

DRAFT FOR PUBLIC COMMENT¹

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MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

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SUBJECT: Anti-Trafficking Risk Management Best Practices & Mitigation
Considerations

Executive Order 13627, *Strengthening Protections Against Trafficking in Persons in Federal Contracts*, and Title XVII of the National Defense Authorization Act (NDAA) for FY 2013, *Ending Trafficking in Government Contracting*, established requirements for government contracts to prevent trafficking in persons. As a result, the Federal Acquisition Regulatory Council amended the Federal Acquisition Regulation (FAR) to implement these requirements. See Attachment A for a summary of the anti-trafficking regulatory changes.

Contractors are expected to be committed, proactive, and forthcoming in their efforts to address and reduce the risk of human trafficking in their operations and supply chains. At the same time, it is recognized that not all contractors are similarly situated and some, such as those with large supply chains, may face more challenges than others in meeting their responsibilities. In addition, not all risks are equal in their impact. To this end, the Procurement and Supply Chains Committee, of the Senior Policy Operating Group of the President's Interagency Task Force to Monitor and Combat Trafficking in Persons ("the SPOG Committee"), which is co-

¹ This draft memorandum is intended for public comment. However, prior to finalization, agencies, in their discretion, may take the contents of this draft, including the best practices and mitigating circumstances, into consideration in applying the anti-trafficking requirements in the Federal Acquisition Regulation.

chaired by the Office Management and Budget (OMB), the Department of Labor, and the Department of State, developed a set of best practices and mitigation considerations to help contracting officers determine if a contractor is taking adequate steps to meet its anti-trafficking responsibilities under the FAR. See Attachment B.

To promote clarity and consistency in the implementation of anti-trafficking requirements, the SPOG Committee also developed responses to a number of frequently asked questions posed by stakeholders following the publication of the final FAR rule. See Attachment C.

The SPOG Committee co-chairs ask that you please share this memorandum widely across your acquisition workforce and with those responsible for anti-trafficking and related compliance efforts in your agencies. Questions regarding this memorandum may be directed to [insert mailbox] or to your agency representative on the SPOG Committee.

Attachments

Regulatory Revisions to FAR Subpart 22.17

In March 2015, revisions to FAR subpart 22.17 and the corresponding clause at 52.222-50 relating to trafficking in persons in federal contracts became effective for all new contract awards and for all new orders under existing Indefinite Delivery, Indefinite Quantity contracts. The revisions strengthen the longstanding ban against human trafficking by:

- i. Clearly identifying prohibited trafficking-related activities for all products and services. Previously, there was a general prohibition during the period of performance of a contract on (1) engaging in human trafficking, (2) procuring commercial sex acts, and (3) using forced labor. Under the revisions to the FAR, the following trafficking-related activities are also expressly prohibited:
 - Destroying, concealing, confiscating, or otherwise denying access by an employee to his or her identity or immigration documents;
 - Charging employees recruitment fees;
 - Using misleading or fraudulent recruitment practices;
 - Providing or arranging housing that fails to meet the host country housing and safety standards, if housing is provided;
 - Failing to provide return transportation costs upon the end of employment, except in special cases;
 - Using recruiters that do not comply with local labor laws in the country where the recruitment takes place; and
 - Failing to provide an employment contract, recruitment agreement, or other required work document in writing, if required by law or in the contract².
- ii. Imposing additional requirements on contractors regarding their own employees. Under the FAR revisions, contractors are required to:
 - Inform their employees of prohibited activities and the consequences for violations;³ and
 - Take appropriate action against employees, agents, or subcontractors that violate prohibitions;⁴

² FAR 52.222-50(b).

³ FAR 52.222-50(c)(1).

⁴ FAR 52.222-50(c)(2).

- iii. Requiring contractors to notify contracting officers and the agency Inspector General of any credible information they receive from any sources alleging a violation of the anti-trafficking prohibitions, and any actions taken in response, and to provide reasonable access to facilities and staff to allow audits, investigations, and/or other actions to ascertain compliance;⁵
- iv. Imposing a number of additional management responsibilities for contracts performed outside the United States that involve the provision of goods or performance of services in excess of \$500,000 where contractors must:
 - Develop a compliance plan which includes:
 - (a) an employee awareness program about trafficking in persons policies, activities prohibited, and remedies when violations occur;
 - (b) a process for employees to report violations without fear of retaliation;
 - (c) recruitment and wage plans, including the requirement to only use bona fide recruitment companies and/or trained employees;
 - (d) housing plans that meet host country housing and safety standards; and
 - (e) procedures to place the same requirements on subcontractors at any tier.

The compliance plan must be appropriate for the nature and scope of activities they are performing as well as the size and complexity of their contracts.

- Certify before contract award and annually thereafter that they have developed and implemented compliance plans to prevent any prohibited activities identified in FAR 52.222-50(h) that are appropriate for the nature and scope of activities they are performing as well as the size and complexity of their contracts.⁶ A contractor must also include as part of the certification that it has conducted due diligence and that (1) to the best of the contractor's knowledge or belief, neither it, nor its agents or subcontractors, has engaged in any of the prohibited practices, or (2) if any violations have been found, the contractor has taken the appropriate remedial and referral actions. The contractor must also include the substance of clause 52.222-50 in all contracts with agents and any subcontracts that have an estimated value that exceeds \$500,000 and that will be acquired or performed outside the United States.

⁵ FAR 52.222-50(d) and (g).

⁶ FAR 52.222-50(h).

Anti-Trafficking Risk Management Best Practices and Mitigation Considerations

FAR Subpart 22.17 sets forth regulatory guidance to implement the improved safeguards called for by E.O. 13627 and the End Trafficking in Government Contracting Act. These safeguards include (i) a number of express prohibitions on certain types of trafficking-related activities (*e.g.*, prohibition on charging employees recruitment fees; destroying, concealing, confiscating or otherwise denying access to identity or immigration documents) and (ii) risk management practices (*e.g.*, an employee awareness program, a hotline, a recruitment and wage plan, a housing plan). The identified safeguards have largely been modeled on successful practices in the private sector to increase stability and productivity within the workforce.

Based on outreach and additional work following issuance of the E.O. and the FAR amendments, the Procurement and Supply Chains Committee of the Senior Policy Operating Group of the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons (“the SPOG Committee”) has identified additional risk management best practices. These practices are included on the list set forth in section A below (the best practices list), along with those that are now included in the FAR. Many of the additional practices are discussed in the Responsible Sourcing Tool website (ResponsibleSourcingTool.org), designed to assist federal contractors, procurement officials, and other companies in identifying human trafficking or trafficking-related practices in their global supply chains and developing effective management systems to prevent and combat trafficking in persons.⁷

Actions have been grouped according to whether they pertain to the prime contractor’s internal activities or to the prime contractor’s relationship with its supply chain. The best practices list is intended to give contracting officers a fuller understanding of the types of actions that might be needed by a contractor that is working to meet its anti-trafficking in persons responsibilities under the FAR, especially for contractors with complicated supply chains. This best practices list might be especially helpful in situations where (i) a contractor reports a human trafficking incident under an ongoing contract and the contracting officer is trying to determine if the contractor’s actions were sufficient, (ii) the agency is planning an acquisition in an environment that is at high risk of trafficking (*e.g.*, the agency is aware that the work it is acquiring is at a heightened risk of trafficking and the agency needs to ensure the offerors or prospective contractor will be able to address these challenges), or (iii) the agency is recording past performance information on compliance with trafficking requirements for contracts where the risk of trafficking was significant.

The best practices list is not intended to augment or otherwise change existing regulatory requirements. However, evidence of a contractor’s efforts to adopt best practices may be appropriately considered as a mitigating circumstance should an incident be reported. In

⁷ The tool enables federal contractors and other entities to visualize human trafficking risks by location, industry sector, and commodity. Additionally, it includes resources such a model compliance plan, a sample code of conduct, a supplier/subcontractor self-assessment questionnaire, and criteria to select and monitor labor recruiters. The tool also includes research. A report entitled “*Strengthening Protections Against Trafficking Persons in Federal and Corporate Supply Chains*” covers commodities and industry sectors at increased risk for trafficking or trafficking-related activities.

addition, there may be other mitigating circumstances that might be considered in determining how to address a contractor's inaction or limited action. These circumstances are discussed in section B, below.

A. Best Practices List

1. Contractor's internal steps

- a. ***Accountable official.*** To create appropriate accountability and to highlight the importance of anti-trafficking efforts, the entity has identified an internal position and individual to be responsible for compliance plan implementation (if a plan is required, or if the entity chooses to create a compliance plan). See section on compliance plans below. The designated position has 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 its certification to the government.⁸
- b. ***Code of conduct and policies around trafficking.*** The entity has reviewed its internal practices, including its recruitment processes, to prevent any fraud or coercion from occurring at any level of the organization. As part of this review, the entity developed a code of conduct and/or corporate policies on: 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).
- c. ***Worker training.*** To promote awareness within the company, the entity has implemented a documented training program for all employees. Such training does not necessarily need to be developed in-house, but the program covers the indicators of trafficking, basic worker rights under law and regulation, required measures, and channels for reporting trafficking concerns.
- d. ***Whistleblower protections.*** The entity has implemented a whistleblower protection mechanism to safeguard the ability of employees to report violations without fear of retaliation.
- e. ***Compliance plan.*** The entity has developed a compliance plan for contracts or portions of contracts performed overseas in excess of \$500,000 to serve as the management blueprint that is used to (i) help ensure it is able to prevent violations and identify any violations when they occur, (ii) safeguard the ability of employees, subcontractors, and their employees to report violations without fear of retaliation, and (iii) take effective and reasonable steps to prevent and mitigate violations. The plan is a "living document" that is structured in a way that allows for tailoring based on the level of risk associated with a particular contract and adoption of best practices and lessons learned as they arise.

⁸As specified in FAR 52.222-50(h)(5) and 52.222-56. For additional information see Attachment A.

2. Contractor's external steps

- a. ***Understanding the supply chain.*** The entity has taken steps to map out the supplier relationships in the various tiers of its supply chain. If the entity has a complex supply chain, it has utilized risk screening tools or procedures to identify high-risk portions of its supply chain, beginning with corporate-owned facilities and tier-1 suppliers. High-risk portions of the entity's supply chain have been identified, or work is planned to do so (*e.g.*, through third-party audits, external consultants or experts, or other mechanisms).
- b. ***Engagement with subcontractors.*** The entity has disseminated a code of conduct throughout its supply chain. The code of conduct is accompanied by awareness training and direct engagement with the subcontractors to ensure that they fully understand their obligations. The entity has made clear to its subcontractors that they should disseminate the code of conduct down to their subcontractors and agents.
- c. ***Validation of protections.*** The entity has ensured that its subcontractors are directly hiring, using licensed recruiters, or using additional scrutiny in those countries where the recruiters are unregulated, and that they have procedures in place to verify that their workers are not being charged recruitment fees. The entity has also reviewed the efficacy of its supply chain's whistleblower mechanisms.
- d. ***Compliance reviews.*** The entity has ensured that its auditing processes are recurring, especially for suppliers identified as high risk, unannounced, and validated those processes externally. Compliance plans and codes of conduct are to be revisited on a set schedule, with senior-level approval, and if possible, with external validation. Training, awareness mechanisms, and reporting mechanisms are to be updated and revised on an ongoing basis.
- e. ***Corrective actions.*** The entity has developed targeted corrective action plans for addressing identified risks, and monitored progress through reporting, direct monitoring, and follow-up audits for any sites identified as being in nonconformance. It also works with suppliers to implement information reporting processes for high-risk sites, such as through self-audit reports and supplier-conducted employee surveys.

B. Evaluating contractor compliance

In reviewing whether a contractor has complied with its anti-trafficking responsibilities, the agency should ensure it is considering the mitigating factors described in the FAR⁹ and should also consider other relevant factors, including ones that may pertain to the contractor's unique situation.

Specifically, if a trafficking violation has been reported, the contracting officer should consider:

- whether the contractor:
 - took remedial steps on its own (such as to provide reparation to victims) or abated a violation when directed to do so by the contracting officer;
 - became aware of the violation because of an effective monitoring program and/or whistleblower program;
 - 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,¹⁰ or other risk-mitigation best practices;
 - notified to the U.S. government immediately of any violations;¹¹
 - cooperated with investigations;
 - took logically sequenced and managed steps to increase its understanding of the supply chain (especially if it has a complex supplier base); and
 - is a new entrant to the federal marketplace or an experienced federal contractor.
- whether the reported information involves:
 - an isolated incident or is part of a systemic pattern of violations; or
 - an incident that is minor and technical in nature or is significant and shows a basic disregard for trafficking laws.

⁹ See FAR 52.222-50(f).

¹⁰ Entities need not develop a plan specifically for each contract with overseas work that meets the threshold, as long as it otherwise has a plan in place that is suitable to address the nature and scope of activities to be performed and the size and complexity of its contract work.

¹¹ See FAR 52.222-50(d).

Efforts to combat trafficking in persons are evolving as better practices and new technologies are identified. For this reason, the SPOG Committee intends to periodically review this guidance to determine whether updates may be required.

**Working with the Regulatory Changes to FAR Subpart 22.17
Combating Trafficking in Persons**

Questions and Answers

The following questions and answers have been developed in response to issues that were identified during outreach on the final FAR rule to implement E.O. 13627 and the NDAA End Trafficking in Government Contracting Act.

Contractor risk mitigation

1. When considering a contractor's efforts to meet its anti-trafficking responsibilities, what considerations will the government take into account, especially for contractors with complex and multi-tiered supply chains?

The FAR rule and the management guidance developed by the SPOG Committee lay out mitigating and aggravating factors that will be carefully considered in determining the adequacy of the contractor's actions in the event violations are identified. These factors include:

- whether the contractor:
 - took remedial steps on its own (such as to provide reparation to victims) or abated a violation when directed to do so by the contracting officer;
 - became aware of the incident because of an effective monitoring program and/or whistleblower program;
 - had risk mitigation tools in place at the time an incident arose, such as a current compliance plan or awareness plan and was following the plan at the time of the incident;¹²
 - notified to the U.S. government immediately of any incidents;¹³
 - cooperated with investigations;
 - took logically sequenced and managed steps to increase its understanding of the supply chain; and
 - is a new entrant to the federal marketplace or an experienced federal contractor.
- whether a reported violation:
 - is an isolated incident or part of a systemic pattern; or
 - is minor and technical in nature or is significant and shows a basic disregard for trafficking laws.

¹² Entities need not develop a plan specifically for each contract with overseas work that meets the threshold, as long as it otherwise has a plan in place that is suitable to address the nature and scope of activities to be performed and the size and complexity of its contract work.

¹³ See FAR 52.222-50(d).

2. Isn't a contractor better off having a less robust plan and accompanying management structure to reduce its exposure to liability?

No. 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 will a contractor that fails to identify these 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.

3. What steps should a contractor take if it does not perform any work overseas?

While contractors that only work domestically are not required to develop or submit a compliance plan, they are still subject to the rule's prohibitions and many of its requirements. As such, domestic contractors are strongly encouraged to develop procedures and controls consistent with the best practices identified in Attachment B, which will help ensure that they are meeting their obligations under the requirements, and may act as a mitigating factor if a violation occurs.

Other issues

4. Are contractors required to furnish copies of their compliance plans to agencies?

In accordance with FAR 52.220-50, a contractor must be prepared to furnish a copy of its compliance plan to the contracting officer. This may be required when there is an incident or in some cases, at the agency's discretion, where an acquisition involves high risk and the agency wants to evaluate the contractor's risk mitigation.

5. When should contracting officers expect to be informed of violations?

Contractors are required to report "credible" information that a violation of the prohibitions outlined in FAR 52.222-50(b) has occurred, along with any actions taken against the employee, subcontractor, subcontractor employee, or its agent to remedy the violation. The preamble to the FAR rule notes that the rule does not define the term "credible information" but explains that the term refers to believable information received from any source. Agencies should encourage their contractors to remediate issues that fall outside the scope of FAR 52.222-50(b), and as circumstances warrant, to report to law enforcement and/or call an appropriate local NGO or hotline with any information about the violation.

6. What steps are taken after a contracting officer receives credible information?

As set out in FAR 52-222.50, when a contracting officer receives credible information that the contractor or its agents or employees have violated the FAR trafficking requirements, the contracting officer must immediately notify the agency Inspector General, the agency debarring and suspending official, and law enforcement officials if appropriate, and can direct the contractor to take specific steps to abate the violation. After receipt of a report from the cognizant agency Inspector General, the authorized agency official conducts an administrative hearing and the contractor has the opportunity to respond to the allegations.

If there is a determination by the Inspector General that allegations of a trafficking in persons violation are substantiated or if the contracting officer finds that the contractor has failed to comply with the procedural requirements in the regulations such as notification, the contracting officer will determine if a contract remedy is appropriate, taking into account the appropriate mitigating and aggravating factors set forth in the FAR and the Anti-Trafficking Risk Management Best Practices guidance developed by the SPOG Committee.¹⁴

7. How does the \$500,000 dollar ‘flowdown’ threshold operate in practice?

Although the contracting officer is responsible for ensuring that the certification clause is included in contracts where the value of the overseas work is expected to exceed \$500,000, the contractor is responsible for developing a compliance plan and for ensuring the requirements apply to its subcontractors and suppliers when the portion of work to be performed overseas exceeds \$500,000.

8. How does the “portions of work” qualifier affect contractor obligations to develop a compliance plan and to certify?

Under FAR 52.222-56(b)—

The apparent successful Offeror shall submit, prior to award, a certification, as specified in paragraph (c) of this provision for the portion (if any) of the contract that—

(1) Is for supplies, other than commercially available off-the-shelf items, to be acquired outside the United States, or services to be performed outside the United States; and (2) Has an estimated value that exceeds \$500,000.

Under FAR 52.222-50(h)(1)—

[The compliance plan requirements apply] to any portion of the contract that—

(1) Is for supplies, other than commercially available off-the-shelf items, acquired outside the United States, or services to be performed outside the United States; and (2) Has an estimated value that exceeds \$500,000.

¹⁴ Remedies may include: (1) Requiring the Contractor to remove a Contractor employee or employees from the performance of the contract; (2) Requiring the Contractor to terminate a subcontract; (3) Suspension of contract payments until the Contractor has taken appropriate remedial action; (4) Loss of award fee, consistent with the award fee plan, for the performance period in which the government determined Contractor non-compliance; (5) Declining to exercise available options under the contract; (6) Termination of the contract for default or cause, in accordance with the termination clause of the contract; or (7) Suspension or debarment. In addition, other remedies available to the government may be exercised.

FAR 52.222-50(h)(2) also ties the nature of the compliance plan to the size and complexity of the particular contract, and to the nature and scope of the activities to be performed for the government. The certification and compliance plan requirements are therefore limited to just the portion of work performed overseas. The regulations do not obligate the contractor to develop a compliance plan for the entire company or to certify that the plan has such a broad scope. However, it may be difficult or impractical for contractors with multiple government contracts to develop multiple plans. Contractors are therefore encouraged to develop corporate-wide compliance plans, which may be further tailored for the individual contract.

- 9. What if a contractor identifies a reportable incident in its supply chains that affects multiple contracts (e.g., a component part manufacturer was using forced labor, and the contractor used the component part in a variety of goods sold to the government)? Does the contractor have a responsibility to trace the component back to every end-product sold to the government, and to notify the individual agency contracting officers who procured that part?**

Under the circumstance where the contractor believes that a violation has occurred which affects multiple contracts, and it is impractical to trace the violation back to a particular contract, the contractor must inform the agency for the contract with the highest dollar value. See FAR 52.222-50(d)(2).

- 10. In cases where contractors have multiple contracts with the government, must the contractor provide individual certifications to each contracting officer on a transactional basis?**

Yes. As the certification is directly related to the particular contract being performed, contractors must provide individual certifications on a per-transaction basis.