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General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street, N.W. 2nd Floor
Washington, D.C. 20405-0001
Attn: Hada Flowers

Ref: FAR Case 2013-001 – Ending Trafficking in Persons
CODSIA Case 08-13

Dear Ms. Flowers:

On behalf of the Council of Space and Defense Industry Associations (CODSIA),[1] we are pleased to submit comments on the proposed Federal Acquisition Regulation (FAR) rule titled "Ending Trafficking in Persons" that was published in the Federal Register on September 26, 2013.[2] The deadline for the submission of comments was extended until December 20, 2013 through a notice published in the Federal Register on November 21, 2013.[3]

Introduction

Our member associations abhor the practice of trafficking in persons and the resulting impact on affected people. We have long supported the U.S. government's strong policy statements and actions to address the causes and effects of such trafficking – whether domestically or internationally. Similarly we have been an advocate for policies and contractual provisions that are understandable, implementable, and consistently applied so that organizations can be held accountable for their actions. But there has to be a recognition that in any organization – be it the military, a federal agency or a contractor – individuals may violate the established rules and organizational norms without the knowledge of the

[1] CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of six associations – the Aerospace Industries Association (AIA), the American Council of Engineering Companies (ACEC), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), TechAmerica, and the Chamber of Commerce of the United States. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

[2] 78 Fed. Reg. 59317, et. seq., Sept 26, 2013, available at http://www.gpo.gov/fdsys/pkg/FR-2013-09-26/pdf/2013-23311.pdf

[3] 78 Fed. Reg. 69812, Nov 21, 2013, available at http://www.gpo.gov/fdsys/pkg/FR-2013-11-21/pdf/2013-27878.pdf

parent organization, and despite the organization's good faith efforts to establish and abide by such rules. This becomes even more pronounced when dealing with agents or subcontractors of that parent company. There must also be a recognition of the limits of private companies (as opposed to law enforcement) to enforce certain government mandates.

The U.S. government's policies have been established through requirements set forth in the Trafficking Victims Protection Act (TVPA), first enacted in 2000 and reauthorized and enhanced in subsequent amendments, and in the FAR and several agency supplemental regulations. For example, since 2006, the FAR has required contractors to inform their contracting officers if they receive any information from any source that alleges a contractor employee, subcontractor, or subcontractor employee has engaged in severe forms of trafficking, procuring a commercial sex act, or using forced labor in the performance of a contract.[4]

On September 25, 2012, the President issued Executive Order 13627, "Strengthening Protections against Trafficking in Persons in Federal Contracts."[5] The Order directs the FAR Council to amend the FAR to prohibit specific trafficking activities and requiring contractors and subcontractors to agree in their contracts to allow for anti-trafficking compliance audits and investigations. For contracts with work performed overseas exceeding $500,000, each contractor and subcontractor is required to maintain a compliance plan that includes several specified elements. To further implement the Executive Order, on September 26, 2013 the Department of Defense also published a proposed rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to further implement DoD trafficking in persons policy and to supplement the FAR coverage.[6] CODSIA is submitting separate comments on that DFARS rule.

Just over three months later, Congress passed and the President signed the fiscal year 2013 National Defense Authorization Act.[7] Title 17 of that Act is titled the "End Trafficking in Government Contracting Act," ("ETGCA" or "the statute"). ETGCA contains many similar but not identical provisions as the Executive Order and has additional provisions that are not addressed at all in the Executive Order. Similarly, there are provisions in the Executive Order which are not contained in ETGCA.[8]

The proposed FAR rule is intended to implement both the statute and the Executive Order. We recognize that in some respects the statute and the Executive Order compete or conflict – and the FAR Council had to make difficult choices and compromises in developing regulations to reconcile the

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[4] See FAR 22.17; FAR 52.222-50

[5] 77 Fed. Reg. 60629 (Sept 25, 2012), available at http://www.gpo.gov/fdsys/pkg/FR-2012-10-02/pdf/2012-24374.pdf

[6] See 78 Fed. Reg. 59325 (Sept 26, 2013), available at http://www.gpo.gov/fdsys/pkg/FR-2013-09-26/pdf/2013-23501.pdf

[7] Public Law 112-239 (Jan 2013), available at http://www.gpo.gov/fdsys/pkg/PLAW-112publ239/pdf/PLAW-112publ239.pdf

[8] We recognize that the statute covers multiple government funding mechanisms beyond contracts – such as grants and cooperative agreements – and that there are differences in the regulatory schemes for each that are beyond the scope of coverage of this Federal Acquisition Regulation. We trust that these comments also will be helpful in formulating the companion coverage for those funding instruments.

dissimilar provisions. But each phrase in the statute matters and cannot be ignored; nor can the FAR Council unilaterally repeal the law by excluding key language contained therein.

Finally, the proposed rule is silent on the "effective date" of any coverage. The statute explicitly provides that the requirements of most sections of the Act apply to contracts entered into on or after 270 days after enactment and to task orders awarded on or after 270 days after enactment pursuant to contracts entered into before, during or after such date.[9] The Executive Order is silent on the applicability date of the changes mandated to the FAR. We strongly recommend that any final rule make the applicability date clear, particularly as it applies to contract performance already underway, and that this date be on or after the date of publication of the interim or final rule in the Federal Register. Some third country nationals have been in country for years and have worked for multiple corporations during that period under recruiting and hiring procedures that may no longer be able to be determined. Implementation should permit a contracting officer to approve exemptions from certain requirements under long-standing contracts.

Our detailed comments on various provisions and topics in the proposed rule are below.

Proposed FAR Part 9.104-6 Federal Awardee Performance and Integrity Information System

The proposed rule would amend FAR 9.104-6 to direct the contracting officer to include in the Federal Awardee Performance and Integrity Information System (FAPIIS) database any allegation of a violation of the prohibitions of either the Trafficking Victims Protection Act or the Executive Order that has been substantiated by the Inspector General, and "providing the contractor an opportunity to respond to any such report in accordance with applicable statutes and regulations." The requirement for posting in FAPIIS is derived from the statute only; no comparable provision is included in the Executive Order. However, while this proposed amendment to FAR 9.104-6 repeats the statutory language, we do not believe it provides meaningful guidance to contracting officers or contractors.

In our view, this provision should repeat or specifically reference the existing provisions of FAR 9.104-6 that provide that the contractor shall be given a reasonable opportunity to review and comment on the report (in this case of the Inspector General that substantiated the violation) in advance of the report being posted in FAPIIS and to have the contractor's comments appended to and made a part of the information that is posted in FAPIIS.[10]

Furthermore, new 9.104-6(e) refers to providing to the contracting officer an IG report of an "investigation of a violation of the trafficking in persons prohibitions in E.O. 13627…" However, the

[9] See Section 1708(c)(1)(B) of the Act

[10] We are aware that the FAR Council has published a proposed rule on the government's requirements for posting certain past performance information reports in FAPIIS. See 78 Fed. Reg. 48123 (Aug 7, 2013), available at http://www.gpo.gov/fdsys/pkg/FR-2013-08-07/pdf/2013-18955.pdf. CODSIA submitted comments on this proposed rule raising concerns with the scope of coverage, the lack of meaningful due process provided to contractors and the challenges facing the government in revising its existing systems to accommodate the regulatory changes proposed. Those CODSIA comments are available at http://www.pscouncil.org/PolicyIssues/TransparencyAccountability/DisclosureDatabases/Comments_on_FAR_Past_Performance_Contractor_Comment_Period_Proposed_Rule.aspx.

Executive Order is not substantive law and its provisions do not provide an independent basis for establishing a trafficking violation. We recommend replacing the entire phrase after "a violation of the trafficking in persons prohibitions in" with "22.1704 or agency-specific supplemental provisions".

Proposed FAR 12.301 – Commercial Items

The proposed rule would amend FAR 12.301 to add a requirement for inserting the certification regarding the Trafficking In Persons Compliance Plan, as provided for in proposed FAR 42.222-XX, in all solicitations prescribed in FAR 22.1705(b), including those for commercial items and for commercial off-the-shelf items (COTS). Additional changes are made to elements in the proposed clause at 52.212-5. There are additional provisions relating to commercial items for work to be performed outside the United States in excess of $500,000 but from which COTS items are exempt. While we recognize and share the federal government's zero tolerance policies, we are concerned about the blanket application of these requirements, particularly the certification requirements, to all commercial items and particularly to COTS items domestically.

Proposed FAR 22.1701 – Applicability

The proposed rule would amend the coverage in existing FAR 22.1701 but the phraseology is missing a key qualification requirement and is confusing because of the placement of commas.

The use of parenthetical phrases after the phrase "except that the requirement of 22.1703(d) for a certification and compliance plan for contracts and subcontracts other than commercially available off-the-shelf items" causes confusion as to which portion of the applicability is subject to the $500,000 threshold. Both the statute[11] and the Executive Order[12] address the threshold for additional requirements over and above the basic prohibitions. To clarify the applicability, we recommend deleting the comma after the phrase "value of the supplies to be acquired" and after the phrase "services required to be performed." Section 2(b) of the Executive Order reflects this proper reference.

In addition, both the statute and the Executive Order further qualify the scope of coverage for the compliance plan and certification requirements as limited to work in performance of the contract. The statute only provides coverage where the value of the services required to be performed under the grant, contract or cooperative agreement outside the United States exceeds $500,000"[13] while the Executive Order covers solicitations "pertaining to the portion of the contract or subcontract performed outside the United States"[14] for both supplies acquired and services to be performed (emphasis added) .

[11] See 22 U.S.C 7104(a), as added by Section 1703(a) of the Act, relating to compliance plans and certification requirements

[12] See Section 2(a)(2) of Executive Order 13627 (Sept 25, 2012) relating to additional requirements for solicitation provisions and contract clauses

[13] See 22 U.S.C. 7104a, as added by Section 1703(a) of the Act

[14] See Sec. 2(a)(2)of Executive Order 13627 (Sept 25, 2012)

Therefore, we recommend modifying FAR 22.1701 to clarify that coverage is applicable if any portion of the contract or subcontract performed outside the United States exceeds $500,000 and modify it to read as follows:

> "This subpart applies to all acquisitions, except that the requirements at 22.1703(d) for a certification and a compliance plan for contracts and subcontracts other than for commercially available off-the-shelf items apply only where the estimated value of the supplies to be acquired or the services required to be performed under the contract outside the United States exceeds $500,000."

Also, there is no flowdown dollar threshold for the anti-trafficking clause; the flowdown provision requires that the certification under subparagraph (h) of the basic clause is only applicable when the estimated value of the subcontract is above the stated threshold and the performance will take place outside the United States. This formulation causes problems for procurement of very low value items. No matter how important the objectives of the rule, imposing the flowdown clause on de minimus value subcontracts may not result in effective anti-trafficking enforcement. We recommend limiting the flowdown requirement to subcontract values in excess of the micro-purchase threshold established in FAR 2.101.

Are foreign military sales transactions covered by the proposed rules? In our view they are not but clarification would be appreciated to avoid any confusion about the scope of coverage.

Proposed FAR 22.1703(a) – Policy

The rule proposes to revise FAR 22.1703 and the 52.222-50 clause by adding additional provisions required by the statute or the Executive Order, but the additions made by the proposed rule significantly modify the coverage in the statute or the Executive Order.

The proposed policy and clause make numerous references to "agents" but the term is not defined anywhere in the rule or in the FAR. We understand concerns have been raised over the use of "local recruiting agents" to locate and hire individuals in support of U.S. government contracts overseas that have been associated with possible trafficking in persons. The final rule should include a definition of the term "agent" as intended by this rule.

FAR 1703(a)(5)

Under both proposed 1703(a)(5) and the clause relating to recruitment practices the proposed rule misplaces the key phrase from the Executive Order "during the recruitment of employees."[15] Similarly, the statute prohibits "soliciting a person for the purpose of employment, or offering employment." [16] In 1703(a)(5), we recommend modifying the phrase "during the recruitment of employees" to add "or offering employment" and moving the place of the revised phrase to come after a modified lead-in phrase "Using misleading or fraudulent practices".

[15] See Sec. 2(a)(1)(A)(i) of Executive Order 13627 (Sept 25, 2012)
[16] See Section 106(g)(iv)(III) of the TVPA (22 U.S.C. 7104(g)), as added by Section 1702 of the Act

Also under 1703(a)(5) – relating to recruitment practices – the proposed rule includes in the list of potentially misleading or fraudulent recruitment practices providing "housing (if employer provided or arranged) ." The statute also adds important qualifications on this matter by precluding "providing or arranging housing that fails to meet the host country housing and safety standards."[17] This statutory provision is already included in proposed 1703(a)(8) and in the proposed clause at 52.22-50(a)(8). Therefore, we recommend modifying 1703(a)(5) by deleting the phrase "housing (if employer provided or arranged)" from the list in this paragraph. We have additional concerns with this provision that are discussed in the comments on 1703(8)(a) below.

While 1703(a)(5) and the proposed clause at 52.222-50(b)(5) seek to prohibit the use of misleading or fraudulent recruitment practices in furtherance of trafficking, the proposed language makes any failure to provide "basic information" about "key" employment terms a violation of the U.S. government trafficking in persons policy, which could potentially apply to employment matters with no connection to trafficking.

Similarly, 1703(a)(5) and the proposed clause at 52.222-50(b)(5) provide that a contractor violates U.S. government policy on trafficking if it fails to disclose "basic information" about the "hazardous nature of the work." Will the final rule provide guidance on what level of detail is sufficient to comply with the rule? If the work is on a U.S. government site which contains hazardous or nuclear substances and materials, is identification of the site sufficient? If the work is at a major construction site or at an industrial facility that includes hazards, what is the level of detail sufficient to comply with the rule?

FAR 1703(a)(6)

Under proposed 1703(a)(6) – relating to recruitment fees – the proposed rule adopts the formulation from the Executive Order but fails to include the critical modifier in the statute of "charging unreasonable placement or recruitment fees" which the law describes as "fees equal to or greater than the employee's monthly salary, or recruitment fees that violate the laws of the country from which an employee is recruited."[18] We strongly recommend that the phrase "unreasonable placement or recruitment fees" be added to the rule and include in the rule the examples provided for in the statute to further explain the types of "unreasonable" fees covered by the prohibition. Without such qualifier, the rule imposes a limitation far beyond what is necessary or appropriate.

FAR 1703(a)(7)

Under proposed 1703(a)(7) and the proposed clause – relating to return transportation – the proposed rule adopts a hybrid formulation combining both statutory and Executive Order provisions but fails to include the critical modifier in the statute "if requested by the employee"[19] in each portion of the proposal. We strongly recommend that this important qualification be added as the opening phrase to

[17] See Section 106(g)(iv)(V) of the TVPA (22 U.S.C. 7104(g)), as added by Section 1702 of the Act
[18] See Section 106(g)(iv)(IV) of the TVPA (22 U.S.C. 7104(g)), as added by Section 1702 of the Act
[19] See Section 106(g)(iv)(II) of the TVPA (22 U.S.C. 7104(g)), as added by Section 1702 of the Act

this provision to state: "If requested by the employee at the end of employment, failing to provide return transportation."

We are also concerned about the lack of clarity in proposed 1703(a)(7) regarding the "provide or pay" provision – which could lead to misinterpretations at best or allegations of violations at worst. While it is obvious that a contractor could choose to "provide" the transportation at the end of the employment, would the contractor be required to "pay" only at the end of the period of employment? What mode of transportation is required? If the employee was brought over by air is the return required by air? By first class or is economy sufficient? Is ship transportation acceptable or must it be via a cruise line? And how should the employer "pay?" Must the payment be in the form of a non-transferrable and non-refundable ticket? Can it be in cash in the currency of the country where the work is being performed or can it be a voucher for the employee to use as they see fit? There are also questions about how this provision is to be applied if the employee is terminated for cause.

Further, with respect to 1703(a)(7), there are four exemptions in the law and the Executive Order from the requirement to provide or pay return transportation, but these exemptions are not consistently addressed in the proposed rule. One exemption – "by the Federal department or agency providing the contract," – is only addressed in the statute[20] and is included in substantially similar form in proposed 22.1703(a)(7)(ii)(B), but it is <u>not</u> included in the contract clause[21] and there is no other coverage in the rule providing information to the contracting officer or contracting agency when to <u>not</u> include the clause in a solicitation or resulting contract. Furthermore, there is no guidance in the regulation as to how, when or from whom within the contracting agency such exemption is to be obtained. Another exemption – for an employee who is legally permitted to remain in the country of employment and who chooses to do so – is included in both 1703(a)(7)(ii)(A) and the clause in identical form. Finally, both the statute and the Executive Order provide an exemption where the employee is a victim of trafficking and is seeking victim services or legal redress in the country of employment, or the employee is a witness in a human trafficking enforcement action, and this exemption is included in identical form in 1703(a)(7)(ii)(C) and the clause. Accordingly, any final rule should reflect the exemptions – as provided in the statute and the Executive Order – consistently between both 1703(a)(7) *and* the contract clause.

<u>FAR 1703(a)(8)</u>

Under proposed 1703(a)(8) and the proposed clause – relating to providing or arranging housing – the proposed rule adopts the statutory formulation because there is no coverage on this topic in the Executive Order. Similar to our concerns with the "provide or pay" requirement for return transportation, we are also concerned here about the lack of clarity in this provision – which could lead to misinterpretations at best or allegations of violations at worst. Most observers acknowledge that rarely are there uniform host country housing standards that are publicly available that would be applicable to the performance of work under U.S. government contracts; even in the United States, housing standards are set by local jurisdictions. Even if such standards exist in a host country, the contractor may have no choice in applying them if the housing is to be provided on a U.S. military or

[20] See Section 106(g)(iv)(II)(aa) of the TVPA (22 U.S.C. 7104(g)), as added by Section 1702 of the Act
[21] See proposed 52.222-50(b)(7)(ii)

other federal enclave or even if such housing is identical to the housing provided to any U.S. national working on the contract or provided to the uniformed military.

Interestingly, in the requirement for the compliance plan specified in paragraph (h)(3)(iv) of the clause, the compliance plan permits the contractor to explain any variance from applying these host country national standards. We further recommend that this "variance" language be added to 1703(a)(8) and the clause at (b)(8) to provide the option to the contractor to adopt a variance and explain the need for and basis of such variance. Alternatively, the coverage relating to the contents of an employment contract under 1703(a)(9) or paragraph (b)(9) of the clause gives the contractor the flexibility to address "living accommodations."

Proposed 22.1703(d) – Certification and Compliance Plans

Proposed 1703(d)(1) and the clause – relating to the contractor certification and compliance plans – adopts a scope of coverage that raises issues similar to those we raised with proposed 1701. As above, we recommend that the first sentence of 1703(d)(1), and the lead-in to the clause at (h)(1), be modified to state:

> "Except for contracts and subcontracts for commercially available off-the-shelf items, where the estimated value of the supplies to be acquired or the services required to be performed under the contract outside the United States exceeds $500,000—".

In addition, proposed 1703(d)(1) spells out the elements of the contractor certification and compliance plan that is required for covered work. However, only the last sentence of 1703(d)(1) creates a requirement for the submission of the certification by the apparent successful offeror before award of the contract.[22] We recommend moving the requirement for the "recipient certification" to the opening phrase of subparagraph (d)(1). Similarly, because we believe the threshold for applicability of the certification applies to all of the requirements, we recommend deleting that applicability language from this subparagraph (d)(1).

Furthermore, Section 1703(b) of the statute provides an important limitation on the compliance plan that is missing from the both the prescription and the clause. Section 1703 of the Act specifically provides that any plan or procedure implemented pursuant to the requirements of the compliance plan shall be appropriate to the size and complexity of the contract and to the nature and scope of its activities, including the number of non-U.S. citizens expected to be employed (emphasis added). We strongly recommend that this qualification be added to both the prescription and the clause. This qualification is important because of the compliance plan monitoring responsibility imposed on a contractor. For example, a company that routinely procures supplies and services that meets the threshold for the compliance plan may have minimal or no contact with the subcontractor or its employees (such as for certain types of janitorial services, or the non-lawyer employees of an attorney [such as receptionists or secretaries] when the contractor retains the services of an attorney). Here

[22] See Section 1703(a) of the statute requiring the head of an agency before award (and annually thereafter) to obtain a certification from the recipient that the recipient has taken the actions listed in (a)(1)-(3)

again, we believe a contractor should be empowered to adopt a compliance plan that recognizes these limitations as long as such exclusions do not thwart the purpose of the rule.

Furthermore, a contractor's (or subcontractor's) plan may include company proprietary or competitive sensitive information concerning execution techniques in implementing the plan requirements. In addition, delays in finalizing the scope of work or the terms and conditions of a subcontract may also create confusion about when or how a subcontractor must submit a compliance plan to the prime "prior to award."

In proposed 1703(d)(2), regarding the contractor's annual certification during contract performance, we recommend clarifying that the content of the annual certification is identical to and no more or less than the three substantive requirements provided for in subparagraph (d)(1).

In proposed 1703(d)(3), the provision fails to properly differentiate the responsibilities of the contractor and the subcontractor(s). We acknowledge that the subcontractor(s) with work outside the United States in excess of the thresholds is required to have a compliance plan and make certain statements. However, we recommend deleting the duplicative coverage for "contractors" under this subparagraph and revising subparagraph (d)(3) to provide:

> "Require the contractor to obtain a certification from each subcontractor, prior to award of a subcontract, for work that will be subject to the threshold, that the subcontractor (a) has a compliance plan that addresses the substantive elements of paragraph (d)(1) and (b) after conducting due diligence, either (i) to the best of the subcontractor's knowledge and belief neither it nor its agents, has engaged in any such activities or (ii) if abuses have been found, the subcontractor has taken the appropriate remedial and referral actions;".

Proposed 1703(d)(3), and the clause at 52.222-50(h)(5)(ii), require the prime contractor and each subcontractor for covered work to conduct "due diligence." The phrase "after having conducted due diligence" is only included in the statute.[23] We recommend that the scope of the term be further defined.

Proposed 1703(d)(1)(ii), (d)(3)(ii) and the clauses at 52.222-50(h)(5)(ii)(B) and new 52.222-XX(b) provide that if "abuses have been found, the contractor or subcontractor certifies it has taken the appropriate remedial and referral actions" (emphasis added) . The term "abuses" is used in the Executive Order[24] but not further defined and is not used in the statute. We recommend clarifying the term "abuses" in each place it appears by providing "if abuses relating to any of the prohibited activities identified in 52.222-50(b) have been found,".

What type and level of "monitoring" is required, including with respect to agents, subcontractors and subcontractor employees? The current trafficking in persons rule covers the conduct of employees during non-work hours and is applicable to non-work activities. Adding a requirement to "monitor" and "detect" employee conduct (including during non-work hours) and extending this same requirement for

[23] See 22 U.S.C. 7104(a) of the TVPA, as added by Section 1703(a) of the statute
[24] See Sec. 2(a)(2)(B)(ii) of Executive Order 13627 (Sept 25, 2012)

a contractor to monitor and detect conduct with respect to all of its subcontractors and subcontractor employees at all tiers and to agents raises considerable, if not insurmountable, compliance challenges and privacy concerns for contractors. How can a contractor realistically monitor the off-work conduct of all of its own employees, much less a third- or fourth-tier subcontractor employee? Does the federal government really expect that a contractor will be able to monitor the off-work conduct of their employees and those of their subcontractors? Must monitoring be invoked only when an employee's conduct or words give rise to suspicion, or must all employee off-work conduct be monitored in an attempt to identify trafficking activity? What if a contractor's employees are located in a country where such monitoring and reporting of off-work conduct could potentially violate local privacy laws? Even within the United States, has the government considered the privacy impact of such broadly scoped monitoring by contractors of employee off-work conduct as the government itself would be required to consider through a Privacy Impact Statement if it were to consider such broadly scoped monitoring? If that is, in fact, the intent of the rule, the rule should provide examples of what steps will be considered sufficient "monitoring" of the conduct of employees during non-working hours to detect and prevent trafficking.

For contractors with significant levels of subcontracts and a varied supply chain, the compliance and monitoring obligations, as applicable to subcontractor and supply chain companies and their employees, impose significant and uncertain burdens on prime contractors. The requirements should be clear, unambiguous and reasonably related to achieving the stated goals, without unnecessary or undue burdens. The final rule should clarify that a prime contractor would not be held responsible for violations committed solely by a subcontractor, subcontractor's employee, or agent, despite a contractor's due diligence and compliance program consistent with the regulations. The rule should further afford a contractor an affirmative defense (or at least a significant mitigating factor) if it has its own compliance plan in place, flows down the required clause, affirmatively communicates to the subcontractors the requirements of the rule and reports trafficking activity of a subcontractor if and when it becomes known to the contractor.

In addition, the proposed rule is ambiguous, at best, regarding contractors' "monitoring" obligations relating to workers who have been severed from employment. Accordingly, any final regulation should clarify that the rule (including its monitoring and detecting obligations) ceases to apply to contractor or subcontractor employees who are no longer working on a covered contract or subcontract except for conduct while employed.

Proposed 22.1703(e) – Access to Contractor and Subcontractor Facilities and Staff

Proposed 1703(e) and the clause at 52.222-50(e) require "full cooperation." The proposed rule requires that contractors (and as flowed down, subcontractors, including COTS subcontractors) provide "reasonable access" to facilities and staff inside or outside the U.S to allow contracting agencies and "other responsible enforcement agencies" to conduct audits, investigations or other actions to ascertain compliance with respect to trafficking. The final rule should (1) clarify what constitutes "reasonable access;" (2) confirm that such access would not be required before a contractor has an opportunity to perform its own investigation; (3) confirm that a contractor has a right to have a representative present

during any access and interviews as long as such action does not "prevent or hinder the ability of employees from cooperating with government authorities;" and (4) clarify what constitutes "other responsible enforcement agencies."

Proposed 1704 – Violations, remedies and notifications

Proposed section 1704 addresses violations and remedies available to the government.

Both proposed 1704(b) and the clause at 52.222-70(f) address available remedies and note that a contracting officer may consider both mitigating and aggravating factors in determining the remedies to be applied. This component is taken directly from the statute[25] even though such a provision was not included in the Executive Order. Despite this omission from the Executive Order, we support the proposal that a contracting office should address both mitigating and aggravating factors in a remedy determination.

Proposed 1704(c) addresses notification requirements by contracting officers and requires notification to the agency's Inspector General, the agency's suspension and debarment official and, if appropriate, law enforcement of "credible violations." As with other complex compliance matters, we do not believe the contracting officer has the necessary skills to assess whether there are "credible violations" and neither the statute nor the Executive Order require notification of "credible violations." The statute requires referral to the Inspector General after receiving "credible information that a recipient … has engaged in an activity described in Section 1702 of the Act, including reports from other identified government officials."[26] The Executive Order requires referral if the contracting officer becomes "aware of any activities that would justify termination under (certain provisions of the Trafficking Victims Protection Act)" or are inconsistent with the requirements of the Executive Order or certain other laws or regulations relating to trafficking.[27]

The proposed rule and clause also require that the contractor "immediately" inform the contracting officer and the IG of any "credible information" received from any source alleging a violation (including by any subcontractor employees at any tier of the supply chain), but this requirement conflicts with the requirement for the timely disclosure of "credible evidence" under the contractor Code of Business Ethics and Conduct (at FAR 52.203-13); it also raises concerns about whether any protections will be afforded for a contractor's attorney-client privilege, attorney work product or any applicable right against self-incrimination. Furthermore, the requirement for immediate disclosure could be read to preclude the contractor from conducting an internal investigation to assess the credibility of information prior to any disclosure. The final rule should allow for these basic rights and should be consistent with the FAR 52.203-13 disclosure standards.

[25] See section 1704(c)(3) of the statute
[26] See section 1704(a)(1) of the statute
[27] See section 2(a)(1)(C) of Executive Order 13627 (Sept 25, 2012)

Proposed 1704(c) also directs the contracting officer to include in FAPIIS any allegation substantiated by the Inspector General in its report and references FAR 9.104-6. As we noted above, we believe that any information to be reported in FAPIIS must follow the procedures in 9.104-6.

Coverage for Subcontractors

This rule presumes the continuation of the antiquated view that each subcontractor supports only one prime contractor and is never a prime contractor under another covered contract or provides support as a subcontractor to multiple prime contractors. Our experience is that many companies – regardless of their place in the contracting hierarchy for any specific procurement – have adopted significant policies and practices and likely their own compliance plans to "end trafficking in persons." The requirements of the proposed rule could add significantly to the confusion of a subcontractors' workforce by appearing to require the subcontractor to post and/or link to the compliance plan of multiple prime contractors, possibly including the company's own plans. Such requirements also contribute to the challenge of compliance by requiring the development and "submission" of a subcontractor's compliance plan prior to award of the subcontract and annually thereafter.[28] In our view, a more effective and efficient approach is to follow the prescription in FAR 3.1002 that requires a contractor to have a business ethics program suitable to the size of the company and the nature of its contracts[29] and to post that information in the workplace and on their website.

Proposed FAR Clause 52.222-50

Elsewhere in these comments we make recommendations for changes to the substantive prescription of the rule. Those comments are equally applicable to identical provisions included in this or other clauses. We have additional comments below specifically addressing the clauses.

Proposed FAR Clause 52.222-50(h)(4) – Posting

Subparagraph (h)(4)(i) of the clause requires that subcontractors post the "relevant contents" of the compliance plan no later than the initiation of contract performance, at the workplace of the subcontractor and on the subcontractor's website if one is maintained. As noted above under "Coverage for Subcontractors," the proposed posting is unnecessarily burdensome and could create greater confusion than clarity. In addition, as noted above under "Compliance Plans," such plans may include company proprietary or competitive sensitive information concerning execution techniques in dealing with the plan requirements.

What if the contractor (or subcontractor) does not have a "workplace" where the information can be posted – such as if work is performed in a government facility or in the field and not in a regular fixed location such as a dining hall or contractor offices?

We recommend that the clause provide greater flexibility to the contractor to post what it determines to be relevant content or information on how to obtain such content in any such notice that is posted

[28] See proposed FAR 22.1703(d)(3) and the clause at 52.222.50-(i)(2)
[29] Sec. 2(a)(2)(A) of Executive Order 13627 includes this formulation

conspicuously where work is performed, consistent with the nature of its compliance plan, the nature and location of the work performed and the number of employees performing work.

Proposed FAR Clause 52.222-50(i)(2)

As noted elsewhere, this paragraph requires that, "if applicable," the contractor shall require subcontractors to submit a compliance plan to the contractor prior to award and annually thereafter. The phrase "if applicable" is ambiguous. Should a contractor require the subcontractor compliance plan only in support of a contracting officer's request or does the clause mean that the contractor shall always require submittal of the plan when the plan is "applicable" pursuant to paragraph (h)? Should it mean the latter, that seems inconsistent with the Federal Register's Annual Reporting Burden that, even at the prime level, submittal of such a plan by a prime contractor to the government should only be on an exception basis when there is reason to believe that there may be trafficking activities in violation of the government's zero-tolerance policy.

While this may seem simple, the business realities are that "prior to award," the first- or lower-tier subcontractors may not have been selected, or even if selected, the size and complexity of the work, nature and scope of activities to be performed, dollar thresholds, extent of work to be performed outside the United States, number of non-United States citizens expected to be employed and risk of trafficking, may not be known or fully developed to formulate a compliance plan that takes these required factors into account.

Proposed FAR Clause 52.222-xx (b) – Due Diligence

The proposed clause requires the prime contractor to conduct "due diligence." This requirement is also required to be flowed down. We recommend that the term be further defined.

Reporting Burden

The proposed rule specifies a reporting/recordkeeping burden of 24 hours for the compliance plan and 4 hours per year for the certification. Given the requirement that the plan be "appropriate to the size and complexity of the contract and to the nature and scope of the activities to be performed," that it includes an awareness program and ongoing procedures to monitor compliance and prevent and detect violations, and the need for the prime contractor to certify as to (and conduct due diligence on) the activities of their subcontractors and agents, these figures appear to be dramatically understated. This is particularly the case for contractors with multiple contracts or contracts for larger projects involving significant subcontracting or a complex supply chain. Depending on the level of due diligence and monitoring that the government expects contractors to perform with respect to supporting the certification, these activities are likely to entail a compliance burden that is several orders of magnitude greater than that represented in the proposed rule.

We are separately submitting this and additional comments on the reporting burden to the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget and to the Chief Counsel for Advocacy at the Small Business Administration.

Conclusion

Thank you for your attention to these comments. We would welcome the opportunity to meet to discuss these comments. In the interim, if you have any questions or need any additional information, please do not hesitate to contact Alan Chvotkin of the Professional Services Council, who serves as our project officer for this case, or Bettie McCarthy, CODSIA's administrative officer. Alan can be reached at (703) 875-8059 or at chvotkin@pscouncil.org. Bettie can be reached at (703) 875-8059 or at codsia@pscouncil.org.

Sincerely,

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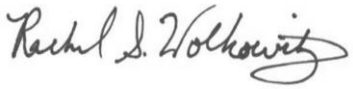

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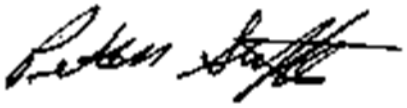

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