

Anti-trafficking regulations impose new obligations on all federal contractors

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Amendments to the Federal Acquisition Regulations aimed at eliminating sub-standard labor conditions within government contractors' supply chains went into effect March 2. Under the amended regulations, new solicitations will impose requirements on all government contractors and subcontractors as part of an effort to curb human trafficking.

Contractors that provide supplies acquired abroad or perform services outside the United States are subject to additional requirements, including implementing compliance plans and completing compliance certification. For all contractors, noncompliance with the new regulations could result in financial penalties, termination of the contract for default, or suspension or debarment.

The amendments follow the Jan. 29 publication in the Federal Register of a final rule implementing Executive Order 13627, titled "Strengthening Protections Against Trafficking in Persons in Federal Contracts," and Title XVII of the National Defense Authorization Act of 2013, titled "Ending Trafficking in Government Contracting."

Human trafficking is defined as the use of force, fraud or coercion for the purpose of obtaining labor. According to the U.S. Department of Labor, nearly 21 million people around the world are the victims of forced labor.

Forced labor can occur in any industry. It is especially prevalent in industries that require low-skilled labor or involve jobs that are hidden from public view, including those in agriculture, mining and domestic service. The dynamics of global production have increased worker vulnerability to forced labor.

For example, buyer pressure on suppliers to keep prices low and to complete orders quickly can lead suppliers to rely on excessively long schedules, in some cases rising to the level of forced overtime.¹ Prompted by the United States' extensive diplomatic, defense and development activities around the world, the government has sought to reduce the risk that government contractors will engage in activities that promote or allow human trafficking — such as utilizing labor recruiters who charge foreign workers placement and/or other fees.²

- **Minimum disclosures:** Contractors and subcontractors are prohibited from using misleading or fraudulent practices during the recruitment of employees or offering of employment. Such misleading or fraudulent practices include failing to disclose the key terms and conditions of employment — including wages, benefits, the location of work, living conditions, housing, significant costs and hazardous working conditions — in a language the employee can understand.
- **Limitations on recruiters:** Contractors and subcontractors may not use recruiters who fail to comply with local labor laws or who charge recruiting fees.
- **Return transportation:** At the end of employment, contractors and subcontractors generally must provide or

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REQUIREMENTS FOR ALL CONTRACTORS

The amendments alter FAR Sections 22.1700 and 52.222-50 to impose the following employment-related requirements on all contractors and subcontractors:

reimburse the cost of return transportation for employees who are not nationals of the country where they are working and were brought to that country for the purpose of working on a U.S. government contract or subcontract.

- **Housing standards:** When contractors and subcontractors provide or arrange for housing for their employees, they must meet the host country's housing and safety standards.
- **Written agreements:** Contractors and subcontractors must provide employment contracts, recruitment agreements and other required work documents in writing in a language the employee understands when law or the contract requires them to do so. These documents must include certain information about the employee's wages, work and rights.



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To ensure adherence to these requirements, the amendments mandate that contractors notify their employees and agents of the government's anti-trafficking policy and the penalties for noncompliance with that policy. Penalties include removal from the contract, reduction in benefits and termination of employment.

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The amendments also require contractors to cooperate fully with any trafficking-related investigations and notify immediately the government's contracting officer and appropriate agency Inspector General of any "credible information" regarding violations by an employee, subcontractor, subcontractor employee or subcontractor agent. The regulations define "agent" to include independent contractors.

COMPLIANCE PLAN AND CERTIFICATION REQUIREMENTS

In addition to the requirements outlined above, contractors and subcontractors that provide supplies acquired abroad or perform services outside the United States must implement a compliance plan and complete a compliance certification prior to receiving a contract award when the estimated value of that portion of the contract exceeds \$500,000.

The compliance and certification requirements apply only to the portion of the contract that meets these criteria. Contracts for commercially available off-the-shelf items are exempt from these additional obligations.

Compliance plans must satisfy the following minimum requirements:

- **Awareness program:** Contractors and subcontractors must inform their employees about the government's policy of prohibiting trafficking-related activities, the actions that are prohibited and the penalties for violations.
- **Reporting process:** Contractors and subcontractors must create a process whereby employees can report, without fear of retaliation, any activities that

violate the government's anti-trafficking policy.

- **Recruitment and wage plan:** Plans must allow only the use of recruiting companies that have trained their employees, prohibit charging recruitment fees to the hired workers and ensure that wages meet the host country's legal requirements. The regulations do not specify what type of employee training is required.
- **Housing plan:** If the contractor or subcontractor provides or arranges for employees' housing, plans must ensure that the housing meets the host country's housing and safety standards.
- **Procedures to prevent agents and subcontractors from engaging in trafficking:** Plans must outline procedures for monitoring, detecting and terminating any agents or subcontractor employees who engage in trafficking activities.

Compliance plans must be "appropriate" to the size and complexity of the contract and the nature and scope of the activities to be performed for the government. Considerations bearing on whether a compliance plan is appropriate include the number of foreign citizens to be employed and the risk that the contract or subcontract will involve supplies or services susceptible to trafficking.

Beyond the minimum requirements outlined above, the regulations provide no guidance to aid contractors and subcontractors in determining what qualifies as an "appropriate" compliance plan.

Contractors and subcontractors must post the contents of their compliance plans at the workplace and on their websites by the start of contract performance. Even when contractors and subcontractors are not required to develop compliance plans, doing so may be beneficial because, in the event of a violation, the government's contracting officer will consider the plans or awareness programs as mitigating factors when deciding what remedies are appropriate.

Before a contractor receives a contract award and annually thereafter, the company must certify to the government that it has implemented a compliance plan that meets the minimum requirements outlined above. Additionally, after conducting due diligence, contractors must certify that neither the company nor its agents, subcontractors

or subcontractors' agents are engaged in trafficking-related activities. Contractors must also certify that they have taken appropriate remedial and reporting actions if they discovered any such activities.

Contractors must also obtain such certification from their subcontractors, including from those that provide supplies for use in the performance of the prime contract, if the subcontractors acquire those supplies abroad, the value of the supplies exceeds \$500,000 and the supplies are not commercially available off-the-shelf items.

NEXT STEPS

The new anti-trafficking regulations apply only to new solicitations as of March 2 and indefinite-delivery/indefinite-quantity contracts if future orders are anticipated. Contractors and subcontractors should take care to ensure they adhere to the FAR amendments' anti-trafficking safeguards when they recruit, hire and terminate employees.

To comply with the amendments' notification requirements, employers should update their employee handbooks to inform their staff of the government's anti-trafficking policy and the penalties for noncompliance.

Contractors that win contracts to provide supplies acquired abroad or to perform services abroad that are valued over \$500,000 must develop plans to comply with the anti-trafficking regulations and certify their compliance on an annual basis.

Contractors that are not required to do so should consider implementing a compliance plan or awareness program to take advantage of mitigated penalties in the event the government finds they violated the regulations.

Contractors should exercise due diligence to uncover violations of the anti-trafficking regulations and should report any misconduct immediately. **WJ**

NOTES

¹ *What are Child Labor and Forced Labor?*, U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFFAIRS, <http://www.dol.gov/ilab/child-forced-labor/What-are-Child-Labor-and-Forced-Labor.htm>.

² U.S. Gov't Accountability Office, GAO-15-102, *Human Trafficking: Oversight of Contractors' Use of Foreign Workers in High-Risk Environments Needs to Be Strengthened* (November 2014), available at <http://www.gao.gov/assets/670/666998.pdf>.