

Government Contracts Alert

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Proposed Anti-Human Trafficking FAR and DFARS Revisions May Impose Significant New Burdens and Liability on Government Contractors

On September 26, 2012, the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA) and the General Services Administration (GSA) proposed revisions to the existing anti-human trafficking Federal Acquisition Regulation (FAR) clauses, which are expected to become final before the end of 2014.¹ The modifications are projected to impose severe administrative and financial burdens on government contractors and are likely to increase contractor liability. The increased focus on human trafficking, both domestically and globally, will undoubtedly force government contractors and corporate entities alike to evaluate their exposure and vulnerability to this serious issue.

The Proposed FAR Revisions

DoD, NASA and GSA proposed the revisions, in part, to comply with Executive Order 13627, "Strengthening Protections Against Trafficking in Persons in Federal Contracts,"² which mandates changes to the FAR to bolster the government's zero-tolerance policy on human trafficking by federal contractors and subcontractors and to ensure American tax dollars are not spent on illegal labor arrangements. The proposed changes to the FAR prohibit certain behavior by all government contractors and impose additional requirements, including creating and maintaining a compliance program aimed at preventing human trafficking on any portion of a contract performed outside the U.S. where such portion exceeds \$500,000.

New Requirements That Impact All Contracts, Regardless of Value or Type

In addition to the current regulations that require contractors to comply with notification requirements, the proposed rules also prohibit all contractors performing contracts of any dollar value or type from:

- denying an employee access to his or her identification documents
- using false or misleading recruitment practices, including failing to provide an employee truthful information pertaining to the location of work
- forcing employees to pay recruitment fees
- failing to provide employees return travel arrangements upon the end of their engagement

¹ Federal Acquisition Regulation; Ending Trafficking in Persons, 78 Fed. Reg. 59317, 59317 (to be codified at 48 C.F.R. pts. 1, 2, 9, 12, 22 and 52).

² Exec. Order No. 13627, 77 Fed. Reg. 60029 (Oct. 2, 2012).

- housing employees in conditions that violate the health and safety standards of the host country
- failing to provide employees employment contracts when they are required.

New Requirements That Only Impact Contracts With a Portion in Excess of \$500,000 to be Performed Outside the U.S.

Prior to award and annually during performance, such contractors must certify that they performed due diligence on their agents and subcontractors and that they will continue to monitor and endeavor to prevent anti-human trafficking regulation violations. Additionally, such contractors must certify that, following due diligence, either (1) the contractor's agents or subcontractors have not engaged in human trafficking or (2) any violations discovered were appropriately addressed.

In addition to the compliance procedures outlined above, the proposed regulations require that successful bidders develop an anti-human trafficking compliance plan that:

- notifies its employees of the government's zero-tolerance policy on human trafficking, the conduct prohibited by the anti-trafficking regulations and the punishment that may be imposed for violating the regulations
- educates employees on how they should report activity that violates the zero-tolerance policy
- allows only the use of recruitment companies employing trained recruiters, disallows charging workers recruitment fees and pays the workers they place the host country's minimum wage
- ensures housing that satisfies the host country's minimum requirements
- monitors agents or subcontractors to ensure they refrain from human trafficking and strives to prohibit them from doing so.

The contractor must post the relevant components of the compliance plan on its website and at the workplace by no later than the start of contract performance.

Enhanced Penalties for Violations

In addition to the current penalties the government may impose for anti-human trafficking regulation violations (including suspension of payment, debarment and termination), the proposed regulations allow the government to forgo exercise of a contract's option periods. Violations of the new regulations may also result in liability under the False Claims Act or expose a company to criminal sanctions.

Corresponding DFARS Modifications

On the same day that DoD, NASA and GSA proposed the FAR changes, DoD proposed similar changes to the Defense Acquisition Regulation System (DFARS).³ DFARS proposed changes that would apply to

³ See Defense Federal Acquisition Regulation Supplement: Further Implementation of Trafficking in Persons Policy, 78 Fed. Reg. 59325, 59327-28 (to be codified at 48 C.F.R. pts. 203, 204, 212, 222 and 252).

defense contractors and impose requirements similar to those of the proposed FAR modifications. However, defense contractors also must ensure that their employees accompanying the U.S. armed forces are aware of their rights to “[r]eceive agreed upon wages on time” and to “[t]ake lunch and work breaks.”⁴ Further, in addition to the DoD Hotline posters that DoD contractors currently must display, the proposed DFARS rule changes will require contractors performing DoD contracts in excess of \$5 million to display “Combatting Trafficking in Persons and Whistleblower Protection” posters at worksites.

Anticipated Impact on Government Contractors

The proposed rule changes exceed current state and federal law disclosure requirements with regard to human trafficking. The pre-award compliance certification, which applies to any portion of a contract performed outside the U.S. exceeding \$500,000, will require extensive due diligence on the part of a contractor before performance begins, potentially causing delays and increased costs. Additionally, for any portion of a contract outside the U.S. in excess of \$500,000, the proposed rules require prime contractors to engage in extensive monitoring and prevention techniques with regard to their subcontractors and agents during performance, in addition to the changes that apply to all contracts. Such contractors will also be held responsible for the actions of their subcontractors and agents, thereby increasing the contractors’ potential liability. Defense contractors are particularly vulnerable to increased liability for human trafficking violations, given the heightened risk of human labor trafficking associated with non-professional work on military bases in conflict areas, such as Iraq and Afghanistan, where nationals of the poorest countries are most likely to become trafficking victims.

Because the final rules will likely be similar to those proposed, contractors should evaluate their current anti-human trafficking compliance policies and prepare to incorporate the new requirements now to ensure compliance with the modified regulations upon finalization.

⁴ Id. at 59328.

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