

## Trafficking Rule Raises Subcontractor Monitoring Concerns

By **Allissa Wickham**

*Law360, New York (January 28, 2015, 9:41 PM ET)* -- A final rule set to be published Thursday will tighten restrictions on human trafficking in government contracting, a move that puts some prime contractors in a tricky position of having to monitor their subcontractors for violations, according to attorneys.

The rule, which implements a 2012 executive order from President Barack Obama and trafficking provision in the National Defense Authorization Act of 2013, places a slew of new requirements on contractors, giving anti-trafficking policy some bite while causing fresh compliance worries.

Under its requirements, all contractors must disclose working conditions to employees, are barred from confiscating passports or other immigration documents, must ensure that workers aren't being charged any recruitment fees and must provide the worker with return transportation for non-nationals.

Additionally, companies with contracts worth more than \$500,000 that will be performed outside the U.S. must perform due diligence on subcontractors before the award is offered, and are required to maintain a compliance plan with procedures to prevent subcontractors from engaging in human trafficking — something attorneys say could pose a significant challenge.

"They have to do due diligence on their agents and subcontractors and continue to monitor them," Kimberly Ball of Akin Gump Strauss Hauer & Feld LLP said. "And that is so difficult to do, because it requires you going down this long chain of people, and a lot of times, you don't even know if you're getting the full story."

Jennifer Plitsch of Covington & Burling LLP said there is concern about how prime contractors are expected to reasonably monitor activity all along the supply chain, particularly because trafficking activity is notoriously hard to detect.

"You talk to people who really enforce these rules and who spend their lives trying to end trafficking, and they'll tell you that the people who do it are good at hiding it, so it's hard to find even if you're there inspecting," Plitsch said.

Ball said that for contractors looking to protect themselves, they should institute training and compliance programs, and include compliance provisions in subcontracts.

Peter Eyre of Crowell & Moring LLP also noted that there's a gray area regarding whether the contractor or

subcontractor is required to pay for these compliance efforts.

"I think another big question is: 'Who pays for this?'" Eyre said. "There are some very specific obligations, both the compliance plan ... and others. But who is going to pay for that?"

Another potential trouble spot is the ban on recruitment fees used by contracting agents, which are fairly common in many industries in other countries, according to Michael J. Navarre of Steptoe & Johnson LLP.

"That's one [thing] that certainly contractors overseas are going to have to look out for, because I know a lot of overseas contractors' hiring agents do charge employees recruitment fees," Navarre said.

Among the significant changes between the proposed rule and the final rule is the removal of a requirement that contractors interview workers suspected of being trafficking victims, and the addition of a provision requiring contractors to use recruiters that comply with the labor laws of the country where the recruiting occurs.

Notably, the rule does not exclude commercial contractors, who may be providing the government with goods that aren't weapons, which will be another tricky area for contracting companies. But it does exempt those providing "commercially available off-the-shelf" items, or COTS items, from certain requirements.

"Only those contractors who can argue that everything under they provide under their contracts falls within the COTS exception — they're the only ones that will be exempted from compliance," Plitsch said.

Although the idea of trafficking is traditionally thought of as something that occurs abroad — and indeed, many of the rules' provisions reference work done overseas — it also occurs in the U.S., said Ball, who noted that foreign workers on military bases sometimes face this problem.

"And a lot of times you wouldn't even know it. You've hired a recruiter who you think is a valid recruiter, and they've in fact told [the workers] that they're coming to the U.S. to work under totally different employment circumstances than they were originally told ... and that at the same time, they've taken their passports," Ball said.

Given the difficulty of rooting out trafficking issues among agents and subcontractors, some attorneys and advocates praised the rule's issuers — Federal Acquisition Regulatory Council members the U.S. Department of Defense, U.S. General Services Administration and NASA — for making a good faith effort to try to tackle the issue.

"I think they really understand the issue and how trafficking takes place in the government contracting process," said Steven Watt, a senior staff attorney with the ACLU's Human Rights Program, adding that government enforcement of the regulation will be key.

Scott Amey, general counsel for the Project On Government Oversight, a nonprofit watchdog group, said he would have liked some remedies to go a little further, but said for the most part "they did a decent job."

"I think a little more could have been done, but I think this is a very good step in providing better protections, disclosure and enforcement mechanisms," he said.

--Editing by Katherine Rautenberg and Chris Yates. All Content © 2003-2015, Portfolio Media, Inc.