

INSIGHTS

Greater Good Adds More Complexity for Contractors in the Middle East

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On January 29, 2014, the Federal Acquisitions Regulations Council published the final rule amending the Combating Trafficking in Persons for U.S. government contracts (the "Anti-Human Trafficking Rule"). The Anti-Human Trafficking Rule implements several new compliance and reporting measures that enhance existing prohibitions on conduct that constitutes human trafficking or represents red flags indicative of trafficking. The effective date of the Anti-Human Trafficking Rule is March 2, 2015. The consequences of violating the Anti-Human Trafficking Rule are stiff – remedies include compulsion to terminate a sub-contractor, suspension of payments or loss of award fees, termination of the prime contract itself, and suspension or debarment.

Consequently, it is now critical for companies with U.S. government contracts performed outside of the U.S. exceeding \$500,000 in value to review and modify their compliance procedures for international operations to adhere to the Anti-Human Trafficking Rule.

Overview of the New Compliance Obligations

By March 2, 2015, contractors will be required to implement robust compliance plans that are commensurate to the size and complexity of the particular U.S. government contract. While the rule does not provide detailed guidance on an acceptable program, at a minimum it must include: (1) an Awareness Program to inform employees of prohibited trafficking activities; (2) a Reporting Program to enable employees to identify violations without fear of retaliation; (3) a Recruitment and Wage Program that limits the use of recruitment companies to those with trained employees that comply with labor laws and do not charge recruitment fees to employees; (4) a Housing Plan to ensure compliance with local housing and safety standards; and (5) Monitoring Procedures to detect violations by any sub-contractor at any tier and dollar level and that provides for termination upon detection. Accordingly, U.S. contractors will need a firm understanding of the local labor and housing safety laws in each applicable jurisdiction in which they operate in order to prepare a robust compliance program.

Upon award of a contract, the Anti-Human Trafficking Rule requires a contractor to annually certify that it has implemented a compliance program and that after conducting due diligence it has no knowledge of violations by its employees, agents, or subcontractors. Additionally, the rule requires prime contractors to obtain similar certifications from each agent and subcontractor performing the contract at every tier. To the extent a contractor receives credible information regarding a potential violation, contractors are required to immediately notify the contracting officer and Inspector General.

Practical Implications for Middle East Operations

For U.S. contractors operating in the Middle East, the use of commercial agents (in particular) makes the issue of compliance with the Anti-Human Trafficking Rule particularly pressing. Commercial agents commonly recruit and supply contractors with their local workforces, who are typically comprised of Third Country Nationals ("TCN"). However, U.S. contractors customarily have no involvement in TCN employee recruitment or their housing arrangements in country.

Consequently, what is typically a passive role will need to be more actively managed and observed by U.S. contractors in order to ensure compliance with a stringent affirmative obligation created by the Anti-Human Trafficking Rule to investigate whether employees provided by an agent (or any third party) were, or are currently being, subjected to trafficking violations. According to the Federal Acquisitions Regulation Council, where a prime contractor has direct access to the employees, it is expected to look for signs of trafficking at the workplace, and if housing is provided, to inspect the housing conditions. Where the employees and subcontractors are distant, or for lower tier subcontractors, the prime contractor is required to review the plans and certifications of its subcontractors to ensure compliance.

In light of the Anti-Human Trafficking Rule's monitoring and reporting obligations, it is critical that U.S. contractors take into consideration their contractual rights and remedies with respect to commercial agents acting as employers of TCN's supplied to support a U.S. contractor's services. To bolster the effectiveness of the mandated compliance plans, contractors should include robust inspection and reporting provisions. Of equal importance is the inclusion of clear termination rights in favor of the U.S. party for breach, with particular thought given to indemnity and liquidated damages coverage for breaches of the Anti-Human Trafficking Rule.

In preparing these provisions, U.S. contractors should be mindful that many countries in the Middle East (particularly within the Gulf Cooperation Countries) have significant protections for commercial agents in their agency laws, which make it potentially problematic and costly to terminate agents even for breach. For that reason, it is crucial that U.S. contractors have sufficient rights and remedies in their agency agreements to permit termination where there are breaches of the Anti-Human Trafficking Rule without finding themselves potentially exposed to significant monetary claims for breach of agency agreements by their agents whose actions have given rise to the breach.