

Expert Analysis

Switching to Offense in Government Contracting: Contractors Conscripted to Join the Fight Against Human Trafficking

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When the largest single purchaser of goods and services in the world — the U.S. government — puts its weight behind something, companies and organizations take notice. On Sept. 25 the government announced in no uncertain terms that taxpayer dollars used for government contracting were no longer to support the global scourge of human trafficking.

At the time the ink was drying on President Obama's groundbreaking Executive Order on Strengthening Protections Against Trafficking in Persons in Federal Contracts, businesses were still coming to grips with the California Transparency in Supply Chains Act's novel effort to legislatively motivate them to join the transnational fight against human trafficking. As the business community will soon come to recognize, the scope and impact of the president's executive order render the California law's efforts positively modest.

Among other requirements, the executive order requires *all* federal contractors and subcontractors to take several actions (see box).

"We're making clear that American tax dollars must never, ever be used to support the trafficking of human beings," Obama said in a Sept. 25 speech to the Clinton Global Initiative. "We will have zero tolerance. We mean what we say. We will enforce it."

INSIGHTS INTO THE EXECUTIVE ORDER'S PURPOSE

The statistics are staggering. More than 20 million men, women and children worldwide are victims of severe forms of human trafficking. Cognizant of this reality, companies around the world have been taking steps to eliminate the potential for trafficked labor in their operations and supply chains. So far, however, these efforts have largely been voluntary. The president's executive order, the California Transparency in Supply Chains Act, and the pending federal Business Transparency on Trafficking and Slavery Act have truly made optional compliance a thing of the past.

Contractors must take concrete steps to ensure that their employees do not engage in trafficking-related activities.

The executive order's requirements

- ✓ **Prevent.** Contractors must take concrete steps to ensure that their employees do not engage in trafficking-related activities.
- ✓ **Comply.** For contracts exceeding \$500 million and involving services to be performed abroad, contractors must develop and maintain detailed compliance plans.
- ✓ **Self-report.** Contractors must now self-report any activities that are "inconsistent with" the executive order.

NOTHING NEW FOR SOME CONTRACTORS

Since 2004, Defense Department contractors have been subject to similar, but less draconian, anti-trafficking provisions aimed at stomping out trafficking-related activities among defense contractors, troops and government employees.

In 2006, in response to instances of labor trafficking in Iraq by defense contractors and subcontractors, the Defense Department instituted its Trafficking in Persons program aimed at combating unintended support of trafficking and educating troops, contractors and government employees on how to detect and report suspected instances of trafficking.

United States Forces Korea, confronted with clear evidence of human trafficking, similarly developed a program that focuses on increasing awareness, identifying victims, reducing demand and cooperating with local authorities. The USFK program is, in fact, considered such a model plan that it now forms the basis for NATO's anti-trafficking training curriculum.

Regulations implemented by the Defense Department in 2007, moreover, require that contractors provide anti-trafficking training to all employees and ensure compliance with U.S. law, host-nation law and local theater directives on combating human trafficking. Under the current Subpart 22.1703 of the Federal Acquisition Regulation, military contractors have been subject to certain anti-trafficking regulations. The Defense Department, in short, has made it clear that it has a zero-tolerance policy for trafficking.

EXECUTIVE ORDER EXPANDS ANTI-TRAFFICKING REACH

The United States will now extend the Defense Department's zero-tolerance policy to all who provide goods and services to the government. The scope of this group is truly immense. Every company that provides a good or service to a federal committee, foundation, service, administration, agency, council, office, bureau, registry, court, commission, etc., must comply. From those who manufacture uniforms for Transportation Security Administration officers, to companies that provide paper to the General Services Administration, to suppliers of upholstery for

seats on Amtrak trains, to makers of food and ingredients sold for school lunches, all must demonstrate and certify that trafficked people were not an element in their supply chain.

In all, it is estimated that over 300,000 contractors fall under executive order's reach (and that does not even begin to account for the hundreds of thousands of companies that *supply* those government contractors).

INCLUDING MORE STAKEHOLDERS

The executive order shares a number of key provisions with those of the Defense Department anti-trafficking rules. Both forbid "engaging in misleading or fraudulent recruitment practices, such as by making material misrepresentations regarding the key terms and conditions of employment (including wages and fringe benefits, the location of work, living conditions and housing)." Both require that contractors implement employee training and awareness programs, and both require companies to self-report.

The rules apply to subcontractors as well. The Defense Department rules also require that all employees of department contractors and subcontractors be provided with a signed copy of their employment contract and that these companies use licensed recruiting firms.

Despite substantial overlap, the new executive order will add to the FAR additional prohibited activities, including:

- Destroying, concealing or confiscating employee identity documents, such as passports or drivers' licenses.
- Failing to pay certain return transportation costs upon the end of employment outside the United States.

For contracts that involve services or supplies exceeding \$500,000 and that are to be performed abroad, federal contractors and subcontractors will now be required to maintain "compliance plans" that are appropriate for the nature and scope of the activities performed.

Such plans must be provided to the contracting officer upon request, be posted on the contractor's or subcontractor's website, and, "at a minimum," include:

- Specific procedures to prevent sub-contractors at any tier from engaging in human trafficking.
- Explicit policies aimed at ensuring that employees do not engage in trafficking-related conduct.
- Processes allowing employees to report trafficking violations without fear of retaliation.
- Recruitment and wage plans restricting the use of recruitment companies to those having "trained employees."

Mandate specific contract language to aid enforcement

Government contracts must now include contractor and subcontractor assurances that they will provide "full cooperation" and "reasonable access" to contract and enforcement agencies conducting audits or investigations.

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Require self-reporting of violations

Contracting officers must notify, as appropriate, the agency inspector general, the debarment officer or law enforcement of any trafficking-related activities that are illegal, violate regulations or are otherwise "inconsistent with" the executive order.

Annual contractor and subcontractor certifications

All government contractors and sub-contractors must certify that neither the contractor nor any subcontractors have engaged in any trafficking-related activities.

THE PENALTIES OF FAILING TO COMPLY

The failure to comply with the existing FAR regulations for defense contractors can lead to significant penalties, ranging from administrative actions resulting in the termination of contracts, to more severe actions such as debarment or suspension.

The easily overlooked, looming criminal penalties are likely of even greater concern to those providing goods and services to the U.S. government. Assume, for example, that a contractor *falsely* certifies that his company is compliant with the executive order (perhaps the contractor knows or should know of a detected instance of trafficking, or perhaps the contractor simply signs off on the certification without having a good-faith belief for claiming compliance).

The act of falsely certifying compliance can result in the criminal charge of having made a false statement to the government under 18 U.S.C. § 1001, providing for up to five years' imprisonment and a \$250,000 fine, or substantial penalties under the False Claims Act, 31 U.S.C. § 3729, calling for treble damages, among other things.

As Obama said in his speech to the Clinton Global Initiative, "These safeguards, which have been largely modeled on successful practices in the private sector, will increase stability, productivity and certainty in federal contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions."

NOW WHAT?

By spring 2013 (that is, in 180 days from Sept. 25), the new guidelines will have developed into binding regulations.

To be prepared, government contractors — and *those who supply* government contractors — must begin to get programs and policies in place so that they can, with confidence, certify that their supply chains are trafficking-free. In light of these groundbreaking new requirements, companies need compliance advice concerning this highly specialized area — namely, anti-trafficking and supply chain security.

External advisers experienced in anti-trafficking efforts can assist in preparing the required training materials and certifications, drafting compliance plans, devising due diligence and vetting procedures, and, as necessary, conducting internal audits and investigations into allegations of noncompliance.

No general counsel or compliance officer wants to learn that their company is going to be the model case for an enforcement proceeding by the government. The time is now for companies to begin to implement their plans.



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