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Anti-Trafficking Rules Raise Contractor Compliance Concerns

By **Dietrich Knauth**

Law360, New York (September 26, 2013, 10:28 PM ET) -- New anti-trafficking regulation proposed Thursday signals that the U.S. will take a flexible, risk-based approach to fighting human trafficking under U.S. contracts, raising questions about exactly how far the government will expect companies to go in vetting subcontractors for riskier work.

Trafficking was an ugly problem in Iraq War contracting, as poorly overseen foreign subcontractors and labor recruiters lured low-skilled workers from places like Bangladesh, Nepal and Fiji with false promises that trapped many in indentured servitude, according to the Commission on Wartime Contracting. To help prevent this problem in the future, the new proposed rules implement parts of the 2013 National Defense Authorization Act and a September 2012 executive order on trafficking that force prime contractors to take more responsibility for vetting their subcontractors and recruiters.

While the rules impose some straightforward responsibilities for all contractors, such as banning the confiscation of passports, they also require companies with larger contracts performed abroad to have a compliance plan "appropriate to the size and complexity of the contract and to the nature and scope of the activities performed, including the risk that the contract will involve services or supplies susceptible to trafficking." It remains unclear exactly what steps the government expects from contractors that must implement a compliance plan, so contractors will likely ask for more clarity before the final rules are published, according to Peter Eyre, an attorney in Crowell & Moring LLP's government contracts group.

"The question is going to be: What else might the government expect above and beyond those minimum requirements?" Eyre said. "It's unclear what entity will opine on the sufficiency of these plans, and that too is a likely area for comment."

There are two separate proposed rules contractors must contend with. One rule would amend the Federal Acquisition Regulation, imposing certain new requirements on all federal contracts, with additional responsibilities for contracts worth more than $500,000 that are performed outside the U.S. The other would amend the Defense Federal Acquisition Regulatory Supplement, adding certain additional responsibilities for Defense Department contractors.

Under the FAR rule, which implements the bulk of the reforms, contractors would be prohibited from recruitment practices that are common red flags for trafficking abuses, including charging recruitment fees to employees; destroying or confiscating employees' passports or other identification documents; and misleading employees about wages, living conditions and job location. It also requires contractors

and subcontractors to protect and interview suspected victims of trafficking, provide foreign employees with an employment contract in their native language before moving them to another country and pay for return transportation for employees who traveled to another country to work on an overseas contract.

The DFARS rule adds onto the FAR rule, requiring DOD contractors contractors to post government posters on human trafficking and whistleblower protections, both in English and in the primary language spoken by the workforce. It also requires companies seeking DOD contracts to have hiring practices compliant with anti-trafficking rules.

The Project on Government Oversight, a nonprofit watchdog group, praised the FAR reforms as a “a great start,” but said the rule missed an opportunity to do more to fight trafficking at its source.

“The rule still relies too heavily on contractors doing the right thing and misses ... protections that must be implemented at the country-of-origin level of the supply chain when workers are targeted and sign up for assignments abroad,” said Scott Amey, POGO's general counsel.

Sam McCahon, a government contracts attorney who has testified to Congress about human trafficking abuses, said the rule left an even larger loophole by exempting contracts for commercial items or services. That language, if broadly interpreted, could “nullify both the intent and impact of the president's executive order and parallel statute” by allowing exemptions for the kinds of routine work that was the primary source of abuses on U.S. military bases in the Iraq War, he said.

“There is no rational basis to exempt 'commercial' services: laundry, food services, cleaning services, warehousing operations, static security, etc. These are the very services where the use of modern-day slave labor has been the norm, rather than the rule,” McCahon said. “If the language remains, it will be business as usual concerning the U.S. government's use of slave labor to support the military and Department of State.”

However, other experts say the rules impose real risks and real compliance costs for affected contractors — especially companies that provide low-skilled services to support the Department of Defense, State Department and U.S. Agency for International Development in areas with less-developed rule of law.

Contractors that take a risk-based approach to anti-trafficking compliance will have to consider whether the type of work they're doing is a particular risk for trafficking violations, such as low-skilled personal services; the relative strength or weakness of local employment regulation, which posed challenges in Iraq and Afghanistan; and the ethics of the subcontractors and labor recruiters they use in performance of the contract, according to Michael Navarre, an attorney with Steptoe & Johnson LLP.

"All those things are risk factors that contractors are going to have to look at," Navarre said. "Many government contractors are already doing this in areas like Iraq and Afghanistan."

The rules' zero-tolerance approach allows for a wide range of remedies for noncompliance, including contract terminations, suspension and debarment, removing employees, and the loss of award fees. The need to certify compliance with the new requirements opens another area of litigation liability for companies whose compliance plans are found wanting, Eyre said.

"There's a wide range of remedies out of the box, but you layer on top of that other risks associated with certifications, including the possibility of False Claims Act liability," Eyre said.

The FAR council asked for additional comment on several issues that were raised before the proposed rules were issued, including comments asking the council to consider requiring proof that any recruitment companies used are licensed in their countries of origin, and requiring a minimum set of labor standards for compensation, work hours and occupational safety.

Some asked the FAR council to do more to ensure that the rule encourages collaboration between the government and its contractors. The American Civil Liberties Union, among others, asked the council to consider publishing a “model compliance plan” to guide contractors, and the American Bar Association's Battle Space and Contingency Procurements Committee asked it to consider ways the government can help contractors identify and avoid bad actors.

“The issue now is setting up a set of standards and a set of compliance policies so the contractors know what they need to do and the government knows what to expect, so that they're all reading from the same sheet of music," Navarre said.

--Editing by Elizabeth Bowen and Melissa Tinklepaugh.
