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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



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# U.S. Government Issues Long-Awaited Definition of “Recruitment Fees” in FAR Anti-Trafficking Regulations

*By Kristen E. Ittig, Samuel Witten, and Leslie C. Bailey\**

*The Department of Defense, General Services Administration, and National Aeronautics and Space Administration have issued a final rule amending the 2015 Federal Acquisition Regulation to clarify the Regulation’s prohibition on assessing employees with recruitment fees in connection with federal contracts. The authors of this article discuss the new rule.*

The Department of Defense (“DoD”), General Services Administration (“GSA”), and National Aeronautics and Space Administration (“NASA”) recently issued a final rule amending the 2015 Federal Acquisition Regulation (“FAR”)<sup>1</sup> to clarify the FAR’s prohibition on assessing employees with recruitment fees in connection with federal contracts.<sup>2</sup> The rule provides a final definition of “recruitment fees” and clarifies the FAR’s broad prohibition on federal contractors or subcontractors assessing employees or potential employees with any such fees.

The final rule brings long-awaited clarity to the scope of the prohibition on recruitment fees, as the term has not previously been defined in anti-trafficking regulations. Upon publication of the FAR in January 2015, the FAR Council invited the public to comment on a draft definition of the term “recruitment fees” in a notice-and-comment process.<sup>3</sup> The final rule, which took effect on

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<sup>1</sup> Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4,967 (Jan. 29, 2015) (codified at 48 C.F.R. pts. 1, 2, 9, 12, 22, 42, and 52).

<sup>2</sup> Federal Acquisition Regulation: Combating Trafficking in Persons—Definition of “Recruitment Fees,” 83 Fed. Reg. 65,466 (Dec. 20, 2018) (FAR—“Recruitment Fees”).

<sup>3</sup> See Defense Acquisition Regulations System, Comment on the Senior Policy Operating Group to Combat Trafficking in Persons Draft Definition for “Recruitment Fees,” *available at* [https://www.acq.osd.mil/dpap/dars/archive/2015/early\\_engagement\\_opportunity\\_2015.html](https://www.acq.osd.mil/dpap/dars/archive/2015/early_engagement_opportunity_2015.html).

January 22, 2019, incorporates a definition that has been revised pursuant to comments received during that rulemaking process. Government contractors will need to take these new rules into account in their compliance efforts in connection with their supply chains.

## BACKGROUND

On January 29, 2015, DoD, GSA, and NASA issued a final rule amending the FAR to strengthen and enhance the human trafficking-related prohibitions applicable to all federal contracts. The final rule implemented Executive Order (“E.O.”) 13627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts,”<sup>4</sup> and Title XVII of the National Defense Authorization Act for Fiscal Year 2013, entitled “Ending Trafficking in Government Contracting.”<sup>5</sup> The amended FAR, which applied to all future contracts and orders under existing indefinite-delivery/indefinite quantity contracts, imposed significant responsibilities on federal contractors and subcontractors to prevent human trafficking and forced labor.<sup>6</sup>

The FAR anti-trafficking regulations significantly bolstered the trafficking-related prohibitions for federal contractors established in the Trafficking Victims Protection Act,<sup>7</sup> which prohibits all federal 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>8</sup> The FAR imposed more specific prohibitions against a wide range of trafficking-related activities and established requirements with which all federal contractors, subcontractors, and their employees and agents must comply. Specifically, the regulations prohibit activities including the use of misleading or fraudulent recruitment practices, providing misleading information about work conditions, confiscating employees’ identity papers, failing to pay return transportation costs for employees brought to a locale to work on a government contract, and requiring employees to pay recruitment fees.<sup>9</sup> In addition, the FAR requires all contractors to notify employees of the government’s anti-

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<sup>4</sup> Exec. Order No. 13627 (Sept. 25, 2012), 77 Fed. Reg. 60,029 (Oct. 2, 2012).

<sup>5</sup> Pub. L. No. 112-239, tit. XVII, 126 Stat. 1632, 2092 (2013).

<sup>6</sup> See Federal Acquisition Regulation, “Ending Trafficking in Persons,” 80 Fed. Reg. 4,967.

<sup>7</sup> Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. §§ 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).

<sup>8</sup> See 22 U.S.C. § 7104(g).

<sup>9</sup> See 48 C.F.R. § 22.1703(a).

trafficking policy and imposes compliance and certification requirements on federal contractors and subcontractors with large contracts performed abroad.<sup>10</sup>

While the FAR prohibited federal contractors and subcontractors from requiring employees to pay recruitment fees, the term “recruitment fees” was not defined in the regulations. In order to comply with both E.O. 13627, which prohibits all recruitment fees, and Title XVII of the National Defense Authorization Act for Fiscal Year 2013, which prohibits only “unreasonable” recruitment fees, the FAR final rule applied the stricter prohibition (i.e., no recruitment fees) but left the scope of the term undefined. Accordingly, further rulemaking to clarify the scope of the prohibition was needed.

Upon publication of the final rule, the FAR Council posted a draft definition of “recruitment fees,” and invited early input by commentators.<sup>11</sup> Following review of early input received, DoD, GSA, and NASA published a proposed rule on May 11, 2016, reflecting a revised definition of “recruitment fees” and inviting public comment on the proposed rule in consideration of the final rule.<sup>12</sup>

#### **FINAL DEFINITION OF “RECRUITMENT FEES”**

Pursuant to the final rule, “recruitment fees” as used in the anti-trafficking regulations refers to “fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.”<sup>13</sup> Of note is that the timing of the fee is irrelevant; the definition makes clear that, if a fee is associated with the recruiting process, it is a recruitment fee, regardless of when the fee is imposed.

The definition provides specific examples of recruitment fees, which the publication notice indicates are provided as illustrative, rather than exhaustive, examples of fees that are prohibited when associated with the recruiting process. The examples include:

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<sup>10</sup> Specifically, 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, publish such plans at their respective workplaces and on their websites, and complete a compliance certification prior to accepting an award. *See* 48 C.F.R. §§ 22.1703(c), 52.222-50(h), 52.222-56.

<sup>11</sup> *See* Defense Acquisition Regulations System, *supra* note 3.

<sup>12</sup> Federal Acquisition Regulation: Combating Trafficking in Persons—Definition of “Recruitment Fees,” 81 Fed. Reg. 29,244 (May 11, 2016).

<sup>13</sup> FAR—“Recruitment Fees,” 83 Fed. Reg. at 65,477 (to be codified at 48 C.F.R. § 22.1702).



- Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending, or placing employees or potential employees;
- Advertising;
- Obtaining permanent or temporary labor certification, including any associated fees;
- Processing applications and petitions;
- Acquiring visas, including any associated fees;
- Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;
- Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;
- An employer’s recruiters, agents or attorneys, or other notary or legal fees;
- Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;
- Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;
- Transportation and subsistence costs, both while in transit as well as from the point of debarkation to the worksite;
- Security deposits, bonds, and insurance; and
- Equipment charges.<sup>14</sup>

In addition, the definition clarifies that a recruitment fee is prohibited regardless of the manner in which the fee is imposed, noting that prohibited fees include those that are:

- Paid in property or money;
- Deducted from wages;
- Paid back in wage or benefit concessions;
- Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute;
- Collected by an employer or a third party, including, but not limited to

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<sup>14</sup> *Id.*

agents, labor brokers, recruiters, staffing firms, subsidiaries/affiliates of an employer, any agent or employee of such entities, and subcontractors at all tiers.<sup>15</sup>

As noted above, it is significant that the final rule clarifies that the operative aspect of a prohibited recruitment fee is that it is a fee associated with the recruiting process, such that the “time, manner, or location” of the imposition of the fee is irrelevant. Also significant is that the rule clarifies that activities that could fall within the definition of recruitment fees outlined in the final rule are not prohibited if they are incurred “as part of normal business practices,” and not “passed on to employees or potential employees.”<sup>16</sup> Thus, the relevant inquiry to determining if the prohibition applies is the purpose for which the fee is incurred and whether the fee is imposed upon the employee or potential employee. The final rule makes clear that a recruiting entity is not prohibited from charging for its services, and indeed recruitment costs can be reimburseable to the prime contractor,<sup>17</sup> they just may not be imposed or passed on to the prospective contract and subcontract employees.<sup>18</sup>

## NEXT STEPS

The final rule clarifies the scope of recruitment fees prohibited by the anti-trafficking regulations, and establishes that the prohibition broadly encompasses many types of fees and charges, without regard to the time or manner imposed. Given the broad applicability of the anti-trafficking regulations, government contractors should be alert to the terms of the final definition, and may need to consult counsel to ensure that their policies and actions remain at all times consistent with the amended FAR regulations.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, 83 Fed. Reg. at 65,478.

<sup>17</sup> *See id.*, 83 Fed. Reg. at 65,476.

<sup>18</sup> *Id.*