

How To Approach The New Anti-Human Trafficking Rule

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Law360, New York (October 17, 2013, 4:01 PM ET) -- On Sept. 26, 2013, the Federal Acquisition Regulatory (FAR) Council published a proposed rule imposing significant responsibility on contractors and subcontractors to act affirmatively to prevent human trafficking and forced labor. The proposed regulations came a year and a day after President Obama issued the groundbreaking executive order, "Strengthening Protections Against Trafficking in Persons in Federal Contracts," aiming to eliminate human trafficking by government contractors and subcontractors^[1] and nearly nine months after the 2013 Defense Reauthorization Act was enacted with largely analogous requirements.^[2]

Simultaneously, the U.S. Department of Defense also published a new proposed rule amending the Defense Acquisition Regulations System (DFARS) to further implement the DOD's anti-trafficking policy and supplement government-wide changes proposed in connection with the executive order.^[3] Comments from the public on the proposed FAR and DFARS regulations are due no later than Nov. 25, 2013.

The proposed rules will have far-reaching consequences for federal contractors and subcontractors both in the U.S. 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.

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.^[4]

Additionally, for the first time, contractors and subcontractors with larger, overseas contracts must develop and maintain detailed anti-trafficking compliance programs and provide annual certifications of their anti-trafficking efforts.

The proposed rule amending the FAR has a 60-day comment period. Covered companies should continue to follow the rulemaking closely and consider expressing their views during the process. Companies should review their compliance programs and make any modifications that are needed to ensure that they are in compliance with the anticipated requirements.

The FAR amendments largely track the requirements outlined in the executive order and statute; thus, regardless of the precise wording of the final regulations, companies already have a very good idea about the key general measures that will have to be implemented by all covered companies that do business with the federal government. Those measures are summarized below.

New Obligations under the Proposed Rule Applicable to All Federal Contracts

President Obama described the executive order as “raising the bar” to ensure that American tax dollars are never used to support human trafficking.[5] The executive order and the FAR amendments implementing it strengthen the U.S. government’s existing zero-tolerance policy on trafficking in persons outlined in the Trafficking Victims Protection Act (TVPA).[6]

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.[7] The proposed rule establishes significantly more specific prohibitions and requirements with which federal contractors and subcontractors must comply.

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

- Destroying, concealing, confiscating or otherwise denying access by an employee to the employee’s identity documents, such as passports or drivers’ licenses
- 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
- Providing or arranging housing that fails to meet the host country and safety standards
- Failing to provide a written employment contract, recruitment agreement or similar work paper in the employee’s native language before the employee parts from his or her country of origin
- 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.[8]

In addition, before returning them to their country of origin, contractors must protect and interview all employees suspected of being victims or witnesses to prohibited activities. The proposed rule prohibits contractors from preventing or hindering the cooperation of these employees with government authorities.[9]

Finally, the proposed rule requires the contracting officer to include in the Federal Awardee Performance and Integrity Information System (FAPIIS) any allegations substantiated in an inspector general report in which the contractor violated the prohibitions in the executive order or the TVPA.[10]

The proposed rule also requires contractors to notify the agency inspector general, the agency official responsible for suspension and debarment actions and law enforcement, if appropriate, if contractors become aware of credible violations.

Detailed Compliance Plans and Annual Certifications Required for Larger Contractors and Subcontractors

Under the proposed rule, 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 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
- A process for employees to report trafficking violations without fear of retaliation
- 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
- A housing plan (if the contractor provides or arranges housing) that ensures compliance with applicable host country legal requirements or explains any variance
- Procedures to prevent agents and subcontractors at any tier from engaging in trafficking in persons, and to monitor, detect and terminate any agents, subcontractors or subcontractor employees that have engaged in such activities

The proposed rule contains a significant exception: The compliance plan requirement does not apply to contracts and subcontracts for commercially available off-the-shelf items (COTS). Accordingly, if the regulations are finalized as drafted, companies that hold supply contracts for commercial items that are sold in substantial quantities in the commercial marketplace will not be subject to the above-referenced compliance plan requirements.

As was the case with the recent mandatory disclosure rule,[11] the proposed rule 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 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.[12]

New DFARS Requirements for Defense Contractors

The proposed amendments to the DFARS brought forth by the DOD add 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.

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.

Additionally, under the proposed rule, all solicitations that exceed the simplified acquisition threshold, including contracts for acquisition of commercial items, must include a new representation that the offerors' hiring practices address combating trafficking in persons and that their companies are complying with these requirements.

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 proposed 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. Specifically, contractors must ensure that their employees are aware of their rights to the following:

- Hold their own identity or immigration documents, such as a passport or driver's license
- Receive agreed upon wages on time
- Take lunch and work breaks
- Elect to terminate employment at any time
- Identify grievances without fear of reprisal
- Have a copy of their employment contract in a language they understand
- Receive wages that are not below the legal in-country minimum wage
- Be notified of their rights, wages and prohibited activities prior to signing their employment contract
- If housing is provided, live in housing that meets host-country housing and safety standards

Does the Proposed Rule on Strengthening Protections against Human Trafficking Affect My Company?

What Companies Are Covered?

The current trafficking regulations^[13] require only that contractors include the language of the 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 was effective as of Sept. 25, 2012, but only applies to solicitations issued on or after the effective date of the FAR revisions. The FAR Council published the proposed rule in the Federal Register on Sept. 26, 2013, and the public is invited to comment on the rule until Nov. 25, 2013.

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.

My Company Bids for Large, Overseas Contracts. What Kind of Compliance Program Does This Proposed Rule Require?

The proposed rule 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 proposed rule, the key elements of a credible program will likely include the following:

- 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 nonretaliation 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^[14]
- A housing plan (if one is provided) that meets the host country housing and safety standards

What Will Happen If My Company Doesn't Comply with the New Requirements?

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, the following:

- 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 noncompliance
- Termination of the contract for default, in accordance with the termination clause of this contract
- Suspension or debarment[15]

The proposed rule notes that after determining in writing that adequate evidence exists to suspect that the contractor, contractor employee, subcontractor, subcontractor employee or their agents engaged in severe forms of trafficking in persons during the period of performance of the contract; the contractor, contractor employee, subcontractor, subcontractor employee or their agents procured a commercial sex act during the period of performance of the contract; the contractor, contractor employee, subcontractor, subcontractor employee or their agents used forced labor in the performance of the contract; or the contractor failed to comply with the new requirements established by the proposed rule, the contracting officer may pursue any of the existing remedies specified under current law.

Significantly, the proposed rule allows the contracting officer to take into consideration as a mitigating factor whether the contractor had a trafficking in persons-compliance plan or awareness program at the time of the violation, and whether the contractor was in compliance with the plan, when determining the appropriate remedies.

The contracting officer may also consider as an aggravating factor the failure of a contractor to abate an alleged violation or enforce the requirements of a compliance plan when directed by a contracting officer to do so. These changes highlight the government's heightened sensitivity to and awareness of the issue of trafficking and federal contracts.

Next Steps

The proposed rule imposes new and important requirements on U.S. government contractors and subcontractors. In the next two months, we anticipate there will be substantial discussion with the U.S. government and the contracting public about the revisions to the FAR.

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.

[1] Exec. Order No. 13627, 77 Fed. Reg. 60029 (Sept. 25, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>.

[2] Public Law 112-239. Although largely similar to the Executive Order, the statute includes amendments to the U.S. Criminal Code to add criminal liability for violations of anti-trafficking requirements and prohibits all labor recruitment fees, as opposed to only unreasonable recruitment fees.

[3] 78 Fed. Reg. 59328 (Sept. 26, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-26/pdf/2013-23501.pdf>.

[4] For more examples of trafficking in government contracts, please see

http://www.aclu.org/files/assets/hrp_traffickingreport_web_0.pdf.

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

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

[7] 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 against human trafficking 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.

[8] 78 Fed. Reg. 59318 (Sept. 26, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-26/pdf/2013-23311.pdf>.

[9] Id.

[10] Id.

[11] 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).

[12] 78 Fed. Reg. 59318-19 (Sept. 26, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-26/pdf/2013-23311.pdf>.

[13] 48 C.F.R. 52.222-50.

[14] 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.

[15] 48 U.S.C. 52.222-50.

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