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FEATURE COMMENT: FAR And DFARS Proposed Rules Expand On Trafficking In Persons Initiatives

On September 26, the Federal Acquisition Regulatory Council and the Department of Defense issued highly anticipated proposed rules addressing trafficking in persons in federal supply chains. The proposed rules, which were issued in response to 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 (NDAA), entitled "Ending Trafficking in Government Contracting" (ETGCA), are aimed at deterring and detecting human trafficking. The new Federal Acquisition Regulation and Defense FAR Supplement rules expand on EO 13627 and the ETGCA by adding to the compliance requirements and expanding various protections addressed in the proposed rules' predecessors.

The proposed FAR rule rewrites the policy section of FAR 22.1703 addressing "Trafficking in Persons" and the FAR contract clause in FAR 52.222-50. First, the proposed FAR rule implements the prohibitions and protections applicable to all contracts that are contained in the EO and ETGCA, and, in fact, expands on them, partially in response to public comments. Second, the proposed FAR rule also implements the significant EO and ETGCA compliance and certification requirements for contracts that are performed overseas and valued at more than $500,000. Third, the proposed FAR rule continues to be a mandatory flow-down clause, which has potential implications for monitoring and mapping supply chains by prime contractors. Finally, the proposed DFARS rule contains a new representation requirement for DOD contracts.

Prohibitions and Requirements Applicable to All Contracts—The proposed FAR rule would implement the requirements contained in the EO and ETGCA for all contracts. And, where there was a divergence between the ETGCA and EO on the provisions applicable to all contracts, the FAR Council usually chose the more restrictive requirement to implement. For example, the EO prohibited "charging employees recruitment fees" while the ETGCA prohibited "[c]harging recruited employees unreasonable placement or recruitment fees, such as fees equal to or greater than the employee's monthly salary, or recruitment fees that violate the laws of the country from which an employee is recruited." Proposed FAR 52.222-50(b)(6) chose to preclude charging any recruitment fees. Similarly, requirements to provide housing that meets host country standards in the EO were embedded within a compliance plan that was not applicable to all contractors, whereas the ETGCA prohibited all contractors from providing housing that did not meet local standards. The proposed FAR rule takes the more restrictive approach and prohibits all contractors from providing or arranging housing that does not meet "host country housing and safety standards."

The current FAR trafficking in persons rule establishes a "zero tolerance policy" for core human trafficking offenses by prohibiting contractors and contractor employees from engaging in sex trafficking, use of forced labor, trafficking for forced labor and "procuring commercial sex acts during the period of performance of the contract." In addition to these core human trafficking offenses, the proposed FAR rule would prohibit a range of other conduct related to human trafficking, including:

- 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 or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment;
- 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;
- Providing or arranging housing that fails to meet the host country housing and safety standards;
- Under certain circumstances, providing an employment agreement that is not in writing in the employee's native language and is not provided prior to the employee departing from his or her country of origin; and
- Failing to include in the employee's agreement details about work description, including such things as wages, work location(s), living accommodations, grievance process, and the content of applicable laws and regulations that prohibit trafficking in persons.

In addition to these expanded prohibitions, the proposed FAR rule also implements a "Notification" regime that is similar to the disclosure regime in FAR 52.203-13, the FAR Contractor Code of Business Ethics and Conduct. Section 52.222-50(d)(1) of the proposed FAR rule specifies that contractors should inform the "Contracting Officer and the agency Inspector General" immediately when they have "credible information . . .that alleges a Contractor employee, subcontractor, or subcontractor employee, or their agent has engaged in conduct that violates" the FAR human trafficking policy.

In comparison, the current version of FAR 52.222-50(d)(1) requires contractors to inform the CO of "any information it receives from any source" alleging a violation of FAR human trafficking policies. The "credible information" standard in the proposed FAR rule better aligns with FAR 52.203-13 and specifies the same reporting channels, the CO and agency IG, as the FAR Code of Business Ethics and Conduct rule. Notwithstanding these similarities, the language used in the "Notification" provision in proposed FAR 52.222-50(d)(1) varies from the disclosure provision in FAR 52.203-13. Section 52.222-50(d) would apply to "conduct that violates this policy," whereas the FAR Code of Business Ethics and Conduct rule discusses certain violations "in connection with the award performance, or closeout of this contract or any subcontract thereunder." While this difference is not explained in the Federal Register notice, a reasonable interpretation of the language is to read them consistently such that contractors would be required to notify the CO and agency IG for the contract under which the contractor received credible evidence of conduct that violates the FAR human trafficking policy.

In addition to the changes in the notification section, the proposed FAR rule not only requires that contractors cooperate with Government human trafficking investigations and audits, but also imposes an investigative requirement:

> Contractors shall protect and interview all employees suspected of being victims of or witnesses to prohibited activities, prior to returning to their country of origin, and shall not prevent or hinder the ability of these employees from cooperating fully with government authorities.

Thus, under the proposed FAR rule, contractors would need to establish a process for conducting and documenting interviews with potential victims and witnesses in alleged human trafficking cases. Contractors and subcontractors would also need to be mindful of potential issues raised when conducting interviews of Government contractor employees that may be used in criminal proceedings. For example, if the employee witness would be required to participate in the interview as part of his or her employment, such an interview might raise concerns about use and derivative use of the statements in a criminal investigation if the witness was part of the trafficking activity.

One thing that has not changed in the proposed FAR rule is the continued mandatory flow-down provision. Thus, every new requirement applicable to all contracts that is set out above applies equally to subcontracts, subcontractors, and their employees.

Compliance Plan and Certification Requirements for Certain Contracts and Subcontracts—In addition to the provisions applicable to all contracts, the proposed FAR rule, in accordance with both the EO and ETGCA, would impose requirements for a compliance plan on all contracts (except those for commercially available off-the-shelf items), 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 compliance plan for these contracts must be:

> appropriate to the size and complexity of the contract and to the nature and scope of the activities to be performed for the Government, including the number of non-United States citizens expected to be employed and the risk that the contract or subcontract will involve services or supplies susceptible to trafficking.

The proposed FAR rule goes on to list several minimum requirements taken mostly from the EO and ETGCA. The most notable of these requirements is the requirement that the compliance plan include:

> Procedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking in persons (including activities in paragraph (b)) and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.

In addition, under proposed section 52.222-50(h)(5)(ii), contractors subject to the compliance plan requirement would be required to certify that they have implemented their anti-human trafficking compliance plan and to 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 have been found, the Contractor or subcontractor has taken the appropriate remedial and referral actions.

The compliance plan and related certification requirement, with its due diligence language, suggest that prime contractors would need to investigate the sources of labor on their contracts and subcontracts, what is known as supply chain mapping, to determine where and how their agents and subcontractors are obtaining labor.

Finally, the "Subcontracts" section of proposed clause 52.222-50 makes clear that the compliance and certification portion of the clause (52.222-50(h)) is a mandatory flow-down, but, as in the case of prime contracts, applies only to the portion of the subcontract that is required to be performed outside the U.S. and for which the estimated value exceeds $500,000. Moreover, proposed section 52.222-50(i)(2), moves the certification requirement further down the supply chain, stating that if these subcontract value requirements are met:

> [T]he Contractor shall require subcontractors to submit a subcontract compliance plan and certification to the prime Contractor prior to the award of the subcontract and annually thereafter. The certification shall cover the items in paragraph (h)(5).

Thus, the proposed FAR rule imposes a due diligence requirement on both prime and subcontractors.

While these compliance plan requirements apply only to certain contracts, the proposed FAR rule allows COs to consider compliance plans as part of their assessment of the remedies that should be employed if a contractor is found to violate the policy. The proposed rule retains the current enforcement mechanism in FAR 22.1704, which permits COs to impose a series of remedies, which are expanded in the proposed FAR rule, "[a]fter determining in writing that adequate evidence exists to suspect" a violation of any of the prohibitions noted above for all contractors. The proposed FAR rule states that COs "may consider" in this determination whether a contractor had a human trafficking "compliance plan or awareness program" as a mitigating factor when determining the remedies that should be used for the violation. But, the rule also cautions that COs may consider, as an aggravating factor, a contractor's failure to "enforce requirements of a compliance plan."

Proposed DFARS Rule Coverage—The proposed DFARS rule mainly addresses issues of notifying DOD employees and contractors about the department's human trafficking policies. However, a new solicitation provision for DOD contracts and its quirky coverage issue are worth noting.

First, the proposed DFARS rule would require that certain DOD solicitations include a provision that requires contractors to represent that they will not engage in human trafficking and have informed their employees about certain notification requirements and protections. The certification must also state that the contractor:

Has hiring and subcontracting policies to protect the rights of its employees and the rights of subcontractor employees and will comply with those policies in the performance of this contract .

Notably, the proposed DFARS representation would apply only to "solicitations and contracts that exceed the simplified acquisition threshold." Thus, the proposed representation would apply to most contracts performed domestically, where the simplified acquisition threshold is $150,000. But, for

example, in the case of contracts supporting contingency operations performed overseas (where human trafficking concerns have been most widespread), the proposed DFARS representation would have more limited coverage because the simplified acquisition threshold for those contracts is $1 million. Thus, using the same example, overseas contingency operations contracts between $500,000 and $1 million would have increased compliance plan and certification requirements under the proposed FAR rule, but such contracts would not have related requirements to make representations under the proposed DFARS rule.

Conclusion—The FAR Council has taken this opportunity to expand on the significant protections against human trafficking already set out in the previous EO and the ETGCA. While the FAR Council and DOD specifically request comments on the proposed rules (comments on both are due by November 25), given the prior opportunity to comment, it would not be surprising if the final rules look a lot like the proposed rules.

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