

Combating Human Trafficking: Five Key Concepts for Ensuring Compliance with the Final Rules

Winter 2015

Although many federal government contractors may have begun the process of reviewing and revising company policies to address the prohibition of human trafficking outlined in the 2013 proposed rules, the Federal Acquisition Regulation (FAR) Council's and Department of Defense's (DOD) issuance of final rules last month renders contractors' understanding of and ability to comply with the requirements a timely and pressing issue. See 80 Fed. Reg. 4967 (Jan. 29, 2015); 80 Fed. Reg. 4999 (Jan 29, 2015).

History of the Rulemaking Effort

Executive Order 13627-Strengthening Protections Against Trafficking in Persons in Federal Contracts, which was issued on September 25, 2012, required the FAR Council to issue regulations to effectuate the Government's zero-tolerance policy on trafficking in persons by federal contractors and subcontractors, primarily by building on and expanding existing FAR provisions prohibiting contractors, subcontractors, and their respective employees from engaging in human trafficking.

The FAR Council published the proposed rule on September 26, 2013, and conducted a public meeting in March 2013. The Council received numerous public comments seeking clarity regarding requirements and applicability. In particular, many of these concerns focused on clarifying the extent to which the rule applies to commercial items and commercially available off-the-shelf (COTS) items, tenets of the compliance plan, and how prime contractors and higher tier subcontractors should monitor the compliance of lower tier subcontractors.

The final rule retained the requirements and prohibitions stated in the proposed rule, but also clarified various terms and the applicability of the rule. (We previously identified some noteworthy changes here.) The final rule goes into effect on March 2, 2015, and any existing indefinite-delivery/ indefinite-quantity contracts will be modified by the Contracting Officer to include the clause for future orders.

DOD simultaneously published a final Defense Federal Acquisition Regulation Supplement (DFARS) to improve awareness, compliance, and enforcement of DOD policies on combating trafficking in persons that went into effect on January 29, 2015. There were no substantive changes from the September 26, 2013 DFARS proposed

rule as a result of public comments.

Compliance with the Final Rules

The final rule, as implemented in the FAR, prohibits *all* federal contractors and subcontractors from engaging in various trafficking activities, including procuring commercial sex acts during the period of the contract, concealing employees' identity or immigration documents, or using misleading practices during employee recruitment. Although this prohibition on such activities is stated in fairly simple terms, complexities abound in the rule's mandate that contractors implement and certify adherence to a formal compliance plan. This article outlines a few of the key considerations for contractors in ensuring compliance with the final rule.

1. Understand Key Terms and Scope. As a threshold matter, it is important to understand what exactly is prohibited by the rule. The final rule prohibits "severe forms of trafficking in persons"-a phrase defined in the FAR to mean (i) sex trafficking where "a commercial sex act is induced by force, fraud or coercion" or the person induced to perform is a minor, or (ii) the "recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." In addition, contractors, their agents and subcontractors, are prohibited from procuring "commercial sex acts" during the period of performance, defined in FAR 22.1702 as "any sex act on account of which anything of value is given to or received by any person."

2. Implement a Robust Compliance Plan. Under the final rule, certain contractors and subcontractors are required to implement and maintain, during the period of contract performance, a "compliance plan" related to preventing, monitoring, and reporting employee and subcontractor activities. The compliance plan is to outline the vendor's awareness program, process for reporting violations, and procedures for preventing trafficking. Of particular note, the plan must include procedures for preventing agents and subcontractors from engaging in trafficking in persons, and for monitoring, detecting, and terminating agents, subcontracts, or subcontractor employees that have engaged in such activities.

Although the Combating Trafficking in Persons contract clause is required to be included in all contracts and subcontracts, it is worth noting that two categories of contracts and subcontracts are excluded from the specific requirement to implement the compliance plan: (i) contracts for COTS supplies, and (ii) contracts for supplies or services to be performed outside the United States, where the estimated value of either type of contract does not exceed \$500,000. Notwithstanding these limited exceptions-which may exempt a contractor only from having a compliance plan in place for one contract or portion of a contract, but not any others the vendor holds-it behooves all vendors that do business with the Government to consider implementing a compliance plan in accordance with the final rule, or to examine any existing plan to ensure it is sufficiently robust to meet these requirements.

The FAR Council recognizes that the components of the compliance plan will differ across industries and contracts based on the risk of trafficking in persons related to the good or service being acquired, and whether the contractor has direct access to the work site, and other factors. For example, the Council notes

that where a prime contractor has direct access to a work site, it would be expected to visit the site and look for signs of trafficking. By contrast, where subcontractors are remotely or distantly located, the prime contractor would need to review plans, policies, procedures, and reports to ensure and certify compliance. Accordingly, for each contract, contractors should consider the most practical means of monitoring the activities of subcontractors and agents. Similarly, for contracts with greater risks of trafficking, the compliance plan should likely be more robust, which may include tailored training.

3. Understand Flowdown Requirements. The final rule requires the clause to be flowed down to all subcontracts and in all contracts with agents, regardless of dollar value, such that every lower-tier subcontractor is responsible for ensuring compliance by its lower-tier subcontractors. Of particular note, however, the FAR Council made clear that the rule is intended to make the prime contractor responsible for preventing subcontractors *at any tier* from engaging in trafficking in persons: "vigilance by the prime contractor is necessary" to combat situations in which subcontractor employees take kickbacks from traffickers but do not report their own violations or those of their agents or lower-tier subcontractors. Thus, contractors may choose to take a conservative approach to monitoring lower-tier subcontractor compliance, for example by including periodic reminders to subcontractors of *their* obligations under the Combating Trafficking in Persons clause, in their compliance plans.

4. Outline Plan for Reviewing and Certifying Compliance. Contractors and subcontractors charged with implementing a compliance plan are also required to certify annually that they have affirmatively implemented the plan, and that, to the best of the vendor's knowledge and belief following "due diligence," neither it, nor any of its subcontractors have engaged in any of the prohibited activities. Or, if its agents and subcontractors have engaged in human trafficking activities, the contractor or subcontractor has taken appropriate remedial actions. In response to comments questioning the meaning and requirements of "due diligence," the FAR Council noted that the phrase is not defined so as to provide contractors flexibility in exercising business judgment. However, in light of the severe penalties for noncompliance, which may include withholding payment or award fee, contract termination, suspension or debarment, and false claims liability, contractors should not take flexibility to mean that a lax or superficial review process will suffice.

In fact, based on the language and preamble of the final rule, a credible compliance program would include, at a minimum, evaluation and monitoring of subcontractors' and agents' compliance with the company's standards on human trafficking through compliance certifications. A more conservative approach may include more robust monitoring of subcontractors' and agents' through internal or third party audits.

5. Understand DFARS Rule Applicability and Requirements. The DFARS rule primarily addresses notification of contractor employees regarding anti-trafficking requirements and reporting obligations. In particular, the rule requires all DoD solicitations that exceed the simplified acquisition threshold, including those for commercial item contracts, to advise offerors that, by submitting a proposal, the offeror represents that it will not engage in any trafficking, has hiring and subcontracting policies in place to protect employees' rights (and will comply with those policies), and has notified its employees and subcontractors both of the responsibility to report trafficking in persons violations, and of employee protection from retaliation for whistleblowing on such activities. To that end, DFARS 252.203-7004 requires DoD contractors performing

contracts exceeding \$5 million to prominently display the DoD Combating Trafficking in Persons and Whistleblower Protection hotline posters, unless the contract is a commercial item contract. Lastly, the rule requires the display of a contractor bill of rights when the contract includes DFARS 252.225-7040, Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States. This obligation includes posting the rights in employee work spaces in English and in any foreign language(s) spoken by a significant part of the workforce.

Conclusion

Although the extent to which a contractor is required to proactively seek and certify implementation of and adherence to a formal compliance plan depends in part on the type of contract at issue, given the expansive applicability of the rules and the high stakes associated with noncompliance, it is important for *all* vendors doing business with the Government to understand the anti-trafficking requirements and proactively take steps to ensure compliance.