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Executive Order Introduces Stricter Anti-Human Trafficking Requirements for Government Contractors and Subcontractors



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On September 25, 2012, President Obama issued an executive order entitled “Strengthening Protections Against Trafficking in Persons in Federal Contracts,”¹ which will have far-reaching consequences for federal contractors and subcontractors both in the U.S. and abroad. This Executive Order and the forthcoming revisions to federal contracting regulations place significantly more responsibility on contractors and subcontractors to act affirmatively to prevent trafficking and forced labor. Contractors or subcontractors must ensure that they and their lower-tier 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. These requirements will apply to a broad range of government contractors, including, for example, a subcontractor that supplies food services for the military mission in Afghanistan, a security contractor that provides security personnel for embassies in Asia, or a contractor that performs construction work on a military base.² Additionally, for the first time, contractors and subcontractors with larger,

¹ Exec. Order No. 13627, 77 Fed. Reg. 60029 (Sept. 25, 2012).

overseas contracts must develop and maintain detailed anti-trafficking compliance programs and provide annual certifications of their anti-trafficking efforts.

The Executive Order charges the Federal Acquisition Regulatory Council with drafting more detailed rules. Covered companies should follow the rulemaking closely and consider participating in the process to express their views. In addition, it is important to start planning for compliance now. The Executive Order already outlines the key measures that will have to be implemented by all covered companies that do business with the federal government.

Enhanced Prohibitions on Human Trafficking. President Obama has described the Executive Order as “raising the bar” to ensure that American tax dollars are never used to support human trafficking.³ The Executive Order strengthens the U.S. government’s existing zero-tolerance policy on trafficking in persons outlined in the Trafficking Victims Protection Act (TVPA).⁴ Current U.S. law already prohibits 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.⁵ The Executive Order establishes significantly more specific prohibitions and requirements with which federal contractors and subcontractors must comply.

Specifically, the Executive Order directs the FAR Council, working with appropriate federal agencies, to revise federal contracting regulations to prohibit *all* contractors, subcontractors, and employees of either from engaging in a broad range of trafficking-related activities including:

- 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;

- charging recruitment fees to employees;

² For more examples of trafficking in government contracts, please see http://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf.

³ President Barack Obama, Remarks to the Clinton Global Initiative (Sept. 25, 2012).

⁴ Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. §§ 7101-7112 (2000).

⁵ 48 U.S.C. 52.222-50. Under the current law, at a minimum, contractors are required to:

- publish a statement notifying employees of the U.S. government’s zero-tolerance policy and obtain written agreement that employees will abide by the policy;

- establish an awareness program to inform employees about the contractor’s anti-trafficking policies, the actions that will be taken for violations of such policy, and the regulations applying to conduct if the contract is being performed outside the U.S.; and

- take appropriate action, including termination, against employees and subcontractors that violate U.S. government policy.

- destroying, concealing, confiscating, or otherwise denying access by an employee to the employee’s identity documents, such as passports or drivers’ licenses; and

- failing to pay 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.⁶

Detailed Compliance Plans and Annual Certifications.

Federal contractors and subcontractors with contracts or subcontracts performed abroad involving services or supplies exceeding \$500,000 will be required to maintain appropriate compliance plans targeting trafficking activities and publish such plans at their respective workplaces and on their websites. Such plans must include at a minimum:

- an employee awareness program about the company’s policy to prevent trafficking, the procurement of commercial sex acts, or the use of forced labor and the actions that will be taken against employees for violations;

- a process for employees to report trafficking violations without fear of retaliation;

- recruitment and housing plans that ensure compliance with applicable host country legal requirements; and

- procedures to prevent subcontractors at any tier from engaging in trafficking in persons, and to monitor, detect, and terminate any subcontractors or subcontractor employees that have engaged in such activities.⁷

The Executive Order contains a significant exception: the compliance plan requirement does not apply to contracts and subcontracts for commercially available off-the-shelf items (“COTS”).⁸ Accordingly, companies that hold supply contracts for commercial items that are sold in substantial quantities in the commercial marketplace will likely not be subject to the above-referenced compliance plan requirements.

As was the case with the recent mandatory disclosure rule,⁹ the Executive Order enhances 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 neither they nor any of its 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.¹⁰

⁶ Exec. Order No. 13627, Sec. 2(a)(1)(A), 77 Fed. Reg. 60030 (Sept. 25, 2012).

⁷ Exec. Order No. 13627, Sec. 2(a)(2)(A), 77 Fed. Reg. 60031 (Sept. 25, 2012).

⁸ Exec. Order No. 13627, Sec. 2(a)(3), 77 Fed. Reg. 60031 (Sept. 25, 2012); 48 C.F.R. 2.101.

⁹ 48 C.F.R. 52.203-13 (requiring covered contractors 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., or a violation of federal civil False Claims Act).

¹⁰ Exec. Order No. 13627, Sec. 2(a)(2)(B), 77 Fed. Reg. 60031 (Sept. 25, 2012).

Self-Reporting of Violations and Contract Clauses. The Executive Order also requires contractors to notify (i) the agency's inspector general, (ii) the agency official responsible for suspension and debarment actions, and (iii) law enforcement, if appropriate, if contractors become aware of any activities that are "inconsistent with" the Executive Order¹¹ or any other applicable law, or that would justify termination under section 106(g) of the TVPA.¹² Contractors must provide "full cooperation" and "reasonable access" to allow contracting agencies and enforcement agencies to conduct audits and investigations to confirm compliance with the Order, TVPA, and all other applicable laws and regulations on trafficking and forced labor.

I. Does the Executive Order affect my company?

What companies are covered? The current trafficking regulations¹³ require only that contractors include the language of TVPA in all subcontracts for the acquisition of services. In contrast, the new prohibitions on specific trafficking-related activities and the requirements on self-reporting and the audit and investigation contract clause will apply to *all* federal contractors, subcontractors, and their employees, regardless of the size of the contract or subcontract and whether the contracts are performed in the U.S. or abroad.

The new compliance plan and certification requirements will apply only to contractors and subcontractors that perform a non-COTS contract or subcontract in which the estimated value of the supplies acquired or services required outside the United States exceeds \$500,000.

When do the new rules go into effect? The Executive Order is effective immediately,¹⁴ but will only apply to solicitations issued on or after the effective date of the FAR revisions. The Executive Order requires these revisions to be made by March 25, 2013. In recent years, however, the FAR revision process has become protracted, and it is far from certain that the rulemaking process will be complete by the date contemplated by the Executive Order.

II. What will be the process for revising the FAR? Will There be a Chance to Comment? The FAR is maintained by a multi-agency working group known as the FAR Council. The FAR Council, in turn, works through teams that are responsible for developing regulatory language. Typically, the FAR Council will publish for public comment either a proposed rule or an interim rule. Under the Office of Federal Procurement Policy Act, and absent compelling circumstances, a proposed (rather than interim) rule must issue if the new rule will have a significant adverse effect on the public, includ-

ing contractors.¹⁵ Given the scope of the Executive Order, we expect that a proposed rule will issue.

Following publication of the proposed rule, the public comment period is generally 30 - 60 days. In some instances, public hearings are held. After consideration of the public comments, the Council will publish either another proposed rule or a final rule setting forth the contract clause that will implement the Executive Order.

III. What kind of compliance program is required for large overseas contracts? The Executive Order requires contractors and subcontractors who supply non-COTS services or supplies exceeding a value of \$500,000 to have a compliance program that pertains to the portion of the contract or subcontract performed outside the United States. 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. Based on our experience in designing and implementing compliance programs, and the guidelines in the Executive Order, the key elements of a credible program will likely include:

- A risk assessment tailored to the nature, scope, and location of the activities performed under the contract or subcontract;
- A written policy outlining the company's prohibition on human trafficking, the procurement of commercial sex acts, or the use of forced labor, including a policy on actions that will be taken against employees who violate this policy;
- Training on the company's policies and procedures to employees on a regular basis;
- Communication to those working on its behalf, such as subcontractors of the company's policy on human trafficking;
- A process for employees to report on suspected trafficking activities, and an associated non-retaliation policy;
- Evaluation and monitoring of subcontractors' compliance with company standards on human trafficking with due diligence, compliance certifications, and/or an internal or third-party audit;
- A well-articulated and enforced recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees to employees, and ensures that wages meet applicable host country legal requirements;¹⁶ and
- A housing plan (if one is provided) that meets the host country housing and safety standards.¹⁷

¹¹ The Executive Order accomplishes many of the goals from two pending House and Senate bills, H.R. 4259 and S. 2234, known as the "End Trafficking in Government Contracting Act of 2012." That legislation goes farther, however, than the Executive Order, by requiring contractors to notify the Inspector General of any "credible evidence" of trafficking occurring on any contract or any subcontracts and allowing for criminal fines, imprisonment, or both in the case of trafficking violations.

¹² 22 U.S.C. 7104(g).

¹³ 48 C.F.R. 52.222-50.

¹⁴ Exec. Order No. 13627, Sec. 4, 77 Fed. Reg. 60032 (Sept. 25, 2012).

¹⁵ 41 U.S.C. 418b.

¹⁶ Contractors and subcontractors performing services abroad will encounter particular difficulties that should be considered in implementing a compliance program. For example, the complete prohibition on employee recruitment fees could present a particular challenge for contractors working in parts of the world where placement fees or commissions are a common means for foreign workers to find employment.

¹⁷ Exec. Order No. 13627, 77 Fed. Reg. 60031 (Sept. 25, 2012).

IV. What will happen if my company doesn't comply? Under the current trafficking regulations, a contractor's failure to comply with the existing trafficking requirements may render the contractor subject to, among other remedies:

- required removal of a contractor employee or employees from the performance of the contract;
- required subcontractor termination;
- suspension of contract payments;
- loss of award fee for the performance period in which the government determined contractor non-compliance;
- termination of the contract for default in accordance with the termination clause of this contract; or
- suspension or debarment.¹⁸

While the Executive Order does not address remedies, the existing remedies most likely will remain in place and could be supplemented. Significantly, the Executive Order further enhances the government's enforcement capacity, affirmatively requiring self-reporting and access for audits and investigations. How the requirements and consequences are ultimately worded in the FAR remains to be seen, but federal contractors should take note of the government's heightened sensitivity to and awareness of the issue of trafficking and federal contracts.

¹⁸ 48 U.S.C. 52.222-50.

Next Steps. Prior to issuance of the Executive Order, Congress had been considering legislation targeted at many of the same issues raised in the Executive Order.¹⁹ It remains to be seen whether Congress will take further action or whether it will cede control of this issue to the executive branch. The president has tasked the Interagency Task Force to Monitor and Combat Trafficking in Persons with a continued study of trafficking issues for contracts performed substantially within the United States.²⁰

The President's Trafficking Executive Order imposes new and important requirements on U.S. government contractors and subcontractors. In the next six months, we anticipate there will be substantial discussion with the U.S. government and the contracting public of how the Executive Order will be implemented in the FAR. Companies will have the opportunity to comment on questions including the scope of the obligations, what should be reported and how, and what expectations the government will have about compliance requirements. During this period, companies should start planning for implementation of their new responsibilities. After new rules are promulgated, companies will need to finalize and promulgate policies and procedures, train on them, and ensure that they are implemented as contemplated and consistently with the FAR requirements.

¹⁹ See End Trafficking in Government Contracting Act of 2012, H.R. 4259, introduced by Congressman Lankford (R-OK) and S. 2234, introduced by Senator Blumenthal (D-CT).

²⁰ Exec. Order No. 13627, Sec. 2(b), 77 Fed. Reg. 60032 (Sept. 25, 2012).