

NEW FAR RULE: HUMAN TRAFFICKING

Compliance and Reporting Implications for Contractors

THE NEW RULE

The new Federal Acquisition Regulation (“FAR”) final rule, [“Ending Trafficking in Persons.”](#) became effective on March 2, 2015. The final rule, issued by the Department of Defense, General Services Administration, and National Aeronautics and Space Administration, implements Executive Order 13627, entitled “Strengthening Protections Against Trafficking in Persons in Federal Contracts.” This new rule poses **compliance challenges** for contractors and subcontractors on government projects.

The new rule provides new policies to ALL contracts, as well as new policies and regulations for contracts, or parts of contracts, performed outside the United States that exceed \$500,000.

The former rules, FAR 22.1700-05 “Combating Trafficking in Persons” and related contract clause FAR 52.222-50, addressed efforts to stop human trafficking by prohibiting contractors, subcontractors, and their employees from engaging in trafficking of persons, procuring commercial sex-acts, or using forced labor in the performance of a government contract.

The new final rule adds the definition of “subcontract” and “subcontractor” according to the definitions contained in [FAR 3.1001](#), defining “subcontract” to mean “any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.”

Two important aspects of contractors’ increased obligations are clarified by the new rule: (1) the certification and compliance plan requirements, and (2) the requirement to disclose information to the contracting officer and agency Inspector General.

PROHIBITIONS OF NEW RULE

The new rule 22.1703 prohibits contractors, subcontractors, their employees and agents, from the following acts relating to government solicitations and government contracts:

- Misleading or fraudulent recruitment practices
- Procuring commercial sex acts during contract performance
- Using forced labor during contract performance
- Charging employees recruitment fees
- Failing to pay return transportation for employees
- Using recruiters that do not comply with local labor laws of country where recruiting

occurs

Note that there is no minimum exception to this rule. All contractors and suppliers, from the Prime to the smallest materials supplier are subject to the reach of these prohibitions.

CERTIFICATION/COMPLIANCE PLAN REQUIREMENTS

In addition to the new prohibitions, the new rule requires a **certification** and **compliance plan** for any portion of a contract for supplies (other than commercially available off-the-shelf items—“COTS”), or services to be performed outside of the United States, with an estimated value over \$500,000. The contractor on such contracts must certify that it has a compliance plan in place before contract award. The contractor certifies that it, (1) implemented a compliance plan and procedures to prevent, monitor, and detect trafficking in persons that is prohibited by this rule, and (2) has conducted due diligence to confirm that its agents, and its subcontractors and their agents do not participate in prohibited activity. The contractor then must re-certify annually thereafter during the life of the project.

The impact of the reporting requirements is potentially wide-reaching. Contractors are required to “promptly notify” the government of any suspected FAR violations by its employees or subcontractors upon receipt of credible information that indicates violation of the new rule. Likewise, subcontractors must report suspected violations, and violations by their subcontractors or suppliers, all the way down the supply chain.

Obviously, this puts a potentially challenging compliance burden on contractors, especially given that the new rule applies to “all” contracts. For example, a toilet paper supplier has the same duty as an aircraft navigation system supplier to be aware of and report any potential violations. Furthermore, as companies certify that their services and products are FAR compliant, the potential liability for “false certification” arises if a contractor has ignored evidence that it, or a member of its supply chain, has violated the new rule and it certifies anyway.

VIOLATIONS AND PENALTIES

Conducting prohibited activity, or non-compliance with the certification/compliance plan, will result in a penalty as set forth in the new rule. **Penalties range from** requiring the contractor to remove an employee from the project, to requiring the contractor to terminate a subcontractor, to suspension or debarment of the contractor. Violations and corresponding penalties are to be determined on a case-by-case basis.

If a contractor violates the new rule, the contracting officer or agency suspending or debarring official may consider mitigating factors in determining the penalty. Mitigating factors may include whether the contractor had a compliance plan in place, was in compliance with its plan at the time of violation, or whether the contractor has taken remedial actions. Similarly, aggravating factors may also be considered.

CONCLUSION

This new “human trafficking” rule poses a significant **compliance challenge** to contractors, as well as creating greater **exposure to risk**. Given that subcontractors and suppliers down the supply chain are less likely to be aware of, or in compliance with the new rule increases the burden on contractors to ensure compliance under its scope of the project. Accordingly, contractors, subcontractors, and suppliers should review the new rule and modify their existing policies to bring them into compliance. Because the penalties can be severe, contractors would be wise to take proactive steps to ensure that their subcontractors and suppliers are aware of, and compliant with, the new rule.

In the end, you will be glad you made the call; by the way, it’s a FREE CALL.

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