internal investigation and assess the credibility of the evidence that contractors have grown accustomed to in considering whether to make disclosures to the government under FAR 52.203-13(b)(3)(i) (Contractor Code of Business Ethics and Conduct). Additionally, under the final rule, a contractor needs to provide information concerning ''any actions taken against a Contractor employee, subcontractor, subcontractor employee, or their agent pursuant to this clause.'' FAR 52.222-50(d).

Remedies. The government's remedies for noncompliance are also relatively clear: Noncompliance could result in:

(1) Requiring the contractor to remove a contractor employee or employees from the performance of the contract;

(2) Requiring the contractor to terminate a subcontract;

(3) Suspension of contract payments;

(4) Loss of award fee;

(5) Declination to exercise available options under the contract;

(6) Termination of the contract for default or cause; and

(7) Suspension or debarment.

FAR 52.222-50(e).

This is a non-exhaustive list of potential government remedies. Contractors must also consider the risk of False Claims Act liability, class actions, consumer boycotts, and possible criminal prosecution for fraud or false statements.

Full Cooperation. Contractors have a newly-specified duty of ''full cooperation'' with the Government as it investigates trafficking offenses. Contractors must disclose to the agency inspector general ''information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct.'' FAR 52.222-50(g)(1). Contractors must also provide timely and complete responses to government auditors' and investigators' requests for documents, and must provide access to its facilities and staff for government audit and investigation purposes.

Contractors must also take steps to protect employees suspected of being victims of or witnesses to prohibited activities, and must ensure that these employees can cooperate with government authorities as well. Id. The final rule points out that the requirement for full cooperation does not foreclose other rights that contractors possess, and does not require that contractors waive attorney-client privilege or work-product doctrine protections. It also does not require officers, directors, owners, employees or agents to waive attorney-client privilege or Fifth Amendment rights. It also does not restrict contractors from conducting internal investigations or defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation. FAR 52.222-50(g)(2).

Advice on Areas Of Greatest Ambiguity

Despite the clarity of the rule in some areas, a number of questions remain:

Reportable Events—A Question of Scope. Many in industry have settled upon the view that only trafficking activity that occurs during the period of performance of—and in connection with—a government contract or subcontract warrants reporting to the contracting officer and inspector general. This view is not universally shared, however (especially among prominent NGOs). Although we are not familiar with contractors that would knowingly fail to report a subcontractor's employment of forced labor simply because the employment occurred on a non-government contract, the rule's various prohibitions present other, more ambiguous possibilities.

What if a contractor learns that a supplier is withholding an employee's passport from him on a commercial contract unrelated to the subcontractor's work for the prime? Is that a reportable event under the rule? There is likely to be disagreement on this point. Making judgment calls on a myriad of possible infractions will require a careful examination of the facts as well as discretion. In general, however, contractors are advised to hew closely to the language of the rule, which requires that they notify the government of violations of the nine prohibited items found in the ''policy'' section of the rule discussed above. Clear communication with subcontractors about the higher-tier contractor's expectations is also essential.

Recruiting Fees—Definitional (and Compliance) Challenge. Although on one level the restrictions on recruiting are straightforward, it is nevertheless an area fraught with risk. Many contractors operating abroad rely on recruiters to find qualified employees. Although the final rule makes it clear that contractors may not use recruiters that do not comply with local labor laws of the country in which the recruiting takes place, this requirement places the onus on the contractor to develop its own knowledge of those local labor laws, and

leaves unclear just how far a contractor has to go to satisfy itself that its recruiter complies with all such laws. And although it is relatively clear that recruitment fees may not be charged to employees, this issue—for a time, at least—is complicated by FAR Case 2015-017, ''Combating Trafficking in Persons—Recruitment Fees,'' which was opened to allow the government to more fully consider a revised definition for the term ''recruitment fees'' at the request of the Senior Policy Operating Group for Combatting Trafficking in Persons.

The Possible Answer. The Defense Acquisition Regulatory Counsel has agreed to draft a proposed rule on the topic, and is awaiting further approvals. Here, one might predict that a very comprehensive definition of recruiting fee—with proscriptions against charging processing fees, visa application fees, border crossing fees, certification fees, and other fees and costs—could result in more difficulties in policing a contractor's chosen recruiter. Until such guidance is provided, close attention to recruitment practices—at any level of the supply chain—is advised.

Compliance Plan, Certification Requirements, and Due Diligence—Definitional (and Compliance) Challenge. Aside from the requirements that apply to all contracts of any dollar value, there are other requirements, for certifications regarding compliance plans and due diligence, that apply above certain thresholds. FAR 52.222-50(h)—Compliance plan—provides: (1) This paragraph (h) applies to *any portion of the contract* that:

(i) Is for supplies, other than commercially available off-the-shelf items, acquired outside the U.S., or services to be performed outside the U.S.; and

(ii) Has an estimated value that exceeds $500,000. (emphasis added).

The clause requires that ''annually after receiving an award,'' a contractor will provide the contracting officer a certification that it has implemented a compliance plan. FAR 52.222-50(h)(5). A contractor must also certify that after having conducted due diligence, either:

(A) 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 such activities; or

(B) If abuses relating to any of the prohibited activities . . . have been found, the Contractor or subcontractor has taken the appropriate remedial and referral actions.

FAR 52.222-50(h)(5)(ii).[4]

FAR 52.222-50(i) (subcontracts) provides that the entire clause is a mandatory flow down ''in all contracts,'' but points out that ''[t]he [compliance plan and certification] requirements in paragraph (h) of this clause *apply only to any portion of the subcontract* that'' meets the threshold criteria listed above. (emphasis added).

So What Level of Diligence is Required? A number of questions arise from these requirements. One obvious question concerns the level of diligence that must be exercised throughout every tier of the supply chain. The difficulties inherent in just the recruiting scenario mentioned above are obvious, especially in an international context. Another issue involves the certification a prime contractor might receive from a subcontractor. Is it to be taken as a ''trafficking-free'' certification relating to the subcontractor's entire enterprise, or simply on the behalf of those employees working on the subcontract? There will be differences of opinion on this point. In sum, a myriad of factual scenarios will present other tough judgment calls. Industry awaits more guidance on the level of diligence that might be appropriate.

And How Do We Calculate the $500,000 Number? Another area of concern is based on different potential methods of calculating whether the $500,000 threshold has been met. One commenter to the proposed human trafficking rule raised the concern that ''contractors would break subcontracts into smaller dollar amounts to avoid the $500,000 threshold.'' In responding to comments in the preamble to the final rule, the Council chose not to address this point directly, and instead simply reiterated the threshold requirements. Nevertheless, in our view, a strategy of ''breaking subcontracts'' to avoid the threshold is likely to be unavailing, as the threshold requirements will apply at the prime contract level irrespective of the subordinate subcontracting decisions a prime contractor makes. The same logic applies to subcontracts that trigger the compliance plan and certification requirements on their own.

We appreciate that contractors and subcontractors can sometimes disagree over how to make the appropriate calculation. It is therefore essential that prime contractors and subcontractors, when flowing down the clause, make sure that their interpretation of the clause is shared by their suppliers. Hopefully, advance planning will avoid potentially more significant and costly disagreements later.

What Do We Put in Our Compliance Plan? Once the need for a compliance plan is established, and contractors begin fashioning plans to incorporate the ''minimum requirements'' found at FAR 52.222-50(h)(3), practical questions remain regarding the contents of the plan. Although some overly expansive language in the final rule, the NDAA for FY 2013, and Executive Order 13627 could lead some to believe that the plans must address the entire enterprise, the better reading is that such plans need only address those portions of contracts that meet the threshold criteria found at FAR 52.222-50(h)(1) and the analogous -(i)(1) portion of the clause addressing subcontracts.

In addition, prime and upper-level subcontractors need to address the question of whether to insist upon compliance plans from their subcontractors even when such plans are not required by FAR 52.222-50(h)(1). Given the heavy price that contractors risk paying for the violations of their subcontractors, and the protective

[4] The new provision at FAR 52.222-56, ''Certification Regarding Trafficking in Persons Compliance Plan,'' applies in solicitations where, as prescribed by FAR 22.1705(b), ''it is possible that at least $500,000 of the value'' of the contract may be performed outside the U.S. (and is not entirely for COTS items). This provision's certification, compliance plan and due diligence requirements are essentially the same as those found in the revised clause discussed above, but it requires a pre-award certification from an apparent successful offeror. It requires that an offeror certify that it has conducted due diligence into itself and its proposed agents and proposed subcontractors. FAR 52.222-56(c)(2)(i)-(ii).

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value that compliance plans can have if violations are found (FAR 52.222-50(f)(1)'s mitigating factors), it only makes sense for contractors to consider requiring some form of plan and related documentation from their subcontractors. Contractors working for the Department of Defense should also be cognizant of the requirements in DFARS 252.222-7007, ''Representation Regarding Combating Trafficking in Persons'', (also promulgated in January 2015), when considering this question.

The (Possible) Answers. On the diligence question, although more guidance would be helpful (and, we hope and expect, will be forthcoming from the government in late 2015 or early 2016), prudent contractors should adopt clear policies that stay well on the safe side of the line and avoid potentially conflicting or ambiguous direction based on local distinctions. Even with such guidance, the proper level of due diligence will remain a concern.

When it comes to compliance plans, it is essential that prime contractors and subcontractors discuss potential issues in advance in order to ensure that their suppliers share their interpretation of the clause. Questions regarding the level of detail in the plan, the activities to be covered, and the annual certifications required from subcontractors should all be addressed. As more guidance becomes available, revisiting these questions with suppliers will be necessary.

Parting Thoughts

Not only contractors, but also the government, will be challenged to develop best practices in support of the admirable and essential goal of ending human trafficking. And the interplay between contractors and the government will undoubtedly yield more lessons learned. See, e.g., FAR 22.1704 (particularly the provisions addressing the ''administrative proceeding'' by which an agency determines whether human trafficking allegations are ''substantiated,'' and addressing the entry of such violations in the Federal Awardee Performance and Integrity Information System (FAPIIS)).[5]

To critics, the issues outlined above provide yet another example of the government promulgating ''final'' rules as part of complex compliance regimes that are nevertheless unfinished and, therefore, offer insufficient predictability to those trying to comply with them. Cybersecurity and counterfeit electronic parts are other areas where, to the eyes of some in the business community, unfinished government business creates compliance risks for contractors. More guidance from the government is likely on the way, but the compliance dangers for contractors are real and present. Guiding contractors on these and similar questions (and potentially business-ending pitfalls) requires case-specific, fact-driven analysis and a practical perspective.

[5] See FAR 42.1503(h)(1)(v). Under FAR 9.104-6, the contracting officer posts information required to be posted about a subcontractor, such as trafficking in persons violations, to the record of the prime contractor. This fact should incentivize prime contractors to proactively address potential problems with their suppliers and to ensure that their own employees act in strict accordance with the prime's compliance plan.