

Reproduced with permission from Federal Contracts Report, 103 FCR 188, 01/24/2015. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

**HUMAN TRAFFICKING****The Day Government Contractor Compliance Changed:  
Federal Acquisition Regulations on Human Trafficking Released**

BY T. MARKUS FUNK, RICK OEHLER AND ELIZABETH  
BREAKSTONE

**O**n occasion, big compliance changes come with little fanfare, while other, much-hyped new laws and regulations largely fall flat (UK Bribery Act, anyone?). In the case of the just-released Federal Acquisition Regulations (FAR)—arising out of President Barack Obama’s 2012 Executive Order 13,627 mandate that all federal contractors take certain actions related to combatting human trafficking and slavery in their supply chains—the compliance community will quickly get up to speed on the truly seismic supply chain changes in the offing.

The FAR provision will have an immediate and significant impact on contractors, subcontractors and lower-tier subcontractors to the world’s largest consumer of goods and services, namely, the U.S. government. After all, the federal government has more than 300,000 companies and organizations doing business (and who want to continue doing business) with it, not to mention the hundreds of thousands of companies around the world that supply and otherwise provide services to these direct government contractors.

The compliance reality for these companies has changed, and many must now play catch-up or risk severe penalties.

**The New Reality  
Of Government Contracting**

On January 29, 2015, the Federal Acquisition Regulatory Council, in coordination with various agencies, promulgated detailed rules calibrated to put into action the zero-tolerance objective. A reading of the just-promulgated (and much-anticipated) rules, effective March 2, 2015, shows that they fundamentally alter federal contractors’ compliance calculus.

Consider, for example, that the rules require government contractors and subcontractors to, among other things:

- Prevent severe forms of trafficking and forced labor<sup>1</sup> by taking concrete preventive steps to ensure employees do not engage in trafficking-related activities.

<sup>1</sup> The Code of Federal Regulations defines “severe forms of trafficking” as “(1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” (48 C.F.R. 52.222-50). “Forced labor” means “knowingly provid-

- Cooperate with, and provide access to, enforcement agencies investigating compliance with anti-trafficking and forced-labor laws.

- Mandatory disclosure (or self-report) upon receipt of any credible information from any source that alleges a contractor employee, subcontractor, or subcontractor employee has engaged in conduct that violates the new FAR provisions, with severe potential government remedies.

- Develop and maintain a detailed compliance plan for contracts for supplies (other than for commercially available off-the-shelf (COTS) items) acquired outside the U.S., or services to be performed outside the U.S., with an estimated value exceeding \$500,000.

- File annual certifications for contracts exceeding \$500,000 confirming that it has implemented a compliance plan, and, after a due diligence inquiry, certifying that neither it nor its employees engaged in any trafficking-related activities, or, if a violation is identified, the contractor has taken appropriate remedial and referral action.

The mandatory self-reporting of a company's awareness of noncriminal trafficking-related conduct, and the corresponding initiation of potential suspension or debarment actions, will—or, at least, should—leave even the most ardent anti-trafficking advocate surprised.

Notably, there also is no *de minimis* exception—if the company does any business with the government, that business is governed by the just-released rules.

## Surveying the Consequences For Noncompliance (or Under-Compliance)

Businesses that do not take the Executive Order's promised rules seriously do so at their own considerable peril:

- **Termination:** For default of the contract.
- **Debarment:** Business death knell for noncompliance.
- **Imprisonment:** “Knowing and willful” false certification is a crime. Consequences include up to five years imprisonment and a \$250,000 fine.
- **False Claims Act:** Government fraud—includes qui tam actions encouraging whistleblowers. Typically provides for 15 percent to 25 percent of damages recovered (31 U.S.C. § 3729).
- **Class actions:** Deceptive advertising? Consumers complain that they wouldn't have purchased a product if they knew it was tainted by trafficking (consider recent “cruelty-free” class actions).
- **Consumer boycotts:** Few consumers want products that child or trafficked/forced laborers make. Trafficking is today's consumer hot topic.

ing or obtaining the labor or services of a person—(1) By threats of serious harm to, or physical restraint against, that person or another person; (2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) By means of the abuse or threatened abuse of law or the legal process.” (48 C.F.R. 52.222-50).

- **Advocacy group pressure:** Hundreds of advocacy groups worldwide stand ready to target businesses accused of violating anti-trafficking laws and regulations.

Today, an estimated 27 million people worldwide are subject to human trafficking, and a significant portion of this trafficking takes place in the form of forced/trafficked/slave labor. Forced labor in the private economy is estimated to generate \$150 billion in illegal revenue each year. With the far reach of the federal government, there is a very real possibility that somewhere on its supply chain, a large number of subcontractors run the risk of violating the new FAR provisions.

The new FAR provisions notably raise the bar by requiring companies to ensure their entire supply chain is free from human trafficking and forced labor. Ensuring compliance, in turn, will require considerable resources.

The flow chart below deconstructs the FAR provision.

T. Markus Funk is a partner at the law firm of Perkins Coie LLP. He is the founding co-chair of the firm's Supply Chain Compliance Practice and focuses on internal investigations, complex commercial litigation both at the trial and appellate levels, and various related supply chain compliance issues. In 2012, Funk and U.S. District Judge Virginia Kendall co-authored “Child Exploitation and Trafficking: Global Challenges and US Responses.” As part of his practice, Markus for the past two years has helped clients prepare for the immediate and long-term compliance impacts of the Executive Order on Trafficking in Government Contracts. He can be reached at [mfunk@perkinscoie.com](mailto:mfunk@perkinscoie.com).

Rick Oehler is a partner at Perkins Coie. He has years of experience handling sophisticated disputes with the U.S., including federal procurement and grant matters, energy matters, export compliance matters and anti-corruption matters. Oehler also has handled numerous Freedom of Information Act matters and other regulatory matters. In the federal procurement arena, he has handled government contract accounting disputes, prime contractor-subcontractor litigation, government claims litigation, government investigations, reverse FOIA litigation, bid protests and small business matters. He can be reached at [roehler@perkinscoie.com](mailto:roehler@perkinscoie.com).

Elizabeth Breakstone is an associate at Perkins Coie's Seattle office and a member of the firm's Supply Chain Compliance Practice. Elizabeth has written extensively on the potential compliance implications of the Executive Order on Trafficking in Government Contracts and the new Federal Acquisition Regulations. She can be reached at [ebreakstone@perkinscoie.com](mailto:ebreakstone@perkinscoie.com).

DECONSTRUCTING THE EXECUTIVE ORDER AGAINST TRAFFICKING IN PERSONS IN FEDERAL CONTRACTING

Federal Contractor for Goods/Services (size/nature of contract irrelevant)?

NO

Executive Order Does Not Apply - But 18 U.S.C. § 545 (smuggling) and 19 U.S.C. § 1307 (forced labor prohibitions) might

YES

Federal contractors, subcontractors, their employees and their agents prohibited from engaging in human trafficking, as evidenced through:

- Using forced labor
- Misleading/fraudulent recruitment practices
- Charging recruitment fees
- Destroying, concealing, confiscating, or otherwise denying employee access to his or her identity docs
- Failing to pay return transportation costs
- Failing to provide employment agreement (if required) in employee's native tongue and prior to employee's departure from home country

Contractors and subcontractors must create and post at the workplace and on their company website a formal compliance plan including, as appropriate:

- A process for employees to report activity inconsistent with zero-tolerance policy without fear of retaliation
- A recruitment and wage plan
- Available disciplinary actions for employees that violate the policy
- Reciprocal expectations between company and supplier
- A housing plan
- Preventative procedures for subcontractors
- Note: Each contractor and subcontractor must formally certify the absence of misconduct, and that, if misconduct was observed, that appropriate remediation and referral actions were taken

Contractors and their subcontractors must agree to:

- "Cooperate fully" with, and provide reasonable access to, agencies conducting investigations into, among other things, violations of this order
- Self-report, among other things, "activities that ... are inconsistent with the requirements of this order or any other applicable law or regulation"

Potential Liability From Non-Compliance: Criminal penalties under:

- 18 U.S.C. § 1001 (False Statement)
- 18 U.S.C. § 545 (Smuggling)
- 19 U.S.C. § 1307 (Forced Labor Prohibitions)
- 31 U.S.C. § 3729 (False Claims Act)
- Debarment (48 C.F.R. 9.406-2)
- Suspension
- Loss of award fee or termination of contract

YES

Contract for Services or Supplies that are not off-the-shelf items that (1) Exceed \$500,000 and (2) to be performed outside U.S.

NO

"Trafficking" is defined broadly to include (1) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age, and (2) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery

Note: The Federal Acquisitions Register will be amended in the Spring of 2013 to reflect the above objectives

