THE GOVERNMENT CONTRACTOR®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 57, No. 11 **March 18, 2015**

Focus

¶ 74

FEATURE COMMENT: Final Trafficking In Persons Rule Creates New Compliance Component For U.S. Government Contractors

After about a year of deliberation, the Federal Acquisition Regulatory Council on January 29th issued a final rule addressing trafficking in persons in federal supply chains. The final rule is the culmination of a steady increase in Federal Government attention to combating trafficking in persons issues in federal contractor supply chains. 80 Fed. Reg. 4967 (Jan. 29, 2015).

The Trafficking Victims Protection Act of 2000 (TVPA) and its reauthorizations, along with Federal Acquisition Regulation 52.222-50, previously prohibited contractors, subcontractors and their employees from engaging in severe forms of trafficking, procuring commercial sex acts, or using forced labor in the performance of a U.S. Government contract or subcontract. Since 2006, the FAR has also required contractors to inform their contracting officer immediately if they receive "[a]ny information ... from any source (including host country law enforcement) that alleges a Contractor employee, subcontractor, or subcontractor employee has engaged in" severe forms of trafficking, procuring commercial sex acts or using forced labor in the performance of a contract.

As we noted in "FAR And DFARS Proposed Rules Expand On Trafficking In Persons Initiatives," 55 GC ¶ 330, the proposed rule (and now the final rule) implement directives to eradicate trafficking in persons in Government contract supply chains in President Obama's Executive Order 13627, "Strengthening Protections Against Trafficking in Persons in Federal Contracts," and title XVII of the National Defense Authorization Act for Fiscal Year 2013, entitled Ending Trafficking in Government Contracting (ETGCA). The final rule creates a broad new compliance framework that accompanies the historical prohibitions on using trafficked labor. To accomplish that goal, it rewrites the policy section of FAR 22.1703 addressing trafficking in persons, and the contract clause in FAR 52.222-50, greatly increasing the protections and processes required to prevent and deter trafficking in persons. The final rule, in fact, expands and clarifies the compliance framework in the proposed rule. This FEATURE COMMENT summarizes and raises questions about future implementation in three key areas of the final rule:

(1) the new prohibited conduct rules and notification and cooperation requirements that apply to all Government contracts, including commercially available off-the-shelf items (COTS) sales and contracts for amounts below the simplified acquisition threshold;
(2) a broader set of compliance plan, due diligence and certification requirements for overseas contracts valued over $500,000; and
(3) Government remedies for and process rights of contractors investigated for potential violations of the final rule.

Prohibitions and Requirements Applicable to All Contracts—The final rule implements a series of requirements applicable to all Government contractors and subcontractors, and their employees and agents. The final rule continues to include basic prohibitions against engaging in severe forms of trafficking in persons, which include using force or threat of force in hiring, procuring commercial sex acts during contract performance, and using forced labor in the performance of a Government contract.

However, it also prohibits contractors and subcontractors, and their employees and agents, from engaging in a range of other conduct in recruitment, hiring and employment practices in domestic and

overseas contract performance. To that end, the final rule provides an expansive definition of agent for use throughout that rule. The definition is similar to the definition of "agent" in the FAR 52.203-13 business ethics rule, which is "any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization."

The prohibited practices for contractors, contractor employees, subcontractors, subcontractor employees, and their agents are:

- destroying, concealing, confiscating or otherwise denying access to the employee's identity or immigration documents;
- using misleading or fraudulent recruitment practices, such as failing to disclose basic information in a "format and language accessible to the worker," or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment;
- using recruiters that do not comply with local labor laws;
- charging employees recruitment fees;
- under certain circumstances, failing to provide return transportation or pay for the cost of return transportation upon the end of employment, for an employee who is not a national of the country in which the work is taking place and who was brought to the country to perform work on a U.S. government contract or subcontract;
- providing or arranging for housing that fails to meet the host country housing and safety standards;
- "[i]f required by law or contract," failing to provide an employment agreement or similar work documents in writing, in a language the employee understands, and, if the employee is relocating, at least five days prior to the relocation; and
- if a written employment agreement is required, failing to include in the employee's agreement details about work description, including such things as wages, work locations, living accommodations, grievance processes, and the content of applicable laws and regulations that prohibit trafficking in persons.

As noted above, these prohibitions apply to all contracts, commercial contracts, COTS sales and contracts for amounts below the simplified acquisition threshold. In that regard, like the proposed rule, the final rule imposes the most restrictive requirement from either the Executive Order or ETGCA—in this case applying the rule broadly to all Government contracts covered by the FAR.

While the coverage in the final rule is more expansive than advocated by some commenters, its "notification" regime addresses comments from many groups concerning the operation of the proposed rule and how it compared to FAR 52.203-13, Contractor Code of Business Ethics and Conduct. In particular, the FAR Council addressed concerns about potential waiver of rights and the right to due process in the final rule's requirement to "inform the Contracting Officer and the agency Inspector General immediately" when the contractor (a) receives "credible information" that alleges that a "[c]ontractor employee, subcontractor, subcontractor employee, or their agent" violated the policy in the rule, or (b) takes any action against a "[c]ontractor employee, subcontractor, subcontractor employee, or their agent" under the rule.

The final rule contains explicit guidance that "full cooperation," which includes the duty to disclose, does not waive any "rights arising in law, the FAR, or the terms of the contract." A change in the final rule expands the definition of full cooperation to more closely resemble the language in the definition of "full cooperation" in the FAR business ethics rule, FAR 52.203-13.

With the addition of "full cooperation," much like FAR 52.203-13(a)(1), the final rule requires (1) an initial disclosure sufficient to identify the nature and extent of the alleged violations and potential responsible individuals, (2) timely and complete responses to auditors' and investigators' requests for documents, (3) reasonable access to facilities and staff to facilitate federal audits and investigations, and (4) protection for employees suspected of being victims or witnesses, and that contractors/subcontractors do not hinder or prevent employees from cooperating with Government authorities. As in FAR 52.203-13(a)(2), "full cooperation" in the final rule does not require (a) waiver of the attorney-client privilege or work product rights, (b) individual waiver by company officials of rights against self-incrimination, or (c) restriction of internal investigations or defense of "a proceeding or dispute arising under the contract or related to a potential or disclosed violation."

Another change, which likely came in response to public comments on the proposed rule, is the elimination of the requirement that contractors not only protect employees suspected of being victims or witnesses, but also "interview all employees suspected of being victims of or witnesses to prohibited activities." The FAR Council provided little explanation for that change, stating only that the interview requirement "is not a requirement of the E.O. or the statute," and therefore is not part of the final rule.

Potential Issues for Contractors under FAR pt. 12—FAR pt. 12 provides policies for the U.S. Government's acquisition of commercial items, including COTS items. Commercial contractors provide the Government with goods and services that are identical, or nearly identical, to those provided to non-Government customers. Thus, the supply chain for products (or services) for both sets of customers is largely undifferentiated. For example, commercial goods suppliers typically do not employ markedly different procurement methods, including labor practices, for the supplies used to manufacture the goods destined for U.S. Government customers.

One example of a labor practice that suppliers to commercial prime contractors may see as an accepted practice in some overseas markets is charging employees recruitment fees. For example, in Hong Kong, employment agencies have, in the past, been permitted to charge employees 10 percent of the worker's monthly wage as a fee for placement. See Amnesty International, *Exploited For Profit, Failed By Governments: Indonesian Migrant Domestic Workers Trafficked To Hong Kong* at 61–62 (Nov. 2013). While avoiding such a fee may be relatively easy for a prime contractor by ensuring that its agents do not charge recruitment fees, the process of compliance for subcontractors and their agents is likely to be more complex. As the rule and accompanying commentary make clear, the new FAR 52.222-50 prohibitions apply to all Government contracts, including commercial and COTS contracts, and are mandatory flowdown clauses. Thus, they are potentially applicable to every supplier in the supply chain for those commercial and COTS items.

In the Hong Kong example, would a Government prime contractor of a COTS product have to ensure that a supplier does not use recruiters that charge employees a 10-percent recruiting fee (as allowed under Hong Kong law)? And what if the Hong Kong supplier also supplies material or components for other products that the contractor also sells commercially—would the charging of recruitment fees for factory workers still be a potential violation?

The final rule raises questions for prime contractors, including: How will it change terms and conditions of subcontracts? How will primes monitor compliance with the new requirements? And how will they ensure all subcontractors are aware of the requirements? Furthermore, as several business organizations have mentioned, would the final rule reduce the incentives for foreign suppliers to do business with companies that are also U.S. Government contractors, when their other customers do not impose a prohibition against charging employees recruitment fees or other additional restrictions contained in the final rule? And what are the potential market consequences?

Broader Requirements for Overseas Contracts Valued over $500,000—The final rule does little to change the proposed rule's requirements for a compliance plan for prevention, monitoring and detection of trafficking in persons, due diligence to determine potential violations in the contractor's supply chain, and certification of no violations in the supply chain that apply to contracts (except COTS) where "the estimated value of the supplies to be acquired, or services required to be performed, outside of the United States exceeds $500,000." The final rule states that the compliance plan must be appropriate (a) to the size and complexity of the contract; and (b) to the nature and scope of the activities to be performed for the Government, including the number of non-U.S. citizens expected to be employed and the risk that the contract or subcontract will involve services or supplies susceptible to trafficking.

Likewise, the final rule contains minimum requirements for a combating trafficking in persons compliance plan:

> (1) An awareness program to inform contractor employees about the Government's policy prohibiting trafficking-related activities described in FAR 52.222-50(b), the activities prohibited, and the actions that will be taken against the employee for violations.
>
> (2) A process for employees to report, without fear of retaliation, activity inconsistent with the policy prohibiting trafficking in persons that includes the Global Human Trafficking Hotline.
>
> (3) A recruitment and wage plan that permits the use of recruitment companies only with trained

> employees, prohibits charging recruitment fees to the employee, and ensures that wages meet applicable host-country legal requirements or explains any variance.
> (4) A housing plan, if the contractor or subcontractor intends to provide or arrange housing that ensures that the housing meets host-country housing and safety standards.
> (5) Procedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking in persons (including activities in FAR 52.222-50(b)) and to monitor, detect and terminate any agents, subcontracts or subcontractor employees that have engaged in such activities.

Moreover, these procedures must be flowed down to all subcontracts and contracts with agents, except that, like the limitation on applicability to prime contracts, the compliance plan requirement applies only to non-COTS, overseas contracts for which the overseas portion exceeds $500,000.

In addition to a compliance plan for prevention, monitoring and detection, the final rule also retains the requirement that prime contractors obtain certification from subcontractors, that are then required to flowdown this requirement, that they have a compliance plan and,

> 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 prohibited activities; or
> (B) If abuses relating to any of the prohibited activities identified in [the policy] of this clause have been found, the Contractor or subcontractor has taken the appropriate remedial and referral actions.

References in the final rule to (1) a compliance plan that is based, in part, on an assessment of "the risk that the contract or subcontract will involve services or supplies susceptible to trafficking in persons" and (2) certifications that are based on a "due diligence" investigation, suggest that prime contractors could conduct supply chain mapping to focus their compliance efforts on areas where they face the greatest risks of trafficking.

The FAR Council's discussion echoes that reading, stating,

> The prime contractor's monitoring efforts will vary based on the risk of trafficking in persons related to the particular product or service being acquired and whether the contractor has direct access to a work site or not. Where a prime contractor has direct access, the prime contractor would be expected to look for signs of trafficking in persons at the workplace, and if housing is provided, inspect the housing conditions. For cases where the employees and subcontractors are distant, or for lower tier subcontractors, the prime contractor must review the plans and certifications of its subcontractors to ensure they include adequate monitoring procedures, and to compare this information to public audits and other trafficking in persons data available.

This and similar passages suggest there is no one-size-fits-all compliance and monitoring plan. In fact, with respect to the definition of due diligence, the discussion states that "the level of 'due diligence' required depends on the particular circumstances. This is a business decision, requiring judgment by the contractor."

The certification portion of the clause in the final rule, FAR 52.222-50(h), is also unchanged. However, like the other provisions of the rule, it remains a mandatory flowdown for all qualifying subcontracts, thus imposing a due diligence requirement on both prime and subcontractors. The final rule, in fact, clarifies that prime contractors are required to obtain certificates prior to award of subcontracts, and annually thereafter.

Government Remedies and Due Process—The final rule also supplements the current enforcement mechanism in FAR 22.1704, and reinforces that COs may impose any remedies already provided in the FAR and take actions such as requiring the contractor to remove an employee from contract performance or requiring the contractor to "terminate a subcontract."

Helpfully, in determining what remedial action the contracting agency should take if a violation is substantiated, the final rule explicitly characterizes whether a contractor has and complies with an internal "compliance plan or awareness program," and takes appropriate remedial action for violations of the policy, as mitigating factors when determining the remedies that should be imposed for a violation. The final rule also retains, as an aggravating factor, a contractor's failure to "abate an alleged violation or enforce requirements of a compliance plan."

In response to comments about rights to due process in determinations of whether a violation has occurred and the remedies to be imposed, the final rule adds a requirement that the agency conduct an "administrative proceeding" in which the contractor has an opportunity to respond before the agency determines that a violation of the policy has occurred. The final rule suggests, but does not require, that the agency may delegate the authority to conduct the proceeding to the agency suspension and debarment official, and it specifically reserves the right of suspension and debarment officials to conduct their own proceedings pursuant to FAR subpt. 9.4. The final rule also notifies contractors that (1) substantiated subcontractor trafficking violations will be posted to their prime contractor's Federal Awardee Performance and Integrity Information System (FAPIIS) record after the prime contractor has an opportunity to respond, and (2) that substantiated trafficking violations will be publicly available in FAPIIS unless otherwise exempted under the Freedom of Information Act.

New Burdens—The final rule's compliance plan requirements create potential new burdens on contracts for goods and services acquired or performed outside the U.S. In particular, projects involving low-skill labor valued over $500,000 could face a new burden to map and police labor practices in a contractor's entire supply chain.

An example used in several industry discussions is procuring raw materials for a large construction project. The prime contractor for the project would need to be aware of the prohibitions in the final rule that apply to all contracts. In addition, if the project is being performed outside the U.S. and the value of the contract is greater than $500,000, the prime contractor would need to be aware of the more expansive compliance plan, due diligence and certification requirements.

In these types of contracts, a prime contractor would need to conduct due diligence to determine the risk of prohibited practices occurring with its suppliers. The investigation would need to satisfy the prime contractor, and potentially the contracting agency, that prohibited practices were not involved in supplying goods or services. Exactly how far the prime contractor's due diligence investigation must go in the supply chain was not resolved by the FAR Council. That was left to contractor business judgment, which, as noted above, can be informed by an appropriate risk assessment. At a minimum, the prime contractor would need to receive certifications from its subcontractors, and its subcontractors would need certifications from their suppliers, that they had implemented a combating trafficking in persons compliance plan consistent with the final rule, and that after conducting this due diligence,

> (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 identified in paragraph (b) of this clause have been found, the Contractor or subcontractor has taken the appropriate remedial and referral actions.

Definition of Recruiting Fees—Another issue left unresolved by the FAR Council in the final rule is the scope of the ban on "recruitment fees" charged to employees. The same day the final rule was published, the FAR Council posted a notice seeking public comment on the definition of "recruitment fees," which was left undefined in the final rule. The FAR Council said that it is "considering a new definition for the term 'recruitment fees' to supplement the new anti-trafficking regulations."

The draft definition is expansive and would prohibit charging employees any fees associated with their employment, including fees for obtaining visas or costs mandated by Government agencies, "such as border crossing fees." And furthermore, there is a parallel and, as yet, uncoordinated effort by Congress that requires input from the Department of State and U.S. Agency for International Development to help define the same term. H.R. 400, the Trafficking Prevention in Foreign Affairs Contracting Act, intends to close a perceived loophole in combating trafficking in persons statutes that prohibit "unreasonable placement or recruitment fees." Quoting a Government Accountability Office report, the bill states that although the ETGCA prohibits "unreasonable placement or recruitment fees," the statute does not define those fees, and, "[w]ithout an explicit definition of the components of recruitment fees, prohibited fees may be renamed and passed on to foreign workers, increasing the risk of debt bondage and other conditions that contribute to trafficking."

Conclusion—The final FAR rule is an expansive effort by the U.S. Government to stamp out traffick-

ing in persons from the supply chains for Government contracts. Although that effort is laudable, the exact cost to industry and how this effort will be implemented are highly uncertain. Prime and subcontractors will need to assess their compliance systems, subcontract terms and conditions, training, and auditing processes to determine whether they can accommodate the requirements of this new rule. While some systems and processes may be able to accommodate the additional requirements because of the FAR Council's effort to resemble requirements in FAR 52.203-13, Contractor Code of Business Ethics and Conduct, the requirements for due diligence and assessing trafficking in persons risks may need to be added to even some larger contractors' current compliance systems.

✦

This Feature Comment was written for The Government Contractor by* Michael Navarre *and* Michael Mutek, *who are members of Steptoe & Johnson LLP's Government Contracts Practice Group in Washington, D.C.