



9/8/15

USAID PROCUREMENT EXECUTIVE

PROCUREMENT EXECUTIVE BULLETIN NO. 2015-03A

SUBJECT: Guidance on New FAR Rule – “Ending Trafficking in Persons” (FAR Case 2013-001)

1. **SCOPE:**

This Bulletin applies to all USAID Contracting Officers (COs) and Acquisition staff worldwide.

2. **PURPOSE:**

The purpose of this PEB is to provide Contracting Officers and Acquisition staff with guidance concerning the implementation of the new FAR rule titled “Ending Trafficking in Persons” (FAR Case 2013-001). This new rule was published as a final rule in FAC 2005-80, which was e-mailed to USAID CONet on March 2, 2015. The intent of this new rule is to strengthen protections against trafficking in persons in Federal contracts.

3. **BACKGROUND:**

The United States has long had a policy prohibiting Government employees and contractor personnel from engaging in trafficking in persons activities. Executive Order 13627, entitled “Strengthening Protections Against Trafficking in Persons in Federal Contracts”, issued on Sept. 25, 2012 and title XVII, entitled “Ending Trafficking in Government Contracting”, of the 2013 National Defense Authorization Act (NDAA), enacted Jan. 2, 2013, greatly expanded the list of trafficking prohibitions and created a stronger framework to eliminate trafficking in persons from Government contracts. The subject FAR rule was developed to implement the strengthened trafficking prohibitions contained in both the E.O. and the NDAA.

4. **DISCUSSION:**

Trafficking Prohibitions. Previously, there were three trafficking prohibitions in FAR subpart 22.17: (1) engaging in **severe forms of trafficking** during the period of the contract, (2) **procuring commercial sex acts** during the period of the contract, and (3) using **forced labor** in the performance of the contract. The new rule adds six more trafficking prohibitions and revises FAR clause 52.222-50 accordingly.

Below is a summary of the six new trafficking prohibitions:

- (1) **Destroying, concealing**, confiscating or otherwise denying the employee access to its **identity documents** (e.g. passport, driver’s license, etc.);

- (2) Using **misleading or fraudulent recruitment** practices (e.g. failing to disclose, in a format and language accessible to the worker, basic information; making a material misrepresentation regarding the key terms or conditions of employment, wages, work location, living conditions; using recruiters that do not comply with local labor laws, etc.);
- (3) Charging employees **recruitment fees**;
- (4) Failing to provide or pay for **return transportation** at the end of the employment, for an employee who is not a national of the country where the work is performed, and who was brought into the country to work on the Government contract;
- (5) Providing or arranging **housing** that fails to meet the host country housing and safety standards; and
- (6) **If required by law or contract**, failing to provide an **employment contract**/document **in writing** and in a language the employee understands. If the employee has to relocate to perform the work, the written work document must be provided to the employee at least 5 days prior to relocating. The work document must include details about the work description, wages, prohibition on charging recruitment fees, work location, etc.

The nine cumulative trafficking prohibitions summarized above, apply to **all** contracts **and** subcontracts, as specified in the revised FAR clause 52.222-50 (dated March 2, 2015).

Compliance Plan and Certification. In addition to the revised trafficking clause 52.222-50, the new FAR rule includes two special requirements for contracts and subcontracts performed outside the United States and valued at \$500,000 or more. For those procurements, prior to award, the apparent successful offeror must provide the CO a certification regarding its trafficking in persons compliance plan, pursuant to the requirements in FAR provision 52.222-56. In that certification, the apparent successful offeror must certify that it “**has implemented a compliance plan** to prevent any prohibited activities identified in paragraph (b)” of the 52.222-50 clause. (emphasis added) The certification must also state that the offeror’s trafficking compliance plan includes a process for it to “monitor, detect, and terminate the contract of a subcontractor engaging in prohibited activities” listed in the 52.222-50 clause. [Note: Compliance plans must be appropriate to the size and complexity of the contract and the nature and scope of its activities, including the number of non-U.S. citizens expected to be employed and the risk that the contract or subcontract will involve services/supplies susceptible to trafficking.]

In addition, the apparent successful offeror’s certification must state that, after conducting “due diligence”, to the “best of the offeror’s knowledge and belief, neither it nor any of its proposed agents, subcontractors, or their agents is engaged” in any of the prohibited trafficking activities. (emphasis added)

Important: The contractor is not required to submit its trafficking compliance plan to the CO. The contractor must submit the plans to the CO only “upon request”. Therefore it is the CO’s discretion as to when, and under what circumstances, the CO wants the compliance plan to be submitted.

FAR clause 52.222-50 contains subcontract flow-down requirements. In addition to flowing down the nine trafficking prohibitions to all subcontracts, the clause requires that, for those subcontracts performed overseas and which meet the \$500,000 threshold, the Contractor must obtain a compliance plan certification from each subcontractor, prior to award of a subcontract. The Contractor is also required to obtain annual re-certifications from its subcontractors.

Minimum Elements of a Compliance Plan. The FAR clause lists five minimum elements for a trafficking compliance plan:

- (1) An **awareness program to inform contractor employees** about the nine prohibited trafficking activities and the actions that will be taken against the employee for any violations.
- (2) A **process for employees to report** trafficking violations, without fear of retaliation.
- (3) A **recruitment and wage plan** that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees to the employee, and ensures that wages meet applicable host country legal requirements or explains any variance.
- (4) A **housing plan**, if the contractor/subcontractor intends to provide or arrange housing, which ensures that the housing meets host-country housing and safety standards.
- (5) **Procedures in place to prevent** agents and subcontractors at any tier and at any dollar value from engaging in trafficking activities, and procedures to monitor, detect, and terminate any offenders.

The FAR rule also requires that the contractor/subcontractor:

- (1) **Immediately report and disclose to both the CO and IG** any credible information it receives from any source that alleges a trafficking violation. The information disclosed must be sufficient to identify the nature and extent of an offense and the suspected individuals. The contractor's report must also include any actions the contractor took against the offending employee, subcontractor or agent.
- (2) **Provide timely and complete responses to Government** auditors' requests for documents;
- (3) **Cooperate fully** in providing reasonable access to their facilities and staff to allow contracting agencies and other responsible Federal agencies to conduct audits or investigations to ascertain trafficking violations;
- (4) **Protect all employees suspected of being victims or witnesses** to prohibited activities.
- (5) **Post the "relevant contents of the compliance plan"** at the workplace and on the contractor's website (if one is maintained). However, if that posting is not practicable, the contractor must provide that info in writing to each worker.

5. CONTRACTING OFFICER RESPONSIBILITIES:

- COs should read and **become familiar** with all of the requirements in the new FAR rule, particularly FAR 52.222-50 and 52.222-56. See link to FAR rule: <https://www.federalregister.gov/articles/2015/01/29/2015-01524/federal-acquisition-regulation-ending-trafficking-in-persons>. Please note that the first part of the federal register could be very helpful to the CO because it contains a summary of all the public comments that were received regarding the rule, as well as the responses from the FAR council. Many questions that COs may have regarding the implementation of the rule

- may already be covered in the FAR council responses to the public comments. The rule itself appears at the end of the public comments and responses.
- COs must ensure that the revised FAR clause 52.222-50 (dated March 2, 2015) is included in **all** solicitations and contracts.
- COs must ensure that the FAR provision 52.222-56 “Certification Regarding Trafficking in Persons Compliance Plan” is included in any solicitation in which the value of the contract, or any portion of the contract, is expected to be \$500,000 or more, and will be performed outside the United States. (Note: The provision is not required if the acquisition is entirely for commercially available off-the-shelf items.)
- **COs must modify, on a bilateral basis, any existing indefinite-delivery/indefinite quantity contracts to include the 52.222-50 clause and the related 52.222-56 provision for future orders, if additional orders are anticipated.**
- COs must consider the risk that the contract or subcontract will involve services or supplies susceptible to trafficking in persons, and the number of non-U.S. citizens expected to be employed, when deciding whether to make it a contractual requirement that the contractor provide its employees with written work documents.
- **VERY IMPORTANT:** As noted earlier, before signing a contract that will be performed outside the United States and is valued at \$500,000 or more, COs **must ensure** that the “apparent successful offeror has provided the CO the required “Certification Regarding Trafficking in Persons Compliance Plan”, pursuant to FAR 52.222-56(b). During contract performance, the contractor is also required to submit to the CO, **annual re-certifications** regarding its compliance plan. Therefore COs will need to develop a method of tracking to ensure receipt of these annual re-certifications. **Important Note: COs are alerted** that this 52.222-56 compliance plan certification **is not** in SAM and therefore, unlike the certifications that are in SAM, this certification will not become binding on the offeror just by the offeror signing its offer. FAR provision 52.222-56 requires that, prior to award, the apparent successful offeror submit to the CO, a compliance plan certification, as it is described in 52.222-56. Please note that the 52.222-56 provision does not contain a signature or date block at the end. Therefore if the apparent successful offeror does not submit a separate **signed and dated** certification to the CO, as described in 52.222-56, but instead, presents the CO with a copy of the
- 52.222-56 provision, the CO must require that the apparent successful offeror actually sign and date the 52.222-56 provision. Alternatively, COs may use the template that is attached to this PEB. The signed and dated certification/s must be included in the contract file.
- When conducting the post award briefings, COs are strongly encouraged to discuss with the contractor, the trafficking prohibitions, requirements and Government remedies described in the trafficking clause 52.222-50. In addition, for those awards performed overseas and valued at \$500,000 or higher, COs should also discuss the trafficking compliance plan requirements and the requirement for the contractor to provide the CO

with annual re-certifications regarding their compliance plan. COs are encouraged to document their contract files to reflect this discussion.

- **Processing of Alleged Trafficking Violations.** Per FAR 22.1704(b), upon receipt of **credible information** from any source regarding a trafficking violation, the CO must **promptly notify** both the IG and the debarring and suspending official. In addition, as a matter of M/OAA policy, the CO must also, at that time, consult with the USAID Labor Compliance Advisor, Deborah Broderick, at lca@usaid.gov. “If appropriate”, the CO may also notify law enforcement officials with jurisdiction over the alleged offense. At that time, the CO “may” also direct the contractor to take specific steps to abate the alleged violation or enforce the requirements in its compliance plan. The IG will conduct an investigation of the alleged offense and then submit its written report to the “head of the agency”. Since the Director of M/OAA has been delegated “head of agency” responsibilities with regard to the FAR, the IG will submit its report to the M/OAA Director.
- Upon receipt of the IG report that provides support for the allegations, an “authorized agency official” will be responsible for expeditiously conducting an “administrative proceeding”, allowing the contractor the opportunity to respond to the report. After the proceeding, the authorized agency official will make a final determination as to whether the allegations are substantiated and will notify the M/OAA Director and/or CO. The CO must enter the substantiated violation into FAPIIS and must consider taking any of the remedies specified in paragraph (e) of the 52.222-50 clause. The CO may take into account any mitigating or aggravating factors, per FAR 22.1704(d)

6. EFFECTIVE DATE.

This Bulletin is effective immediately and will remain in effect until cancelled by the Procurement Executive or otherwise rescinded

9/8/15
Date

/s/
Aman S. Djahanbani
Procurement Executive

Attachment

“Certification Regarding Trafficking in Persons Compliance Plan”, pursuant to FAR 52.222-56

For the contract or portion (if any) of contract number (insert contract number) that (1) Is for supplies, other than commercially available off-the-shelf items, to be acquired outside the United States, or services to be performed outside the United States; and (2) Has an estimated value that exceeds \$500,000, I hereby certify that, (insert name of apparent successful Offeror/Contractor)

1) Has implemented a compliance plan to prevent any prohibited activities identified in paragraph (b) of the clause at 52.222–50, Combating Trafficking in Persons, and to monitor, detect, and terminate the contract with a subcontractor engaging in prohibited activities identified at paragraph (b) of the clause at 52.222–50, Combating Trafficking in Persons; and
(2) After having conducted due diligence, either— (i) To the best of the Offeror/Contractor’s knowledge and belief, neither it nor any of its proposed agents, subcontractors, or their agents is engaged in any such activities; or (ii) If abuses relating to any of the prohibited activities identified in 52.222– 50(b) have been found, the Offeror/Contractor or proposed subcontractor has taken the appropriate remedial and referral actions.

The term “commercially available off the-shelf (COTS) item,” is defined in the clause of this solicitation/contract entitled “Combating Trafficking in Persons” (FAR clause 52.222–50)

Signature: _____

Date: _____