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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Final Anti-Human Trafficking FAR and DFARS Rules Create Significant New Supply Chain Burdens and Liabilities for Government Contractors

*By Robert K. Huffman, Scott M. Heimberg, Kimberly A. Ball, and Carroll A. Skehan**

This article explains the final anti-human trafficking rules amending the current Federal Acquisition Regulation and Defense Federal Acquisition Regulation Supplement provisions, which contain several noteworthy additions and clarifications with crucial implications for government contractors, affecting both their administrative and financial burdens while increasing their potential liability.

Recently, the Department of Defense (“DOD”), the National Aeronautics and Space Administration (“NASA”) and the General Services Administration (“GSA”) published the final anti-human trafficking rule amending the current Federal Acquisition Regulation (“FAR”) provisions. The final rule, titled Ending Trafficking in Persons, substantially tracks the proposed rule published on September 26, 2013, with a few notable additions and clarifications. The final rule retains the proposed requirement that for contracts with an estimated value over \$500,000 for supplies acquired outside the United States or services to be performed outside the United States, the contractor must certify both prior to award and annually regarding their human trafficking compliance and monitoring. As in the proposed rule, contracts for commercial-off-the-shelf (“COTS”) items are exempt from this requirement even if they meet the other threshold requirements.

The final rule contains several noteworthy additions and clarifications with crucial implications for government contractors, affecting both their administrative and financial burdens while increasing their potential liability. The FAR rule took effect March 2, 2015 and applies to all new contracts as well as future orders under existing indefinite-delivery/indefinite-quantity (“IDIQ”) contracts. These requirements force government contractors to quickly evaluate and update their compliance programs addressing human trafficking. DOD simultaneously published a final Defense Federal Acquisition Regulation Supplement (“DFARS”) anti-human trafficking rule that went into effect on January 29, 2015 and is discussed below.

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NEW FAR REQUIREMENTS

Government contractors will need to ensure their compliance with the rule's new, more robust requirements. The rule creates increased obligations for all contractors and imposes even weightier responsibilities for contractors if a contract is for supplies, other than entirely COTS items, acquired outside the United States, or services to be performed outside the United States, and the estimated value of the contract is over \$500,000.

All Contracts Regardless of Type or Value

The final rule prohibits government contractors and their employees, regardless of the contract type or value, from:

- engaging in severe forms of human trafficking during the period of performance of the contract;
- procuring commercial sex acts during the period of performance of the contract;
- using forced labor in the performance of the contract;
- destroying, concealing, confiscating or otherwise denying employees' access to identity or immigration documents;
- engaging in fraudulent or misleading recruitment practices;
- employing recruiters that violate the labor laws of the country where the recruitment takes place;
- charging recruiting fees;
- failing to provide return transportation to an employee who is not a national of the country where the work is to take place, subject to limited exceptions;
- providing housing, if required, that fails to meet host country safety or housing laws; or
- failing to provide a written work document, if required.

The final rule mandates that all contractors inform employees and agents of these requirements and the possible repercussions if the requirements are violated. Contractors are required to immediately disclose credible information to the Contracting Officer and the agency Inspector General of a human trafficking violation and to fully cooperate with any investigation. The final rule includes administrative proceedings that provide contractors an opportunity to respond to any Inspector General report prior to any final determination as to whether allegations are substantiated. A violation of these regulations may result in suspension of contract payments, termination of a contract, or suspension or

debarment, as well as False Claims Act and other liability.

Reports of substantiated human trafficking violations are posted by the Contracting Officer in the Federal Awardee Performance and Integrity Information System (“FAPIS”). The final rule clarifies that reports entered concerning subcontractors will be posted to the FAPIS record of the prime contractor. However, prime contractors will have the ability to respond to a report in FAPIS with any mitigating factors, such as prior implementation of a compliance or awareness program or taking remedial action to address the violation.

The final rule includes definitions of “agent,” “subcontractor” and “subcontract” in response to requests for clarification of these terms in the proposed rule. These definitions confirm a broad application of the rule in accordance with the U.S. government’s zero-tolerance policy for engaging in trafficking activities. The inclusion of these definitions provides insight into the extent to which prime contractors are responsible for the actions of their sub-tier contractors and agents.

Contracts with a Portion in Excess of \$500,000 Outside the U.S.

If any part of a contract is for supplies, other than entirely COTS items, acquired outside the United States, or services to be performed outside the United States, and the estimated value of the contract is over \$500,000, before the contract may be awarded, the apparent successful offeror must certify that, (1) it has implemented an anti-human trafficking compliance plan and procedures to prevent human trafficking violations; and (2) has performed due diligence on its agents and subcontractors and taken remedial actions, if necessary. After receiving the contract, the contractor must annually certify during the course of the contract that, to the best of its knowledge, neither it, nor any of its agents or subcontractors has engaged in human trafficking violations, or if such violations have been identified, appropriate remedial actions have been taken. The regulators clarify that only contracts entirely for COTS items are exempt from the requirements for a compliance plan and certification. If a contract is not entirely for COTS items and meets the other threshold requirements, then a compliance plan and certification is required. Contractors are required to flowdown the substance of the revised human trafficking clause at FAR 52.222-50 in all subcontracts, and any subcontractor that meets the threshold requirements must also comply with compliance plan, certification, and flowdown requirements.

Regulators note that the due diligence required for these contracts is a risk-based business decision requiring analysis of the risks inherent in each particular situation. Due diligence must be appropriate to the size and complexity of the particular contract and may require measures beyond

collection of subcontractor certifications. Thus, it is incumbent on government contractors to proactively assess the nature of their current activities to ensure their compliance programs meet the needs of their business to conform to these new requirements.

The comment section of the regulations provides clarification that prime contractors are expected to prevent subcontractors “at any tier from engaging in trafficking in persons” and must “monitor, detect, and terminate any subcontractors or subcontractor employees that have engaged in such activities at any tier.” The appropriate level of monitoring required will be difficult for contractors to determine given the extensive global supply chains involved and the often hidden nature of human trafficking violations.

NEW DFARS REQUIREMENTS

DOD also issued a final rule implementing new DFARS policies regarding human trafficking. The rule requires contractors with a contract or subcontract for a non-commercial item (defined more broadly than COTS items) with a value exceeding \$5 million to comply with requirements regarding the display of DOD hotline posters. The rule also requires all contracts and solicitations exceeding the simplified acquisition threshold to include a contractor representation regarding anti-human trafficking policies. Finally, the new rule requires contractors to ensure that contractor employees supporting U.S. Armed Forces deployed outside the United States in defined operations are aware of certain employee rights. This duty includes the requirement to post these employee rights in employee work spaces and to enforce these rights.