



ANTI-HUMAN-TRAFFICKING

FINAL RULES

The purpose of this article is to provide a basic awareness of the final rules from a compliance point of view and by so doing perhaps lessen some of the “angst” often faced by compliance professionals in the government contracting space upon the promulgation of new rules and initiatives.

By Paul B. Cogswell
and James L. McGovern

On January 29, 2015, the Department of Defense (DOD), the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) published a final rule amending the Federal Acquisition Regulation (FAR) provisions. The rule, titled “Ending Trafficking in Persons,” is focused on U.S. federal government contractors:

The new rule is designed to prevent and deter human trafficking and imposes responsibilities to contractors, especially those that procure over \$500,000 of supplies outside of the continental United States. The rule requires certain government contractors to exercise reasonable risk-based due diligence to ensure compliance for themselves and potentially their subcontractors as well. The final rule exempts contracts for commercial-off-the-shelf items, even if they meet other threshold requirements.

Background

According to a number of sources, more than 20 million individuals throughout the world are victims of trafficking in persons.¹ As part of the U.S. government’s policy denouncing and prohibiting such practices, President Barack Obama issued an Executive Order that called for prohibitions relating to human trafficking in federal contracts and asked for government agencies to produce plans and regulations that strengthen protections for human trafficking victims.

A recent suit filed on behalf of the Iraqi Refugee Assistance Project sought documentation on the level of pervasiveness of the practice specifically as it relates to the hiring and labor practices utilized by defense contractors on U.S. military bases in Iraq and Afghanistan.² In response to the Executive Order and the DOD “Strategic Plan for Combatting Trafficking in Persons,” DOD, GSA, and NASA issued a final rule amending the FAR to strengthen protections against trafficking.

The rule requires government contractors to prohibit “severe forms” of trafficking in persons.³ This includes “recruitment, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery, and sex trafficking.”⁴ The rule also requires contractors and subcontractors to affirmatively notify the government of credible suspected violations of trafficking in persons.

The rule requires contractors to institute a compliance plan⁵ and enact procedures designed to prevent human trafficking violations and remediate effectively when violations are suspected or found. The compliance plan should be “appropriate to the size and complexity of the contract.”⁶ Upon award and annually thereafter the contractor must conduct “due diligence” sufficient to certify that the plan has been implemented and that procedures have been taken to “prevent any prohibited trafficking in persons activities.”⁷

The certification requires the prime contractor to certify that neither they, their agents, nor any of their subcontractors have engaged in human trafficking violations. This could be interpreted as placing the onus on the prime contractor for downstream acts of their subcontractors.

Major components of the rule include prohibitions by the contractor for:

- The use of recruiting practices that violate the labor laws of the country where the recruitment takes place;



- Soliciting a person for the purposes of employment or offering employment by means of materially false or fraudulent practices;
- Charging fees either directly or indirectly to employees for recruiting;
- Destroying, concealing, confiscating, or otherwise denying employees access to their immigration or identity documents;
- Failing to provide a written work document, if required;
- Failing to provide or arrange for housing that fails to meet the host country housing and safety standards;
- Procuring or obtaining commercial sex acts during the pendency of the contract;
- Failing to post or submit the compliance plan or adequately inform employ-

ees of its existence (for contracts with a portion in excess of \$500,000 outside the United States (excluding commercial-off-the-shelf items));

- Failing to provide return transportation (repatriation) to third-party nationals, subject to certain limited exceptions (if the third-party national is a victim of human trafficking and is seeking redress in the country of employment or a witness in a human trafficking enforcement action);
- Failing to immediately disclose “credible information” that a violation has occurred and fully cooperate with any federal agency responsible for audits, investigations, or corrective actions relating to trafficking in persons; and
- Failing to notify agents as well as employees about the policy prohibiting trafficking persons described in FAR

52.222-50(b), and actions that will be taken for violations.

The rule does provide guidance and resources for contractors available through the Department of State’s website, among other resources.⁸ The rule details an investigation and remediation protocol and requires substantiated violations to be reported in the Federal Awardee Performance and Integrity Information System. Violations of the regulations could result in either suspension or debarment, and could leave the contractor open to potential liability under the False Claims Act as well.

Of particular interest is the fact that the rule does detail to a certain extent what is necessary for contractors to implement a compliance plan. The rule provides: “Any compliance plan or procedures should be appropriate to the size and complexity of the contract and the nature and scope of its activities.”⁹ There are, however, some minimum elements referred to in the rule:

- Disclosure to the contracting officer and the agency inspector general information sufficient to identify the nature and extent of prohibited conduct;
- Timely and complete responses to audits and investigations;
- Full and complete cooperation with federal agencies conducting audits, investigations, or other actions to ascertain compliance with the Trafficking Victims Protection Act, as well as reasonable access to facilities, books, and records both inside and outside the United States;
- Nonretaliation and protection of all employees suspected to be victims or witnesses to prohibited activity, prior to returning to the country in which the employee was recruited, and assisting with their cooperation with government authorities investigating;
- Providing and publishing suitable remedies for violators individually and as subcontractors; and
- Providing training and awareness of the rule and its requirements to staff personnel.

In conjunction with amending the FAR, DOD amended the *Defense FAR Supplement* policies as well (as they relate to human trafficking). DOD requires that there be contractor representation regarding anti-human-trafficking policies, as well as requiring internal awareness and posting of the policy and a hotline in employee work areas under certain conditions.

Perhaps the most important portion of the rule is that it places significant responsibility on the contractor to “monitor, detect, and terminate” any subcontractors engaged in violations. As in other areas involving prime contractor accountability for the actions of those they contract with or employ, the effectiveness of the compliance plan will most likely be decided on the basis of “reasonableness.” Proactive vendor and supplier due diligence will most likely be an



essential outcome of an effective compliance program here. As with other areas, third-party diligence providers may assist in the expediency and efficiency of this part of a compliance program.

Lessons gained from other areas of effective compliance programs are also useful here. The government may weigh effectiveness based on standards and procedures that are reasonably capable of reducing the likelihood of violations. In other areas of compliance, effective compliance is judged on effective controls promulgated to monitor and detect untoward conduct generally. The rules are often combined with effective awareness and education to prevent and report bad conduct.

In 1991, the U.S. Sentencing Commission established what has become one of the most recognized standards for effective compliance within the *Sentencing Guidelines Manual*. While not directly attributable to all areas of this act, as undoubtedly there is no “one size fits all” compliance program, the government does provide for judging effectiveness that can be applied here.¹⁰ For example, one of the attributes that weighs heavily on compliance effectiveness is the ability of a contractor to communicate its policies as stated in the guidelines:

The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals’ respective roles and responsibilities.

At a high level, the new regulations build on already existing prohibitions on human trafficking, but may have limited impact to a broad section of the government contracting community. On the other hand, those involved in contracting in hostile theaters (such as Iraq and Afghanistan) required to utilize skilled and general labor in large amounts quickly and often times under many challenging conditions, could find certain portions of the rule somewhat challenging.

Ultimately, as with any new rule, what decides reasonableness will be judged by hindsight and as most things, hindsight is usually 20/20. That being said, developing an awareness program, providing training to ensure existing hotline operators respond effectively, and developing sound policy and remediation procedures (either through

a third party consultant or internally) will meet the first threshold of effectiveness. Consideration as to the depth, breadth, and complexity of vendor and subcontractor due diligence, combined with a clearly articulated policy and a due diligence effort conducted either by a third party or internally will suffice to meet another significant threshold.

There is much synergy when looking at these rules and other compliance initiatives. Researching common factors may help to increase efficiencies, especially as they relate to diligence of the supply chain. **CM**

ABOUT THE AUTHORS

PAUL B. COGSWELL, JD, CFE, CPP, CAMS, CCEP, is the managing director of the Compliance Advisory and Investigations practice at McGovern & Greene, LLP. He is a Certified Compliance and Ethics Professional, Certified Fraud Examiner, and has over 30 years of senior leadership experience focused on compliance. His last assignment was with Cerid-

ian Corporation as the vice president of risk and compliance and FSO for the Government Solutions business (TS Clearance granted 2010).

JAMES L. MCGOVERN, CPA/CFF, CVA, NCMA FELLOW, is the managing partner of McGovern & Greene, LLP. He is a CPA, Certified in Financial Forensics, and a Certified Valuation Analyst. He has 25 years of experience as a consultant and expert witness on matters involving government contracting, complex financial and economic damage issues, intellectual property infringement, construction claims, business interruption or devastation, and shareholder/partnership disputes. He is a past president of NCMA and also an arbitrator for the AAA in cases involving complex financial issues.

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ENDNOTES

1. Executive Order 13627, "Strengthening Protections Against Trafficking in Persons in Federal Contracts" (September 25, 2012).
2. Steven M. Watt, "Your Tax Dollars at Work? Military Contractors and Human Trafficking in War Zones," available at www.aclu.org/human-rights/military-contractor-human-trafficking-complaint.
3. As defined in Section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102).
4. *Federal Register*, Vol. 80, No. 19 (January 29, 2015.)
5. *Ibid.*
6. *Ibid.*
7. *Ibid.*
8. www.state.gov/j/tip/.
9. *Federal Register*, Vol. 80, No. 19: 4998.
10. See, generally, www.ussc.gov/guidelines-manual/2012/2012-8b21.

