



# BRIEFING PAPERS<sup>®</sup> SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## THE NEW ANTI-TRAFFICKING RULES AND WHAT THEY MEAN FOR GOVERNMENT CONTRACTORS AND SUBCONTRACTORS

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On January 29, 2015, the Federal Acquisition Regulation (FAR) Council published a final rule amending the FAR by imposing significant responsibility on contractors and subcontractors to act affirmatively to prevent human trafficking and forced labor.<sup>1</sup> The final rule implemented Executive Order (E.O.) 13627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts,”<sup>2</sup> and Title XVII of the National Defense Authorization Act for Fiscal Year 2013, entitled “Ending Trafficking in Government Contracting,”<sup>3</sup> substantially augmenting existing human trafficking-related prohibitions for federal contractors and subcontractors.<sup>4</sup> The final rule took effect March 2, 2015, and applies to all new contracts and future orders under existing indefinite-delivery/indefinite-quantity (ID/IQ) contracts.<sup>5</sup> The Department of Defense (DOD)

simultaneously published a final rule amending the Defense FAR Supplement (DFARS) to further implement the DOD’s anti-trafficking policy and supplement Government-wide changes.<sup>6</sup> The DFARS amendments took effect January 29, 2015.<sup>7</sup>

The anti-trafficking regulations have far-reaching consequences for federal contractors and subcontractors both in the United States

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and abroad. Contractors or subcontractors must ensure that they and their subcontractors and recruiting agents do not engage in a wide range of trafficking-related activities, such as providing misleading information about work conditions, requiring employees to pay recruitment fees, confiscating employees' identity papers, or failing to pay return transportation costs for employees brought to a locale to work on a Government contract.<sup>8</sup> These requirements apply to almost all Government prime contractors and subcontractors, even those that may not have historically thought that this issue affected their industry or that this type of regulation would apply to them. As detailed in this BRIEFING PAPER, the requirements reach commercial item contractors, subcontractors, and small businesses, as well as larger traditional contractors.<sup>9</sup> In addition, entities with larger, overseas contracts must develop and maintain detailed anti-trafficking compliance programs and provide annual certifications of their anti-trafficking efforts.<sup>10</sup>

In the light of these stricter requirements for Government contractors and subcontractors, this BRIEFING PAPER discusses the broad applicability of the FAR anti-trafficking rule to all federal contracts, the FAR requirements for reporting and detailed compliance plans and annual certifications, the DFARS requirements for defense contractors, and the proposed rulemaking to define the scope of the prohibition on "recruitment fees." In addition, to guide contractors in their efforts to ensure compliance with the requirements, the PAPER presents a series of common questions and general answers about the anti-trafficking regulations.

## Applicability To All Federal Contracts

The FAR anti-trafficking final rule strengthens the U.S. Government's existing zero-tolerance policy on trafficking in persons outlined in the Trafficking Victims Protection Act (TVPA).<sup>11</sup> Prior to the implementation of the new regulations, U.S. law already prohibited all contractors and their employees from engaging in "severe forms of trafficking in persons," procuring commercial sex, or using forced labor during the performance of the contract.<sup>12</sup> The revised regulations establish significantly more specific prohibitions and requirements with which federal contractors and subcontractors must comply.

Specifically, the final rule revised federal contracting regulations to prohibit *all* contractors, subcontractors, and employees of either from engaging in a broad range of trafficking-related activities including:

- (1) Engaging in severe forms of trafficking during the period of performance of the contract;
- (2) Procuring commercial sex acts during the period of performance of the contract;
- (3) Using forced labor in the performance of the contract;
- (4) Destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents, such as passports or drivers' licenses;
- (5) Using misleading or fraudulent recruitment practices during the recruitment of employees, such as failing to disclose basic information or making material



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misrepresentations regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, living conditions and housing, any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work;

- (6) Using recruiters that do not comply with local labor laws and charging “recruitment fees” to employees;
- (7) Providing or arranging housing that fails to meet the host country and safety standards;
- (8) Failing to provide a written employment contract, recruitment agreement, or similar work paper, if required by law or contract, in the employee’s native language at least five days before the employee parts from his or her country of origin; and
- (9) Failing to provide or reimburse return transportation costs upon the end of employment for employees who were brought into a country for the purpose of working on a U.S. Government contract or subcontract.<sup>13</sup>

Moreover, all contractors must notify agents and employees of the Government’s anti-trafficking policy and the actions the contractor will take against an employee, subcontractor, subcontractor employee, or agent for violations of the policy’s prohibitions and must take appropriate action for violations of the prohibitions.<sup>14</sup>

## Reporting

The anti-trafficking regulations require contractors to notify the Contracting Officer (CO) and the agency Inspector General (IG) upon becoming aware of credible information alleging that a contractor employee, subcontractor, subcontractor employee, or their agent has engaged in prohibited trafficking behavior.<sup>15</sup> In turn, the CO must notify the agency IG, the agency debarring and suspending official, and if appropriate, law enforcement officials with jurisdiction over the alleged offense.<sup>16</sup> The regulations also require COs to include in the Federal Awardee Performance and Integrity Information

System (FAPIS) any allegations substantiated in an administrative proceeding regarding trafficking violations.<sup>17</sup> All such information posted in FAPIS will presumptively be publicly available.<sup>18</sup>

## Detailed Compliance Plans And Annual Certifications Required For Larger Contractors And Subcontractors

Under the anti-trafficking regulations, federal contractors and subcontractors with contracts or subcontracts performed abroad involving services or supplies exceeding \$500,000 must implement appropriate compliance plans targeting trafficking activities, complete a compliance certification prior to accepting an award, and publish such plans at their respective workplaces and on their websites.<sup>19</sup> Such plans must include at a minimum:

- (a) An employee awareness program about the Government’s zero-tolerance policy with regard to human trafficking, the trafficking-related activities in which the contractor is prohibiting from engaging, and the actions that will be taken against employees for violations;
- (b) A process for employees to report trafficking violations without fear of retaliation, including through a hotline number and email address;
- (c) A recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging “recruitment fees” to the employee, and ensures that wages meet applicable host country legal requirements or explains any variance;
- (d) A housing plan (if the contractor provides or arranges housing) that ensures compliance with applicable host country legal requirements; and
- (e) Procedures to prevent agents and subcontractors at any tier and at any dollar amount from engaging in trafficking in persons and to monitor, detect, and terminate any agents, subcontractors or subcontractor employees that have engaged in such activities.<sup>20</sup>

The regulations contain a significant exception: the compliance plan requirement does not apply to contracts and subcontracts for commercially available off-the-shelf items (COTS).<sup>21</sup> Accordingly, companies that hold supply contracts for commercial items that are sold in substantial quantities in the commercial marketplace and are offered to the Government without modification in the same form in which they are sold in the commercial marketplace are not subject to the above-referenced compliance plan requirements. Significantly, the compliance plan requirements do apply to non-COTS commercial item contracts.

As was the case with the mandatory disclosure rule<sup>22</sup> and other recent supply chain regulatory provisions,<sup>23</sup> the FAR provisions enhance the obligation of contractors to oversee the actions of their subcontractors. Contractors and subcontractors must certify (prior to award and then annually thereafter) that they have in place an appropriate compliance plan and that, after conducting “due diligence,” neither they nor any of their subcontractors have engaged in trafficking-related activities, or, if abuses have been found, the contractor or subcontractor has taken the appropriate remedial and referral actions.<sup>24</sup>

## New DFARS Requirements For Defense Contractors

The DFARS anti-trafficking final rule<sup>25</sup> added the requirement to display hotline posters regarding human trafficking and whistleblowing for noncommercial contracts and subcontracts above a \$5 million threshold whether performed within or outside the United States.<sup>26</sup> The hotline posters must be posted prominently in common work areas, and if a substantial portion of the workforce does not speak English, then contractors must also post the notices in the language(s) spoken by a substantial portion of the workforce.<sup>27</sup>

In addition, all solicitations and contracts that exceed the simplified acquisition threshold, including those for the acquisition of commercial items, must include a new representation that the offerors’ hiring practices address combat-

ing trafficking in persons and that offerors will comply with the anti-trafficking policies.<sup>28</sup> This representation adds requirements to notify employees and subcontractors regarding their obligation to report human trafficking violations and that they will be afforded whistleblower protection.<sup>29</sup>

The DFARS final rule also integrates a contractor employee bill of rights and requires that employees be made aware of it, that their employers enforce it, and that it be posted in employee workspaces in English and any foreign languages spoken by a significant portion of the workforce.<sup>30</sup> Specifically, contractors must ensure that their employees are aware of their rights to:<sup>31</sup>

- (A) Hold their own identity or immigration documents, such as a passport or driver’s license, regardless of the document’s issuing authority;
- (B) Receive agreed upon wages on time;
- (C) Take lunch and work-breaks;
- (D) Elect to terminate employment at any time;
- (E) Identify grievances without fear of reprisal;
- (F) Have a copy of their employment contract in a language they understand;
- (G) Receive wages that are not below the legal host-country minimum wage;
- (H) Be notified of their rights, wages, and prohibited activities prior to signing their employment contract; and
- (I) If housing is provided, live in housing that meets host-country housing and safety standards.

## Proposed Rulemaking On “Recruitment Fees”

While finalizing its regulations, the FAR Council left one issue open for public comment—the definition of “recruitment fees.” In order to comply with both E.O. 13627, which prohibits all recruitment fees,<sup>32</sup> and Title XVII of the National Defense Authorization Act for Fiscal Year 2013, which prohibits only “unreasonable” recruitment fees,<sup>33</sup> the FAR final rule applies the most stringent requirement (*i.e.*, no recruitment fees).<sup>34</sup> Consequently, additional rulemaking is necessary to define the scope of this prohibition. In January 2015, upon publication of the



final rule, the FAR Council invited the public to comment on a draft definition. The period for public comment closed in March 2015; as of the submission of this PAPER, the draft definition remains under the consideration of the U.S. Government.<sup>35</sup>

The current draft definition of “recruitment fees” is:<sup>36</sup>

- (1) Recruitment fees include but are not limited to the following fees, charges, or costs:
  - a. for soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, or placing potential employees;
  - b. for covering the cost, in whole or in part, of advertising;
  - c. for certifying labor applications;
  - d. for processing petitions;
  - e. for visas and any fee that facilitates an employee obtaining a visa such as appointment and application fees;
  - f. for government-mandated costs such as border crossing fees;
  - g. for procuring photographs and identity documentation, including any nongovernmental passport fees;
  - h. fees charged as a condition of access to the job opportunity, including procuring medical examinations and immunizations and obtaining background, reference and security clearance checks and examinations; and
  - i. for an employer’s recruiters, agents or attorneys, or other notary or legal fees.
- (2) Any fee, charge, or cost may be a recruitment fee regardless of whether it is deducted from wages, paid back in wage or benefit concessions, paid back as a kickback, bribe or tribute, remitted in connection with recruitment, or collected by an employer or a third party, including but not limited to agents, recruiters, staffing firms (including private employment and placement firms), subsidiaries/affiliates of the employer and any agent or employee of such entities.

There have also been congressional developments that could influence the final form of the definition of recruitment fees. On February 27, 2015, the U.S. House of Representatives Committee on Foreign Affairs approved a bill, H.R. 400, “Trafficking Prevention in Foreign Affairs Contracting Act,”<sup>37</sup> which would require the Department of State and the U.S. Agency for

International Development to propose a definition of recruitment fees to apply to the TVPA within 180 days of the statute’s enactment.<sup>38</sup> As the TVPA was instrumental in shaping the regulations,<sup>39</sup> the definition provided by H.R. 400 could help shape a final definition of recruitment fees. However, H.R. 400 has yet to be considered by the full House of Representatives.

## Common Questions And General Answers

As contractors digest the new FAR and DFARS requirements, many questions have arisen. Below are some commonly asked questions and general answers to help guide contractors as they seek to ensure compliance with the anti-trafficking regulations. These answers should be considered as guidance only and not a replacement for legal or other professional advice about particular circumstances.

### ■ General Overview

(1) *What companies are covered under the new obligations?*

The anti-trafficking regulations’ prohibitions on specified trafficking-related activities and the self-reporting requirements, audit and investigation obligation, and contract clause requirements apply to all federal contractors, subcontractors, and their employees, regardless of the size of the contract or subcontract and whether the contract are performed in the United States or abroad.<sup>40</sup> As stated above, the new FAR compliance plan and certification requirements do not extend to all contractors and subcontractors.<sup>41</sup> Instead, they only apply to contractors and subcontractors that perform on a non-COTS contract or subcontract in which the estimated value of the supplies acquired or services rendered outside the United States exceeds \$500,000.<sup>42</sup>

(2) *My company is a large commercial business with only a few federal contracts. Do the new regulations apply to my company since so little of its overall business concerns federal contracts?*

The new regulations are significant because they cover the activities of *all* federal contractors and subcontractors, regardless of size, number of Government contracts, number of contractors, and/

or location of contract performance.<sup>43</sup> Even if a large business were to have only one Government contract in its business structure, at a minimum, the business would still be subject to the anti-trafficking regulations' policy prohibitions.<sup>44</sup>

(3) *My company is a federal contracting subsidiary of a larger commercial business. I am aware that the scope of the regulations cover the federal subsidiary I work in, but do they also affect the larger commercial business?*

Although the applicability of the anti-trafficking regulations are case specific, the regulations only cover a larger commercial business (when there is a separate federal contracts subsidiary) if the larger business assists the federal subsidiary in its performance of a Government contract. Specifically, the FAR defines the coverage of the new policy prohibitions as extending to “contractors, contractor employees, subcontractors, subcontractor employees, and their agents.”<sup>45</sup> If the larger commercial business assumes the position of any of those categories of assistance, then the regulations will apply to that larger business. By contrast, if the commercial business is entirely separate from the federal business subsidiary, the commercial business may not be affected by the obligations under the new regulations.

#### ■ Dealings With Subcontractors And Flow Down

(4) *What constitutes adequate monitoring of subcontractors and employees by a prime contractor under the new rule?*

The U.S. Government's analysis of the new regulations emphasizes that “vigilance by the prime contractor is necessary.”<sup>46</sup> The regulations require contractors to “[t]ake appropriate action, up to and including termination, against employees, agents, or subcontractors that violate” the prohibitions.<sup>47</sup> Thus, a contractor's monitoring of its subcontractors,<sup>48</sup> agents, and employees must be credible and sufficient to enable it to detect a potential violation. However, a prime contractor's monitoring efforts may vary based on the risk of trafficking involved with a particular product and the amount of access a prime contractor has to a given worksite.<sup>49</sup> For example, the FAR Council noted in the preamble to the final rule that “[w]here 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.”<sup>50</sup> According to the U.S. Government, when “the employees and subcontractors are distant, or for lower tier subcontractors,” the prime contractor must at a minimum review its subcontractor's plans and certifications to confirm adequate monitoring procedures are in place.<sup>51</sup> Similarly, in cases where subcontractors may be far removed from the prime, the U.S. Government advises that the prime contractor should also compare the subcontractors' information against publicly available audits and trafficking in persons data for the particular area and product.<sup>52</sup> Because prime contractors have significant monitoring obligations for compliance with the regulations, the maintenance of a process for employees, subcontractors, and agents to report potential violations without a fear of retribution is paramount.<sup>53</sup>

(5) *Do my company's obligations flow down to my subcontractors? And if so, what do I need to do to be sure the obligations appropriately flow down?*

Yes, a prime federal contractor's anti-trafficking obligations flow down to its subcontractors. First, a contractor must include the substance of the clause found in FAR 52.222.50 “in all subcontracts, and in all contracts with agents.”<sup>54</sup> Second, if the subcontract is subject to the regulations' compliance plan and certification requirements,<sup>55</sup> then that subcontractor must submit to the contractor its certification prior to the award of the subcontract and annually thereafter.<sup>56</sup> The offering subcontractor certification must attest that the subcontractor has (a) “implemented a compliance plan” and (b) “conducted due diligence,” concluding either that “to the best of [its] knowledge and belief, neither it nor any of its proposed agents, subcontractors, or their agents is engaged in” the prohibited activities or noting that the offering subcontractor “has taken the appropriate remedial and referral actions.”<sup>57</sup>

#### ■ Prohibited Activities And Contractor Requirements

(6) *Do I need to pay for return transportation or its equivalent costs if an employee does not request it?*

Yes. The regulations specifically provide that a contractor must not fail to “provide return

transportation or pay for the cost of return transportation upon the end of employment” for all employees who are not nationals of the country in which they have been brought by the employer to work on a U.S. Government contract.<sup>58</sup>

(7) *Do I still need to pay return transportation costs if I fire my employee for cause?*

Yes. The regulations do not make any exception for firing an employee for cause. A contractor is obligated to provide return transportation or the costs of return transportation for any employee brought either to a country different from the country in which the employee was hired or to the United States for work on a U.S. Government contract or subcontract.<sup>59</sup> The regulations provide few exceptions to this obligation, which include (a) any employee “legally permitted to remain in the country of employment and who chooses” to remain and (b) any employee exempted from the rule’s obligation by an authorized official of the contracting agency.<sup>60</sup>

(8) *Do I need to train my employees on the new regulations?*

Yes. The regulations require all contractors to notify employees, subcontractors, and agents of the U.S. Government’s policy prohibiting human trafficking outlined in the regulations. Moreover, all contractors must train their employees or agents on their adoption of the U.S. Government policy and the remedies it will impose upon violations of the policy.<sup>61</sup>

For companies required to implement a compliance plan, training is an essential component of any plan. First, all plans require contractors to implement an awareness program notifying all employees of the U.S. Government policy and actions a contractor will take in the event of a violation.<sup>62</sup> Second, all plans must include training employees on a process of reporting any potential violations without fear of retaliation.<sup>63</sup> Moreover, all plans must include “[p]rocedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking in persons.”<sup>64</sup>

(9) *Are there any requirements to create a process for employees to report violations?*

A reporting process must be included in a compliance plan under the new regulations.<sup>65</sup> The reporting process must allow for any employee to report a potential violation without fear of retaliation.<sup>66</sup> To ensure a nonretaliatory process, the regulations require contractors to make a national hotline available to all employees.<sup>67</sup>

(10) *Do contractors need to use licensed recruiters for the recruitment process?*

The regulations, the Trafficking Victims Protection Act of 2000, and E.O 13627 “do not specifically” mandate a licensing requirement for recruiters.<sup>68</sup> Instead, the regulations require that recruiters comply with the laws of each country in which recruiting takes place.<sup>69</sup> Thus, covered companies will want their recruiters to have enough training to ensure compliance with local laws.

(11) *When will the Government define a “recruitment fee”?*

The regulations prohibit the charging of any recruitment fees upon an employee.<sup>70</sup> However, at the time of the final rule’s publication, the FAR Council invited the public to provide input on the proposed draft definition for recruitment fees.<sup>71</sup> The period for public input closed in March 2015. As of October 15, 2015, the draft definition was apparently still under consideration in the Federal Government.<sup>72</sup>

## ■ Compliance Plans And Certifications

(12) *My company bids for large, overseas contracts. What kind of compliance program does the regulations require?*

The regulations require contractors and subcontractors that supply non-COTS services or supplies exceeding a value of \$500,000 to have a compliance program “if any portion of the contract or subcontract” is performed outside the United States.<sup>73</sup> Each contractor’s or subcontractor’s compliance program will look slightly different, depending on factors including the size and complexity of the contract or subcontract, the structure of the relevant companies, and the nature and scope of the activities performed.<sup>74</sup> As detailed above, all compliance plans must include the following minimum elements:

- (a) An awareness program;
- (b) A reporting process;
- (c) A recruitment and wage plan;
- (d) A housing plan, if applicable; and
- (e) Prevention procedures.<sup>75</sup>

(13) *How detailed must a compliance plan be to satisfy the FAR requirements?*

The regulations do not spell out a minimum level of detail for compliance plans. Although every compliance plan must address the FAR's minimum requirements, it is up to the contractor to decide how much detail to use in creating its compliance plan. The FAR establishes that the contractor must maintain a compliance plan appropriate to "the size and complexity of the contract" and to "the nature and scope of the activities to be performed for the Government."<sup>76</sup>

(14) *What does a company need to certify and when does a company need to certify compliance with the anti-trafficking regulations?*

When a certification is required, it must provide that the company has (a) implemented a compliance plan and (b) conducted due diligence, concluding either that "[t]o the best of [its] knowledge and belief, neither it nor any of its proposed agents, subcontractors, or their agents has engaged in" the prohibited activities or noting that the company "has taken the appropriate remedial and referral actions."<sup>77</sup> Moreover, there are two timeline requirements associated with the submission of a certification. First, apparent successful offerors must submit certification prior to an award.<sup>78</sup> Second, all specified contractors must annually submit a certification to the CO following the receipt of an award.<sup>79</sup>

In connection with the certifications submitted prior to an award, the submitting company must make its certification in connection with all proposed subcontracts as of the date of submission.<sup>80</sup> Following the award of the prime contract, if a prime contractor hires an additional subcontractor (or substitutes a subcontractor for one that

was previously identified), the prime contractor must obtain the subcontractor's certification at the time of the subcontract award.<sup>81</sup>

(15) *Do I still need to certify annually even if nothing has changed?*

Yes. The regulations explicitly require that a contractor provide certification of compliance annually following an award of a U.S. Government contract.<sup>82</sup> The annual certification requirement lasts for the duration of the "performance of the contract, when a compliance plan was required at award."<sup>83</sup>

(16) *For a certification, what level of "due diligence" is required?*

"Due diligence" is not defined generally in the FAR. In addition, the regulations do not provide any clarification or definition of the term. However, in preamble to the final rule, the FAR Council noted that "the level of 'due diligence' required depends on the particular circumstances."<sup>84</sup> Therefore, the depth and scope of a contractor's due diligence is a "business decision, requiring judgment by the contractor,"<sup>85</sup> for which little formal guidance is available. Contractors may wish to review the State Department's annual *Trafficking in Persons Report*, which indicates that trafficking risks are more pronounced in industries that rely on low-skilled or unskilled labor, in industries where labor demands fluctuate and include periods of urgent demand, and where the urgency to retain workers can result in dependence on labor recruiters, creating layers of separation between the company and the workers.<sup>86</sup> Further guidance on areas of high risk may also be gleaned from a State Department-commissioned report produced by Verité.<sup>87</sup> In circumstances such as those described in the State Department and Verité reports, prudent contractors will exercise heightened due diligence.

(17) *What are the possible False Claims Act implications associated with an inaccurate certification?*

The regulations specifically state that the list of remedies provided (loss of award, contract termination, suspension, etc.) is "in addition to any other remedies available to the United



States Government.”<sup>88</sup> Other remedies might include, *inter alia*, an action under the federal Civil False Claims Act (FCA).<sup>89</sup> Under that statute, the filing of a false certification of compliance or inaccurate anti-trafficking record could be seen as a false claim,<sup>90</sup> triggering potential FCA liability.<sup>91</sup> The FCA imposes harsh civil and criminal penalties on contractors for any false claims, including false statements, made to the Government.<sup>92</sup> Therefore, the possibility of FCA liability must be forefront in the mind of any entity preparing a submission or certification to the Government.<sup>93</sup>

(18) *Do the regulations impose any additional obligations on companies required to maintain a compliance plan?*

All contractors must “post the relevant contents” of their compliance plans, “no later than the initiation of contract performance, at the workplace” and on their websites, if maintained.<sup>94</sup>

#### ■ Potential Violations And Remedies

(19) *When do I need to report to my CO that there might be a violation?*

A contractor is required immediately to inform the CO and agency IG if it receives “[a]ny credible information” from “any source”<sup>95</sup> alleging that an employee, subcontractor, subcontractor employee, or agent of the contractor engaged in conduct violating the anti-trafficking policy.<sup>96</sup> In addition, the contractor must also provide the CO and agency IG all information regarding “actions taken” by the contractor against its employee, subcontractor, subcontractor employee, or agent.<sup>97</sup>

(20) *What if the alleged violation relates to multiple contracts?*

In the event an allegation is tied to more than one contract, a contractor must notify the CO associated with the contract of the largest dollar value.<sup>98</sup>

(21) *What will happen upon the CO’s receipt of credible information of a violation?*

Although the FAR does not spell out each step of the process, it appears that investigations of alleged violations will be conducted by

the agency IG, who will then provide copies of their reports to the COs. Following receipt of the agency IG’s report, the agency head will delegate authorization to an agency official to expeditiously conduct an administrative proceeding, allowing the contractor the opportunity to respond to the report. The authorized agency official will then make a final determination as to whether the allegations are substantiated and will notify the Contracting Officer of the determination.<sup>99</sup> If there was a final determination that the violation was substantiated, the CO will enter it into FAPIIS and consider what remedies are appropriate.<sup>100</sup>

(22) *In determining a remedy for a violation of the rule, are there any mitigating or aggravating factors?*

The regulations provide that a CO may consider the following mitigating factors when determining an appropriate remedy:

- (a) The contractor has a compliance plan or an awareness program at the time of the violation;
- (b) The contractor was in compliance with its plan; and
- (c) The contractor took appropriate remedial actions for the violation, which may include “reparation to victims” in connection to the violation.<sup>101</sup>

Similarly, the regulations also provide aggravating factors for a CO to take into consideration when determining an appropriate remedy. They include:

- (a) A contractor’s failure to abate an alleged violation; or
- (b) A contractor’s failure to enforce its compliance plan’s requirements, when directed by the CO.<sup>102</sup>

(23) *What obligations do contractors have to cooperate with the CO’s consideration of a potential violation?*

All contractors must fully cooperate with the CO involved in the investigation and consideration of a potential violation.<sup>103</sup> In accordance with the rule, to be considered fully cooperative, a contractor must at a minimum:

- (a) Provide disclosures to the agency IG providing sufficient information about the nature, extent, and individuals responsible for the offense;
- (b) Respond in a timely and complete manner to document requests by Government auditors and investigators;
- (c) Provide reasonable access to its domestic and international facilities and staff so as to allow governmental agencies to conduct audits, investigations, or other appropriate action to ensure compliance with all applicable anti-trafficking laws and regulations; and
- (d) Provide protection for all employees who may be suspected victims or witnesses of prohibited activities, including allowing the employees to cooperate fully with the Government and giving protection to employees prior to their return to the country of their recruitment.<sup>104</sup>

(24) *Is there any affirmative defense or safe harbor for a prime contractor that has implemented its own compliance plan, completed appropriate flow downs, and complied with notification and reporting requirements?*

Prior to the final publication of the final rule, the FAR Council considered comments suggesting the need to create an affirmative defense or safe harbor for those prime contractors facing remedies for acts of subcontractors.<sup>105</sup> The Council decided not to implement any defense or safe harbor. It reasoned that “[n]either the statute nor the E.O. fully shield a prime contractor or create an affirmative defense.”<sup>106</sup> However, the Council did acknowledge that “[c]ulpability is determined on a case-by-case basis,” suggesting that a prime contractor’s compliance with the regulations would serve as a mitigating factor in the Government’s consideration of an appropriate remedy for the prime.<sup>107</sup>

(25) *What will happen if my company does not comply with the new requirements?*

Under the regulations, a contractor’s failure to comply with the anti-trafficking regulations<sup>108</sup>

may render the contractor subject to, among other remedies:

- (a) Required removal of a contractor employee or employees from the performance of the contract;
- (b) Required subcontractor termination;
- (c) Suspension of contract payments;
- (d) Loss of award fee for the performance period in which the Government determined contractor noncompliance;
- (e) Declination by the Government to exercise contract options;
- (f) Termination of the contract for default, in accordance with the termination clause of the contract; or
- (g) Suspension or debarment.<sup>109</sup>

#### ■ Other

(26) *What are other U.S. domestic laws that might be relevant to trafficking?*

Key anti-trafficking legislation enacted by Congress include:

- (a) The Trafficking Victims Protection Act of 2000<sup>110</sup> and its reauthorizations (TVPRAs of 2003, 2005, 2008, 2013);<sup>111</sup>
- (b) The Child Soldiers Prevention Act of 2008 (CSPA);<sup>112</sup>
- (c) The Tariff Act of 1930;<sup>113</sup>
- (d) The Trade Act of 1974;<sup>114</sup>
- (e) The Trade and Development Act of 2000;<sup>115</sup>
- (f) Title XVII of the National Defense Authorization Act for Fiscal Year 2013;<sup>116</sup> and
- (g) Congressionally authorized trade preference programs.<sup>117</sup>

Other executive actions on trafficking include:

- (a) Executive Memorandum on Steps To Combat Violence Against Women and Trafficking in Women and Girls;<sup>118</sup>

(b) E.O. 13126;<sup>119</sup>

(c) National Security Presidential Directive 22,<sup>120</sup> and

(c) E.O. 13627.<sup>121</sup>

(27) *Is there international law requiring cooperation in trafficking in persons?*

Yes, there are several international cooperation agreements to prevent trafficking in persons. The United States has ratified or acceded to international obligations under the following legal instruments:

(a) 1956 U.N. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery;<sup>122</sup>

(b) 2000 U.N. Protocol To Prevent, Suppress

and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime;<sup>123</sup>

(c) 2000 U.N. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;<sup>124</sup>

(d) 2000 U.N. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;<sup>125</sup>

(e) 1957 International Labour Organization (ILO) Convention No. 105 on the Abolition of Forced Labor;<sup>126</sup> and

(f) 1999 ILO Convention No. 182 on the Worst Forms of Child Labor.<sup>127</sup>

## GUIDELINES

These *Guidelines* are intended to assist you in gaining a better understanding of the FAR and DFARS regulatory requirements prohibiting human trafficking in Federal Government contracts. They are not, however, a substitute for professional representation in any specific situation.

1. The anti-trafficking regulations prohibit *all* federal contractors, subcontractors, and employees of either from engaging in a broad range of trafficking-related activities. This coverage includes commercial item contractors, subcontractors, and small businesses, regardless of whether the contract is performed in the United States or abroad.

2. The regulations apply to all new contracts and future orders under existing ID/IQ contracts.

3. All federal contractors, subcontractors, and employees of either are prohibited from:

(a) Engaging in severe forms of trafficking during the period of performance of the contract;

(b) Procuring commercial sex acts during the period of performance of the contract;

(c) Using forced labor in the performance of the contract;

(d) Destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents, such as passports or drivers' licenses;

(e) Using misleading or fraudulent recruitment practices during the recruitment of employees such as failing to disclose basic information or making material misrepresentations regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, living conditions and housing, any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work;

(f) Using recruiters that do not comply with local labor laws and charging "recruitment fees" to employees;

(g) Providing or arranging housing that fails to meet the host country and safety standards;

(h) Failing to provide a written employment contract, recruitment agreement, or similar work paper, if required by law or contract,

in the employee's native language at least five days before the employee parts from his or her country of origin; and

- (i) Failing to provide or reimburse return transportation costs upon the end of employment for employees who were brought into a country for the purpose of working on a U.S. Government contract or subcontract.

4. All federal contractors must notify agents and employees of the Government's anti-trafficking prohibitions and the actions the contractor will take against an employee, subcontractor, subcontractor employee, or agent for violations of the regulations. Further, federal contractors must take appropriate actions against employees, agents, subcontractors, or subcontractor employees who violate anti-trafficking policies.

5. All federal contractors must notify the CO and the agency IG upon becoming aware of credible information alleging that a contractor employee, subcontractor, subcontractor employee, or their agent has engaged in prohibited trafficking behavior.

6. Federal contractors and subcontractors with non-COTS contracts or subcontracts performed abroad involving services or supplies exceeding \$500,000 must have appropriate compliance plans targeting trafficking activities, must publish the plans at their workplaces and on their websites, and must certify compliance prior to award and annually thereafter. An appropriate compliance plan must include:

- (a) An employee awareness program about the Government's zero-tolerance policy with regard to human trafficking, the trafficking-related activities in which the contractor is prohibiting from engaging, and the actions that will be taken against employees for violations;
- (b) A process for employees to report trafficking violations without fear of retaliation, including through a hotline number and email address;
- (c) A recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging

"recruitment fees" to the employee, and ensures that wages meet applicable host country legal requirements or explains any variance;

- (d) A housing plan (if the contractor provides or arranges housing) that ensures compliance with applicable host country legal requirements; and
- (e) Procedures to prevent agents and subcontractors at any tier and at any dollar amount from engaging in trafficking in persons, and to monitor, detect, and terminate any agents, subcontractors or subcontractor employees that have engaged in such activities.

7. A federal prime contractor's anti-trafficking obligations flow down to its subcontractors. The prime contractor must include the substance of the "Combating Trafficking in Persons" clause at FAR 52.222.50 in all subcontracts and in all contracts with agents. If the subcontract is subject to the regulations' compliance plan and certification requirements, then that subcontractor must submit to the contractor its certification prior to the award of the subcontract and annually thereafter.

8. Contractors that are subject to the DFARS requirements must display hotline posters. In addition, DOD solicitations and contracts that exceed the simplified acquisition threshold, including those for the acquisition of commercial items, must include a new representation that the offerors' hiring practices address combating trafficking in persons and that offerors will comply with the anti-trafficking policies. This representation adds requirements to notify employees and subcontractors regarding their obligation to report human trafficking violations and that they will be afforded whistleblower protection. The DFARS also integrates a contractor employee bill of rights and requires that employees be made aware of it, that their employers enforce it, and that it be posted in employee workspaces.

9. A contractor's failure to comply with the anti-trafficking requirements could result in a range of remedies. The FAR includes the following nonexclusive list of potential remedies:



- (a) Requiring the contractor to remove a contractor employee or employees from the performance of the contract;
- (b) Requiring the contractor to terminate a subcontract;
- (c) Suspension of contract payments until the contractor has taken appropriate remedial action;
- (d) Loss of award fee, consistent with the award fee plan, for the performance period in which the government determined contractor noncompliance;
- (e) Declining to exercise available options under the contract;
- (f) Termination of the contract for default or cause, in accordance with the termination clause of this contract; or
- (g) Suspension or debarment.

In addition to negative publicity, other consequences could potentially include an unfavorable past performance assessment or responsibility determination, civil suit, criminal prosecution, or an action for damages under the federal civil FCA.

★ REFERENCES ★

- 1/ Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967 (Jan. 29, 2015) (codified at FAR pts. 1, 2, 9, 12, 22, 42, and 52).
- 2/ Exec. Order No. 13627 (Sept. 25, 2012), 77 Fed. Reg. 60,029 (Oct. 2, 2012).
- 3/ Pub. L. No. 112-239, tit. XVII, 126 Stat. 1632, 2092 (2013). Although largely similar to the E.O. 13627, the statute includes amendments to the U.S. Criminal Code to add criminal liability for violations of anti-trafficking requirements and prohibits “unreasonable” labor recruitment fees, as opposed to all recruitment fees. 22 U.S.C.A. § 7104(g)(iv)(IV).
- 4/ See also FAR 22.1700 (“This subpart [22.17] prescribes policy for implementing 22 U.S.C. chapter 78 and Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, dated September 25, 2012.”).
- 5/ 80 Fed. Reg. 4967.
- 6/ Defense Federal Acquisition Regulation Supplement; Further Implementation of Trafficking in Persons Policy (DFARS Case 2013-D007), 80 Fed. Reg. 4999 (Jan. 29, 2015) (codified at DFARS pts. 203, 204, 212, 222, and 252).
- 7/ 80 Fed. Reg. 4999.
- 8/ FAR 22.1703.
- 9/ FAR 22.1701, 22.1703. For more examples of trafficking in Government contracts, see American Civil Liberties Union, Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors (June 2012), available at [https://www.aclu.org/files/assets/hrp\\_traffickingreport\\_web\\_0.pdf](https://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf).
- 10/ FAR 22.1701, 22.1703(c).
- 11/ Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C.A. §§ 7101–7112; see also Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).
- 12/ See 22 U.S.C.A. § 7104(g).
- 13/ FAR 22.1703(a), 52.222-50(b).
- 14/ FAR 22.1703(b), 52.222-50(c).
- 15/ FAR 52.222-50(d).

- 16/ FAR 22.1704(b)(1).
- 17/ FAR 22.1704(d); see FAR 42.1503(h).
- 18/ See Pub. L. No. 111-212, Supplemental Appropriations Act, 2010, § 3010 (Public Availability of Contractor Integrity and Performance Database), 124 Stat. 2302, 2340 (2010); FAR 9.105-2(b)(2)(iii).
- 19/ FAR 22.1703(c), 52.222-50(h); see FAR 52.222-56.
- 20/ FAR 52.222-50(h).
- 21/ FAR 22.1703(c)(1)(i), 52.222-50(h)(1); see 41 U.S.C.A. § 103(1) (“the term ‘commercial item’ means—(1) an item, other than real property, that—(A) is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes; and (B) has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public”); 41 U.S.C.A. § 104 (“the term ‘commercially available off-the-shelf item’—(1) means an item that—(A) is a commercial item (as described in [41 U.S.C.A. § 103(1)]); (B) is sold in substantial quantities in the commercial marketplace; and (C) is offered to the Federal Government, without modification, in the same form in which it is sold in the commercial marketplace; but (2) does not include bulk cargo, . . . such as agricultural products and petroleum products”); accord FAR 2.101.
- 22/ FAR 52.203-13 (requiring a covered contractor to self-report when, among other things, it has credible evidence that a subcontractor has committed a violation of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations found in 18 U.S.C.A., or a violation of federal civil False Claims Act). See generally Chierichella & Casino, “Compulsory Confession Without Absolution: Complying With the FAR Mandatory Disclosure Rule,” Briefing Papers No. 15-10 (Sept. 2015).
- 23/ See, e.g., Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 80 Fed. Reg. 30,548 (May 28, 2015) (proposed rule implementing Exec. Order No. 13673, Fair Pay and Safe Workplaces (July 31, 2014) , 79 Fed. Reg. 45,309 (Aug. 5, 2014)).
- 24/ FAR 22.1703(c), 52.222-50(h)(5), (i), 52.222-56.
- 25/ Defense Federal Acquisition Regulation Supplement; Further Implementation of Trafficking in Persons Policy (DFARS Case 2013-D007), 80 Fed. Reg. 4999 (Jan. 29, 2015) (codified at DFARS pts. 203, 204, 212, 222, and 252).
- 26/ DFARS 203.1004.
- 27/ DFARS 252.203-7004(b)–(d).
- 28/ DFARS 222.1771, 252.222-7007.
- 29/ DFARS 252.222-7007(c).
- 30/ DFARS 252.225-7040(d)(8).
- 31/ See DFARS 252.225-7040(d)(8)(i).
- 32/ Exec. Order No. 13627 (Sept. 25, 2012), 77 Fed. Reg. 60,029 (Oct. 2, 2012).
- 33/ 22 U.S.C.A. § 7104(g)(iv)(IV).
- 34/ FAR 22.1703(a)(6), 52.222-50(b)(6); see Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967, 4971 (Jan. 29, 2015).
- 35/ For more information, see Defense Acquisition Regulations System, Comment on the Senior Policy Operating Group to Combat Trafficking in Persons Draft Definition for “Recruitment Fees,” <http://www.acq.osd.mil/dpap/dars/>.
- 36/ Senior Policy Operating Group to Combat Trafficking in Persons Draft Definition for “Recruitment Fees,” available at [http://www.acq.osd.mil/dpap/dars/docs/Draft\\_Definition.pdf](http://www.acq.osd.mil/dpap/dars/docs/Draft_Definition.pdf).
- 37/ H.R. 400—Trafficking Prevention in Foreign Affairs Contracting Act, Congress.Gov, <https://www.congress.gov/bill/114th-congress/house-bill/400/actions>.

- 38/ Trafficking Prevention in Foreign Affairs Contracting Act, H.R. 400, 114th Cong. (2015).
- 39/ See FAR 22.1700.
- 40/ See FAR 22.1703, 52.222-50.
- 41/ FAR 22.1703(c), 52.222-50(h).
- 42/ FAR 22.1703(c)(1)(i)), 52.222-50(h)(1). Moreover, the rules specify that the calculation of \$500,000 corresponds to the overarching value of the contract. See FAR 52.222-50(h)(1)(ii) (specifying the compliance plan requirement applies to contracts that have “an [overall] estimated value that exceeds \$500,000”). See Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967, 4969 (Jan. 29, 2015) (discussing \$500,000 threshold).
- 43/ See FAR 22.1703(a), 52.222-50(b).
- 44/ See FAR 22.1703(a), 52.222-50(b).
- 45/ See FAR 22.1703(a), 52.222-50(b). Within the anti-trafficking rules, “agent” is defined as “any individual, including a director, an officer, an employee, or an independent contractor authorized to act on behalf of the organization.” FAR 22.1702, 52.222-50(a).
- 46/ 80 Fed. Reg. at 4977.
- 47/ FAR 52.222-50(c)(2).
- 48/ See FAR 52.222-50(i)(2), stating: “If any subcontractor is required by [FAR 52.222-50] to submit a certification, the Contractor shall require submission prior to the award of the subcontract and annually thereafter.” Thus, it is mandatory for all prime contractors to monitor the certifications of its subcontractors.
- 49/ 80 Fed. Reg. at 4976.
- 50/ 80 Fed. Reg. at 4976.
- 51/ 80 Fed. Reg. at 4976.
- 52/ 80 Fed. Reg. at 4976.
- 53/ If a company is required to implement a compliance plan in accordance with the rules, then it must implement a reporting process for employees to report potential violations without fear of retaliation. FAR 52.222-50(h)(3); 80 Fed. Reg. at 4974.
- 54/ FAR 52.222-50(i)(1).
- 55/ FAR 52.222-50(i)(1)–(2).
- 56/ FAR 22.1703(c)(3), 52.222-50(i)(2).
- 57/ FAR 52.222-56(c).
- 58/ FAR 22.1703(a)(7)(i), 52.222-50(b)(7)(i).
- 59/ FAR 22.1703(a)(7)(i), 52.222-50(b)(7)(i).
- 60/ FAR 22.1703(a)(7)(ii), 52.222-50(b)(7)(ii).
- 61/ FAR 52.222-50(c)(1).
- 62/ FAR 52.222-50(h)(3)(i).
- 63/ FAR 52.222-50(h)(3)(ii).
- 64/ FAR 52.222-50(h)(3)(v). Plans must also include training on appropriate procedures for monitoring, detection, and termination. FAR 52.222-50(h)(3)(v).
- 65/ FAR 52.222-50(h)(3)(ii).
- 66/ FAR 52.222-50(h)(3)(ii); see Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967, 4974 (Jan. 29, 2015).

- 67/ FAR 52.222-50(h)(3)(ii); see 80 Fed. Reg. at 4974–75; The hotline is the Global Human Trafficking Hotline. The hotline can be contacted by phone at 1-844-888-FREE and by email at [help@befree.org](mailto:help@befree.org). FAR 52.222-50(h)(3)(ii).
- 68/ 80 Fed Reg. at 4971.
- 69/ FAR 22.1703(a)(5)(ii), 52.222-50(b)(5)(ii).
- 70/ FAR 22.1703(a)(6), 52.222-50(b)(6); 80 Fed. Reg. at 4971.
- 71/ For more information, see Defense Acquisition Regulations System, Comment on the Senior Policy Operating Group to Combat Trafficking in Persons Draft Definition for “Recruitment Fees,” <http://www.acq.osd.mil/dpap/dars/>.
- 72/ Moreover, the draft definition could be influenced by current legislation, H.R. 400, “Trafficking Prevention in Foreign Affairs Contracting Act,” if it passes in Congress. H.R. 400 would require the U.S. Department of State and the U.S. Agency for International Development to propose a definition of recruitment fees to apply to the TVPA within 180 days of the statute’s enactment. Trafficking Prevention in Foreign Affairs Contracting Act, H.R. 400, 114th Cong. (2015). Although the House Foreign Affairs Committee approved the legislation on February 27, 2015, it has yet to be considered by the full House. See H.R. 400—Trafficking Prevention in Foreign Affairs Contracting Act, Congress.Gov, <https://www.congress.gov/bill/114th-congress/house-bill/400/actions>.
- 73/ FAR 22.1703(c)(1); FAR 52.222-50(h)(1) (stating that “[t]his paragraph (h) applies to any portion of the contract that [i]s for supplies, other than commercially available off-the-shelf items, acquired outside the United States, or services to be performed outside the United States; and [h]as an estimated value that exceeds \$500,000”).
- 74/ FAR 22.1703(c)(5), 52.222-50(h)(2).
- 75/ FAR 52.222-50(h)(3).
- 76/ See FAR 52.222-56(h)(2) (including other detail variables, such as “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 in persons”).
- 77/ FAR 22.1703(c)(1)(ii), 52.222-56(c).
- 78/ FAR 52.222-56(b), 22.1703(c)(1).
- 79/ FAR 22.1703(c)(2), 52.222-50(h)(5); see Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967, 4969 (Jan. 29, 2015).
- 80/ 80 Fed. Reg. at 4977.
- 81/ 80 Fed. Reg. at 4977.
- 82/ See FAR 22.1703(c)(2), 52.222-50(h)(5); 80 Fed. Reg. at 4969.
- 83/ FAR 22.1703(c)(2).
- 84/ 80 Fed. Reg. at 4970.
- 85/ 80 Fed. Reg. at 4970.
- 86/ U.S. Dep’t of State, Trafficking in Persons Report 14 (July 2015), available at <http://www.state.gov/documents/organization/245365.pdf>.
- 87/ Verité, Strengthening Protections Against Trafficking in Persons in Federal and Corporate Supply Chains (Jan. 2015), available at [http://www.verite.org/sites/default/files/images/Verite-Executive\\_Order\\_13627.pdf](http://www.verite.org/sites/default/files/images/Verite-Executive_Order_13627.pdf).
- 88/ FAR 22.1704(d)(2), 52.222-50(e).



- 89/ 31 U.S.C.A. §§ 3729–3733.
- 90/ Nearly anything submitted to the Government can argued to be a claim—“any request or demand, whether under a contract or otherwise, for money or property” that is presented to “an officer, employee, or agent of the United States,” or “a contractor, grantee, or other recipient” of U.S. Government money. 31 U.S.C.A. § 3729(b)(2). Moreover, the statement need not cause the payment, but must only be “material to” the request for Government funding. 31 U.S.C.A. § 3729(a)(1)(G).
- 91/ See also Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967, 4980–81 (Jan. 29, 2015). In particular, some of the False Claims Act prohibitions include “knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval” or “knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim.” 31 U.S.C.A. § 3729(a)(1)(A)–(B).
- 92/ Under the FCA, a defendant can be assessed a “civil penalty” of up to \$11,000 for every false claim submitted to the Government, plus an additional penalty of three times the Government’s actual damages. 31 U.S.C.A. § 3729(a). Criminal penalties associated with fraud in foreign labor contracting, whether in the United States or abroad, include large fines and/or imprisonment for up to five years. 18 U.S.C.A. § 1351.
- 93/ While this Briefing Paper focuses primarily on the unique remedies available under the FAR, other civil actions and criminal penalties are separately possible. That said, the State Department 2015 Trafficking in Persons Report indicates that while the Federal Bureau of Investigation and other federal law enforcement agencies investigated allegations of debt bondage and excessive recruitment fees that were required of third-country nationals working on certain U.S. Government contracts abroad, “there were no reports of civil actions or criminal prosecutions, or other sanctions against noncompliant employers and labor contractors, including debarment of noncompliant employers or labor contractors from U.S. programs.” U.S. Dep’t of State, Trafficking in Persons Report 357 (July 2015), available at <http://www.state.gov/documents/organization/245365.pdf>.
- 94/ FAR 52.222-50(h)(4).
- 95/ Within its reference to “any source,” the rules note that it includes “host country law enforcement.” FAR 52.222-50(d)(1)(i).
- 96/ FAR 52.222-50(d)(1)(i).
- 97/ FAR 52.222-50(d)(1)(ii). Pursuant to the FAR, contractors must “[ta]ke appropriate action, up to and including termination, against employees, agents, or subcontractors that violate the policy.” FAR 52.222-50(c)(2).
- 98/ FAR 52.222-50(d)(2).
- 99/ FAR 22.1704(c).
- 100/ FAR 22.1704(d). The rules also note that a suspending and debarring official “has the authority, at any time before or after the final determination as to whether the allegations are substantiated, to use the suspension and debarment procedures... to suspend, propose for debarment, or debar the contractor, if appropriate.” FAR 22.1704(c)(2)(ii).
- 101/ FAR 22.1704(d)(2)(i), 52.222-50(f)(1).
- 102/ FAR 22.1704(d)(2)(ii), 52.222-50(f)(2).
- 103/ FAR 22.1703(d), 52.222-50(g)(1).
- 104/ FAR 52.222-50(g)(1).
- 105/ See Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967, 4978 (Jan. 29, 2015).
- 106/ 80 Fed. Reg. at 4978.
- 107/ 80 Fed. Reg. at 4978.
- 108/ The remedies section of the FAR 52.222-50 clause provides that it is applicable when a contractor fails to comply with the

- requirements for notification (paragraph (d)), full cooperation (paragraph (g)), compliance plan, as applicable (paragraph (h)), subcontracts (paragraph (i)), and general obligations as a contractor (paragraph (c)). FAR 52.222-50(e).
- 109/** FAR 52.222-50(e).
- 110/** Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C.A. §§ 7101–7112.
- 111/** Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008).
- 112/** Child Soldiers Prevention Act of 2008, Pub. L. No. 110-457, tit. IV, 122 Stat. 5044, 5087 (2008).
- 113/** Tariff Act of 1930, Pub. L. No. 71-361, tit. III, ch. 497, § 307, 46 Stat. 590, 689 (1930) (codified as amended at 19 U.S.C.A. § 1307).
- 114/** Trade Act of 1974, Pub. L. No. 93-618, tit. V (Generalized System of Preferences), 88 Stat. 1978, 2066 (2005) (codified as amended at 19 U.S.C.A. §§ 2462–2467).
- 115/** Trade and Development Act of 2000, Pub. L. No. 106-200, 114 Stat. 251 (2000).
- 116/** National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, tit. XVII, 126 Stat. 1632, 2092 (2013).
- 117/** See, e.g., Generalized System of Preferences (GSP), 19 U.S.C.A. §§ 2462–2467; Caribbean Basin Economic Recovery Act (CBERA), as amended and extended through the U.S. Caribbean Basin Trade Partnership Act (CBTPA), 19 U.S.C.A. §§ 2701–2707; Andean Trade Preference Act (ATPA), as amended and extended through the Andean Trade Promotion and Drug Eradication Act (ATPDEA), 19 U.S.C.A. §§ 3201–3206; African Growth and Opportunity Act (AGOA), 19 U.S.C.A. §§ 3701–3706, 19 U.S.C.A. 2466a–2466b.
- 118/** Memorandum on Steps to Combat Violence Against Women and Trafficking in Women and Girls (Mar. 11, 1998), 34 Weekly Comp. Pres. Doc. 412 (Mar. 16, 1998), available at <http://www.gpo.gov/fdsys/pkg/WCPD-1998-03-16/pdf/WCPD-1998-03-16-Pg412.pdf>.
- 119/** Exec. Order No. 13,126, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor (June 12, 1999), 64 Fed. Reg. 32,383 (June 16, 1999).
- 120/** President George W. Bush, National Security Presidential Directive 22 (NSPD-22), Combating Trafficking in Persons, December 16, 2002, partially declassified for publication as “Appendix C” in U.S. Department of Defense (DOD), Office of the Inspector General (OIG), Inspections and Evaluations: Evaluation of DOD Efforts To Combat Trafficking in Persons, Report No. IE-2007-002 (Nov. 21, 2006).
- 121/** Exec. Order No. 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts (Sept. 25, 2012), 77 Fed. Reg. 60,029 (Oct. 2, 2012).
- 122/** Sept. 7, 1956, 226 U.N.T.S. 3 (entry into force Apr. 30, 1957, and United States acceded Dec. 6, 1967).
- 123/** Nov. 15, 2000, 2237 U.N.T.S. 319 (Doc. A/55/383) (entry into force Dec. 25, 2003, and ratified by the United States Nov. 3, 2005).
- 124/** May 25, 2000, 2171 U.N.T.S. 227 (Doc. A/RES/54/263) (entry into force Jan. 18, 2002, and ratified by the United States Dec. 23, 2002).
- 125/** May 25, 2000, 2173 U.N.T.S. 222 (Doc. A/RES/54/263) (entry into force Feb. 12, 2002, and ratified by the United States Dec. 23, 2002).
- 126/** June 25, 1957, 320 U.N.T.S. 291 (entry into force Jan. 17, 1959, and ratified by the United States Sept. 25, 1991).
- 127/** June 17, 1999, 2133 U.N.T.S. 161 (entry into force Nov. 19, 2000).