

December 9, 2019

Anti-human Trafficking Compliance Guidance for U.S. Government Contractors Published

During late October, the U.S. Office of Management and Budget issued a memorandum to support agency compliance with the Federal Acquisition Regulation's anti-human trafficking compliance requirements. The stated purpose of the memorandum is to enhance the effectiveness of these requirements while helping federal government contractors manage and reduce the burden associated with meeting their compliance responsibilities. To achieve these dual goals, as discussed in this Alert, the memorandum describes risk management best practices and mitigating factors for U.S. federal officials to take into account when working with contractors to address their obligations under the FAR anti-human trafficking provisions. Although the memorandum is directed to personnel at U.S. executive departments and agencies, it provides helpful guidance for legal and compliance personnel at U.S. government contractors.

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For a more extensive discussion of the FAR anti-human trafficking provisions and related compliance requirements, see our earlier Alerts [here](#) and [here](#). For a discussion of other recent developments in human trafficking and modern slavery legislation and compliance, also see our earlier Alert [here](#).

Risk Management Best Practices

The memorandum includes a list of risk management best practices that are intended to give contracting officers a fuller understanding of the types of actions that a contractor might take to meet its responsibilities under the FAR anti-human trafficking provisions. The memorandum notes that the list is illustrative, not exhaustive, and that it is not intended to represent a compliance floor or to augment or otherwise change existing regulatory requirements.

Under the FAR, contractors that only work domestically are not required to develop or submit an anti-human trafficking compliance plan. However, the memorandum notes that, since domestic contractors are still required to comply with the prohibited conduct requirements and certain other requirements of the anti-human trafficking provisions, they are strongly encouraged to develop procedures and controls consistent with the best practices described below. The memorandum indicates that doing so will help ensure that the contractor is meeting its FAR compliance obligations and may act as a mitigating factor if a violation occurs.

Compliance with the FAR anti-human trafficking provisions is contract-specific and does not require an enterprise-wide compliance program. Nevertheless, the memorandum also indicates that, since it may be difficult or impractical for contractors with multiple government contracts to develop multiple plans, contractors are encouraged to develop enterprise-wide compliance plans, which may be further tailored for the individual contract.

Contractor Internal Steps

Accountable official: To create appropriate accountability and to highlight the importance of anti-trafficking efforts, the contractor should identify an internal position and individual to be responsible for compliance plan implementation, including risk prioritization. The designated position should have the necessary authority to ensure compliance at all levels of the company and throughout the supply chain, and should be able to ensure the accuracy of the contractor's anti-human trafficking compliance certification to the federal government.

Code of conduct and policies: The contractor should review its internal practices, including its recruitment processes, for preventing any fraudulent recruitment or coercive treatment of workers from occurring at any level of the organization. As part of this review, the contractor should develop or adopt an appropriate code of conduct and/or corporate policies on trafficking in persons, covering such issues as hiring recruiters and conducting recruitment, disciplinary processes for employees that commit violations, otherwise ensuring that no prohibited activity takes place and complying with host

country employment law and housing standards (if housing is provided). The code of conduct should be revisited on a set schedule, with senior-level approval, and, if possible, with external validation.

Regular review of mechanisms to deter trafficking: The contractor should continuously review its anti-human trafficking compliance plan and make revisions and updates whenever necessary, including to employee awareness and reporting programs, based on best practices and lessons learned. Revisions should be reviewed at a senior level and, if possible, with external validation.

Contractor External Steps

Impactful due diligence to maximize effectiveness: The contractor should take steps to prioritize its risk assessment. High-risk portions of the contractor's supply chain should be identified (including contractors and/or subcontractors who use labor agents/recruiters), or the contractor should have plans in place to do so (e.g., through third-party audits, external consultants or experts or other mechanisms). The contractor also should work with suppliers to implement information-reporting processes for high-risk sites, such as through self-audit reports and supplier-conducted employee surveys.

Corrective actions: The contractor should develop targeted action plans that include industry and other broadly demonstrated best practices for addressing violations that are identified in its supply chain. For example, where termination of a contract is necessary, the placement and treatment of its workers should be considered and addressed. In addition, the contractor should monitor progress through contractor follow-up audits for sites identified as being out of compliance (e.g., ensuring that recruitment fees have been refunded to workers and employees have been given secure accessible storage solutions for their identity documents).

Engagement with subcontractors: The contractor should ensure its subcontractors have their own codes of conduct or flow down the code developed/adopted by the prime contractor. The foregoing should be accompanied by direct engagement with subcontractors to ensure that they fully understand their obligations.

Subcontractor compliance reviews: The contractor should implement appropriate auditing processes to assess subcontractor compliance with its code of conduct/policy, particularly for suppliers identified as high risk, including unannounced audits as appropriate. These audits should include, among other considerations, whether subcontractors (1) are directly hiring, (2) are using licensed recruiters, or using additional scrutiny in countries where there are known trafficking risks and/or recruiters are unregulated, (3) have effective reporting and whistleblowing mechanisms and (4) have copies of their signed contracts in a language the worker understands. Audit processes should be validated externally.

Mitigating Factors

The memorandum indicates that, in reviewing whether a contractor has complied with its anti-trafficking responsibilities under the FAR, the contracting agency should consider the mitigating factors described in the FAR anti-human trafficking provisions, as well as whether the contractor adopted any of the best practices described above or other suitable practices. In addition, if a trafficking violation has been reported, the memorandum indicates that the contracting officer should consider the following:

- whether the contractor:
 - became aware of the violation because of an effective monitoring program and/or reporting mechanism;
 - had risk mitigation tools in place at the time an incident arose, such as a current compliance plan or awareness plan that the contractor was following at the time of the incident, or other risk-mitigation best practices;
 - notified the U.S. government immediately of any violations;

- abated a violation when directed to do so by the contracting officer;
- cooperated with investigations;
- is a new or experienced federal contractor; and
- has a particularly lengthy or complex supply chain.
- whether the reported information involves:
 - an isolated incident or is part of a systemic pattern of violations; or
 - an incident that is minor in nature or is significant and shows a basic disregard for FAR anti-trafficking compliance requirements.

Other mitigating factors noted in the Q&A included in the memorandum include whether the contractor:

- worked with the subcontractor, if applicable, to appropriately remediate identified issues;
- took remedial steps on its own (such as to provide reparation to victims where the contractor has caused or contributed to the impacts) or abated a violation when directed to do so by the contracting officer; and
- took logically sequenced and managed steps to increase its understanding of the supply chain.

The Q&A notes that a contractor that is working to implement a compliance plan and awareness program, and that identifies violations as a result of such actions, will be viewed more favorably when mitigating factors are considered than a contractor that fails to identify violations because it has made no meaningful effort to implement internal controls that could enable it to uncover trafficking, and has instead either negligently failed to implement controls or made a management decision to treat human trafficking as a cost of doing business.

Selected Other Recent Developments Concerning the FAR Anti-human Trafficking Provisions

Evaluation of Department of Defense Efforts to Combat Trafficking in Persons in Kuwait

During June 2019, the Department of Defense Office of Inspector General released the report of its evaluation of DoD efforts to combat trafficking in persons in Kuwait. The evaluation was initiated after military criminal investigators substantiated that a DoD contractor violated the FAR anti-human trafficking provisions by failing to pay food services employees at three bases the legally required minimum monthly salary. According to the report, the evaluation also concluded that, to obtain work in Kuwait, the employees were required to pay what were characterized as exorbitant recruitment fees, putting them in a “state of enslaved bondage” because most of their salary went to paying off the debt for the fee and its accrued interest. Furthermore, the contractor enforced a 7-day-a-week, 12-hour-workday schedule with continuous overtime and no permissible sick leave or regular days off, while also providing substandard housing.

The OIG determined that contracting personnel did not always ensure that contracts performed in Kuwait included required clauses under the FAR anti-human trafficking provisions and compliance requirements were not consistently monitored. Among other things, the report recommended that additional procedures be established for the identification, oversight and monitoring of the FAR anti-human trafficking provisions and compliance with their requirements.

The June 2019 report was not the first compliance deficiency publicly noted by the Department of Defense Office of Inspector General. In February 2018, the OIG released a report on the U.S. Navy’s oversight and administration of base

support contracts in Bahrain. Among other things, the OIG concluded that certain requirements of the FAR anti-human trafficking provisions were not followed by the contracting authority and recommended remedial measures in its report.

Updated Department of Defense Instruction

In June 2019, DoD updated its “Combating Trafficking in Persons” Instruction that outlines the anti-trafficking roles and responsibilities for all DoD components, services and agencies. One of the responsibilities for DoD components is to submit an annual self-assessment on the strengths, weaknesses and effectiveness of their anti-trafficking programs.

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