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New FAR Rule Requires Federal Contractors and Subcontractors to Implement Compliance Programs Relating to Human Trafficking, Including Due Diligence

On Jan. 29, the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration issued a final rule amending the Federal Acquisition Regulation (“FAR”), which is intended to significantly strengthen protections against human trafficking in connection with government contracts. The rule implements the 2012 Executive Order 13627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts.”

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As discussed in this Alert, the new rule prohibits specified conduct and, under certain circumstances, requires contractors and subcontractors to establish a compliance program that includes due diligence and to provide written certifications.

The rule, which was proposed in 2013, is part of the unabated focus in the United States on human rights regulation across many subject areas, regions of the world and commodities.

Effective Date

The effective date of the rule is March 2, 2015.

The rule will apply to contracts awarded on or after its effective date. In addition, contracting officers are required to modify on a bilateral basis existing indefinite delivery/indefinite quantity (“IDIQ”) contracts to include the requirements of the rule for additional orders, if additional orders are anticipated.

Prohibited Conduct Under the Rule

Under the rule, government solicitations and contracts are required to prohibit contractors, contractor employees, subcontractors (which under the rule also includes indirect subcontractors), subcontractor employees and their agents from:

- Engaging in severe forms of trafficking in persons during the contract performance period;
- Procuring commercial sex acts during the period of contract performance;
- Using forced labor in the performance of the contract;
- Destroying, concealing, confiscating or otherwise denying access by an employee to the employee’s identity or immigration documents;
- Using misleading or fraudulent practices during the recruitment of employees or offering of employment and using recruiters that do not comply with local labor laws;
- Charging recruitment fees to employees;
- Under certain circumstances, failing to provide or pay for return transportation upon the end of employment for employees brought into the country for the purpose of working on the contract or subcontract;

- Providing or arranging housing that fails to meet the host country housing and safety standards; or
- If required by law or contract, failing to provide an employment contract, recruitment agreement or other required work document in writing, and failing to satisfy certain other related requirements.

The foregoing prohibitions will apply to all contracts, including those for commercially available off-the-shelf, or COTS, items. In addition, there is no de minimis exception.

Certification Requirements

The rule requires the apparent successful contractor under a contract to provide, before contract award, a certification that the contractor has a compliance plan (which is discussed in the next section of this Alert) if any portion of the contract or subcontract:

- Is for supplies, other than COTS items, to be acquired outside the United States, or services to be performed outside the United States; and
- The estimated value exceeds \$500,000.

The contractor must certify with respect to the applicable portion of the contract that:

- The contractor has implemented a compliance plan and procedures to prevent any activities prohibited by the rule and to monitor, detect and terminate the contract with a subcontractor or agent engaging in prohibited activities; and
- After having conducted due diligence, either:
 - To the best of the contractor's knowledge and belief, neither it nor any of its agents, proposed subcontractors or their agents is engaged in any such activities; or
 - If abuses relating to any of the prohibited activities identified in the rule have been found, the contractor or proposed subcontractor has taken the appropriate remedial and referral actions.

The level of due diligence required depends upon the particular facts and circumstances, in the judgment of the contractor.

Prior to the award of a subcontract, the contractor is required to obtain a similar certification from each relevant subcontractor (i.e., if any portion of the subcontract is for supplies, other than COTS items, to be acquired outside the United States or services to be performed outside the United States and the estimated value exceeds \$500,000).

In addition, annual certifications during performance of the contract are required by both the contractor and subcontractors to the extent that a compliance plan was required at the time of award.

Compliance Plan Requirements

The compliance plan requirement applies in the same circumstances as the certification requirement. In other words, it applies to supplies, other than COTS, acquired outside the United States or services to be performed outside the United States and that have an estimated value that exceeds \$500,000.

Companies have flexibility to design their compliance plan to fit their particular facts and circumstances. Under the rule, the compliance plan or procedures are required to be appropriate to the size and complexity of the contract and the nature and scope of its activities, including the number of non-U.S. citizens expected to be employed and the risk that the contract or subcontract will involve services or supplies susceptible to trafficking in persons.

However, at a minimum, the plan must include the following elements:

- An awareness program to inform contractor employees about the government's policy prohibiting trafficking-related activities, the activities prohibited and the actions that will be taken against employees for violations;
- A process for employees to report, without fear of retaliation, activity inconsistent with the policy; in that regard, contractors must provide, at a minimum, the Global Human Trafficking hotline and its email address, although companies may provide additional ways for employees to report.
- A recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees to employees and ensures that wages meet applicable host-country legal requirements or explains any variance;
- A housing plan, if the contractor or subcontractor intends to provide or arrange housing, that ensures that the housing meets host-country housing and safety standards; and
- Procedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking in persons and to monitor, detect and terminate any agents, subcontractors or subcontractor employees that have engaged in such activities.

The rule also contains requirements relating to the posting or furnishing of the relevant contents of the compliance plan.

Applicability to Subcontractors and Agents

The contractor is required to contractually flow down in its contracts with subcontractors and agents the substance of the human trafficking clause contained in its contract pursuant to the rule, including, to the extent the threshold is met, the certification and compliance plan requirements. As noted above, subcontractors are defined to include both direct and indirect subcontractors.

Violations and Remedies

The contractor is required to inform the contracting officer and the agency Inspector General of any credible information it receives from any source that alleges a contractor employee, subcontractor, subcontractor employee, or their agent, has engaged in prohibited conduct under the rule, or any actions taken against any of them in connection with the violation. The contractor also is required to provide other cooperation specified in the rule.

If the contractor fails to comply with its requirements under the rule, remedies may include:

- Requiring the contractor to remove an employee from the performance of the contract or terminate a subcontract;
- Suspension of contract payments until the contractor has taken appropriate remedial action;
- Loss of award fees for the performance period in which the government determined contractor noncompliance;
- Declining to exercise available options under the contract;
- Termination of the contract for default or cause, in accordance with the termination clause of the contract; or
- Suspension or debarment.

Violations of the rule also may result in criminal liability and liability under the False Claims Act.

In addition, as many companies have experienced in a variety of contexts and industries, human rights-related practices of the company or its business partners that are illegal or perceived as unethical can result in significant reputational harm, as well as become a focus of NGOs and socially responsible investors.

In considering remedies, the contracting officer is authorized to take into account as a mitigating factor whether the contractor had a compliance plan or awareness program at the time of the violation, was in compliance with the plan at the time of the violation and has taken appropriate remedial actions for the violations.

Selected Compliance Take-Aways

Although the rule was proposed almost two years ago, our experience with this and other human rights-driven regulations has been that relatively few companies expend resources on implementing compliance measures until final rules are adopted. Accordingly, potentially affected companies that have not already done so should assess their existing compliance policies and procedures against the requirements of the rule, with a focus on their risk profile. Given the March 2 effective date, many companies should be conducting this assessment now. Following the assessment, enhancements and modifications will in many cases need to be made to existing compliance plans and procedures, and relevant employees, subcontractors and agents will need to be trained.

As part of the assessment, companies will need to determine what incremental due diligence they may need to conduct to satisfy certification requirements under the rule. They also will need to develop a plan for completing that due diligence. Because the level of due diligence will be determined by the particular facts and circumstances, more than one due diligence approach may be appropriate or required.

Companies usually benefit from taking a holistic approach to their supply chain compliance, business ethics and corporate social responsibility initiatives. Doing so often enhances efficiency, reduces risk and results in more consistent compliance and messaging. Therefore, as companies implement the new FAR human trafficking requirements, they should, where practical, leverage complementary elements of their existing compliance framework, including existing human rights-related due diligence practices and procedures.

For Further Information

If you would like to learn more about the issues in this Alert, please contact your usual Ropes & Gray attorney.

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