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FEATURE COMMENT: The FAR And DFARS Ban On Human Trafficking—Heavy On Rhetoric, Light On Enforcement

With strong support from President George W. Bush, the U.S. Government is actively and ardently attempting to combat human trafficking around the world by punishing traffickers, protecting victims and waging a global anti-trafficking campaign. Last year, the Government enlisted federal contractors, subcontractors and their employees (Contractors) in this mission. On April 19, 2006, the Government issued the interim rule in Federal Acquisition Regulation subpt. 22.17 and its accompanying contract clause at 52.222-50, to implement the Trafficking Victims Protection Act of 2000, as amended in 2003 and 2005 (TVPA). Only six months later, on Oct. 26, 2006, the Government issued the interim Defense FAR Supplement rule in 252.222-7006 to supplement the interim FAR rule.

While these well-intentioned and important rules now have the force and effect of law, there appear to be no true means of enforcement. Contractors essentially have been asked to turn themselves in upon learning that an employee has violated this policy—even at the risk of contract termination, suspension and debarment. Thus, while the FAR and DFARS ban on human trafficking is a warning to Contractors that such activities are expressly prohibited, it is doubtful that the regulations will accomplish their laudable objectives, since Contractors are unlikely to self-report.

If the Department of Labor, for example, did not have the authority to "audit" Contractors for compliance with the requirement for a written affirmative action plan, many Contractors might choose to ignore the requirement, since the chance of being caught is relatively small. One could argue that other FAR self-reporting provisions such as the Drug-Free Workplace and Anti-Kickback Act regulations present similar risks.

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The regulations noticeably stop short of authorizing audits—which undoubtedly would prompt Contractors into compliance—or of requiring a company to certify compliance with the prohibition against human trafficking. Good rhetoric, without a reliable method of enforcement such as consistent auditing or, at the very least, a certificate of compliance, is unlikely to meet the Government's "zero tolerance" objective.

Background of the TVPA and Its Application to Government Contractors—The TVPA was created to address the growing problem of human trafficking in the U.S. and abroad. Congress was aware that, although most nations eliminated servitude as a state-sanctioned practice—as the U.S. did more than 150 years ago—this modern form of slavery has taken its place. Estimates on the scope and magnitude of modern-day slavery vary widely. The International Labor Organization estimates that there are 12.3 million people in forced labor, bonded labor, forced child labor and sexual servitude at any given time. Recognizing this "special evil," as President Bush refers to it, Sen. Sam Brownback (R-Kan.) and Rep. Christopher H. Smith (R-N.J.) sponsored, and the late Sen. Paul Wellstone (D-Minn.) and Rep. Sam Gjedenson (D-Conn.) co-sponsored, the TVPA (P.L. 106-386), which was signed into law by President Clinton on Oct. 28, 2000.

The TVPA is designed to:

- protect and assist victims in the U.S. and abroad;
- enhance federal criminal laws against traffickers;
- authorize domestic grants to state and local law enforcement agencies to combat severe forms of trafficking and to aid victims of sex trafficking;
- increase measures to prevent persons from being trafficked; and
- mandate the Department of State to report annually on Government actions to combat human trafficking.

Although President Clinton signed the legislation, President Bush has played an important role in the TVPA's development. On Feb. 13, 2002, he issued EO 13257 to establish an interagency task force to monitor and combat trafficking in persons and, inter alia, to coordinate implementation of the Act. Later that year, he issued National Security Presidential Directive-22, decreeing that all Government agencies shall take a zero tolerance approach to trafficking in persons.

The genesis for the Department of Defense zero tolerance policy was a May 2002 request by 13 members of Congress for a "thorough, global and extensive" investigation into publicized allegations that U.S. military leadership in Korea implicitly condoned sex slavery by frequenting "Hooker Hill" in Seoul's Itaewon District, where foreign women were sold weekly from one establishment to another. Following orders, Paul Wolfowitz, then-deputy secretary of defense, issued a memorandum to the secretaries of the military departments, chairman of the joint chiefs of staff, undersecretaries of defense and others stating:

> It is the policy of the Department of Defense that trafficking in persons will not be facilitated in any way by the activities of our Service members, civilian employees, indirect hires, or DoD contract personnel. Following the policy set by the Commander in Chief, DoD opposes prostitution and any related activities that may contribute to the phenomenon of trafficking in persons as inherently harmful and dehumanizing. Trafficking in persons is a violation of human rights; it is cruel and demeaning; it is linked to organized crime; it undermines our peacekeeping efforts; and it is incompatible with military core values.

Congress amended the TVPA in 2003 to strengthen the existing legislation and provide additional funding for initiatives such as training and service programs. The 2003 changes also mandate use of clauses in federal contracts that permit agencies to terminate the agreements if Contractors engage in trafficking. On March 18, 2004, President Bush amended EO 13257 to permit regulatory implementation of the TVPA as follows:

> The Secretary of State shall have responsibility to initiate appropriate regulatory implementation of the requirements set out in section 106(g) of the Act with respect to contracts, *including proposing appropriate amendments to the Federal Acquisition Regulation*. Each affected executive branch department or agency shall implement, within that department or agency, the requirements set out in section 106(g) of the Act with respect to grants and cooperative agreements. (Emphasis added.)

The TVPA was amended again in December 2005 to close loopholes and further strengthen the legislation.

TVPA Enforcement Left to Contractors—Although the Government pays lip-service to its zero tolerance policy on human trafficking, it has left true enforcement to Contractors themselves. FAR 22.17 requires the Contractor to "inform the contracting officer immediately of any information it receives from any source (including host country law enforcement) that alleges a contract employee has engaged in conduct that violates this policy and any actions taken against employees for such conduct."

One need only think back to the 2002 U.N. scandal to wonder whether this will be effective. Although the U.N. had an official policy of zero tolerance for sexual exploitation and abuse, there were 150 allegations of sexual exploitation by peacekeepers stationed at a refugee camp in the Democratic Republic of Congo. The allegations involved rape, which peacekeepers sometimes tried to disguise as prostitution by giving the girls money or food, and prostitution with children and adult women for prices ranging from $1–$3, food or jobs. In its internal report, the U.N. concluded that there was "zero compliance with zero tolerance."

That same year, a private military contractor (hereinafter Company A) receiving more than $2 billion in DOD contracts was plagued by similar allegations. One employee sent e-mails in July and October 2000 to the U.N. and Company A, detailing the abusive nature of human trafficking and stating that Company A personnel frequented brothels that imprisoned women. Company A fired the employee in April 2001. The employee filed suit for unfair dismissal and ultimately prevailed at trial. Another Company A employee reported to the U.S. Army Criminal Investigation Command (CID) that company employees were engaging in slavery, including the buying and selling through the purchase of passports of underage women to use for sex and as domestic servants. The employee had overheard a coworker brag, "My girl's not a day over 12," referring to the preteen he had purchased from a local brothel. Because of the possibility of retaliation by Company A and the Serbian mafia, CID placed the employee and his wife in protective custody. According to Human Rights Watch, an international human rights advocacy group, a CID investigative report indicated that, during an interview with a CID agent, one Company A employee confessed to purchasing a woman from a brothel and provided investigators with a pornographic videotape that appeared to document the rape of a trafficked woman by a Company A employee. Company A fired the employee for bringing discredit to the company. This employee also filed suit for damages arising from his termination, and Company A settled.

A second private military contractor (hereinafter Company B) awarded $12 billion in DOD contracts also has been accused of trafficking abuses. The Chicago Tribune series published Oct. 9–10, 2005, entitled "Pipeline to Peril," disclosed the often-illicit networks used by the prime contractor's more than 200 subcontractors. The "Pipeline to Peril" stories disclose how subcontractors and brokers routinely seized workers' passports, deceived workers about their safety or the contract terms, and threatened workers with cutting off food and water to force them to enter Iraq. These stories also illustrate how Company B subcontractors employed workers from countries that had banned the deployment of their citizens to Iraq, meaning that thousands of workers were trafficked into Iraq through illicit channels.

Even DOD's internal investigation of trafficking abuses in 2005 implies that Contractors are not ready to self-enforce the Government's mandated zero tolerance policy. The office of General George W. Casey, Commanding General, Multi-National Force-Iraq, confirmed that the practice of confiscating passports from laborers imported to Iraq from impoverished countries such as Nepal, India, Pakistan, Bangladesh, Sri Lanka and the Philippines was widespread on American bases, in violation of U.S. trafficking laws. Casey's office also confirmed other abuses such as deceptive hiring practices, excessive fees charged by overseas job brokers that lure workers into Iraq, substandard living conditions for laborers, violations of Iraqi immigration laws and inadequate human trafficking "awareness training" on U.S. military bases. Casey responded with measures to closely monitor the hiring and employment of foreign laborers. In April 2006, he issued labor guidelines to defense contractors in Iraq and Afghanistan, and included a mandate that all Contractors cease the practice of holding employee passports.

Difficulties of Complying with Zero Tolerance Policy—Failure to comply with the zero tolerance policy on human trafficking carries the potential penalties of (1) termination of the contract for default, (2) suspension or debarment, (3) suspension of contract payments, (4) loss of award fees for the performance period in which the Government determined Contractor noncompliance, (5) required removal of employees from the performance of the contract, and (6) required subcontractor termination.

But compliance is not necessarily easy. FAR 22.17 requires a contractor to establish policies and procedures for ensuring that its employees do not engage in or support severe forms of trafficking in persons, procure commercial sex acts, or use forced labor in the performance of a contract. At a minimum, these policies and procedures must include:

(a) publishing a statement notifying employees of the Government's zero tolerance policy and specifying actions that will be taken against employees for violating this policy, including, but not limited to, removal from the contract, reduction in benefits or termination of employment;

(b) establishing an awareness program to inform employees about (1) the contractor's policy against severe forms of trafficking in persons, procurement of commercial sex acts or use of forced labor; (2) penalties for violation of such policy; and (3) if the contract is performed outside the U.S., other applicable regulations, including host country laws and regulations relating to severe forms of trafficking in persons, procurement of commercial sex acts and use of forced labor, and U.S. laws and regulations on severe forms of trafficking in persons, procurement of commercial sex acts and use of forced labor that apply in the host nation, including those laws for which jurisdiction is established by the Military Extraterritorial Jurisdiction Act of 2000 and 18 USCA § 3271, Trafficking in Persons—Offenses Committed by Persons Employed by or Accompanying the Federal Government Outside the United States;

(c) providing employees directly engaged in contract performance with a copy of the U.S. zero tolerance policy on Contractors that engage in or support severe forms of trafficking in persons, procurement of commercial sex acts or use of forced labor; and

(d) taking appropriate action, up to and including termination of employment, against employees or subcontractors that violate the zero tolerance policy.

The regulations, however, are devoid of important details. The definition of "commercial sex act" set forth in FAR 22.1702 is "any sex act on account of which anything of value is given to or received by any person." Yet the FAR does not define "sex act," which makes it difficult, perhaps impossible, for a contractor to give detailed direction to its employees on what exactly is prohibited.

Thus, to establish policies and procedures required by the FAR, Contractors need to find and adopt a definition of "sex act." The Model Elements of Comprehensive State Legislation to Combat Trafficking in Persons defines a "sex act" as "any touching of the sexual or other intimate parts of another person for the purpose of gratifying sexual desire of any person. It includes touching of the actor as well as touching by the actor, whether directly or through clothing." The Model is compiled from numerous sources, including the TVPA, Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (P.L. 108-21), the Department of State's 2003 Model Anti-Trafficking Law, the Department of Justice's 2004 Model State Anti-Trafficking Criminal Statute, and current and proposed state statutes related to combating human trafficking. Under this definition, for example, a lap dance paid for by a contractor employee violates the ban on human trafficking. Without additional details, contractors may be unable to counsel employees on what conduct violates the TVPA.

Conclusion—The Government's attempt to enlist Contractors in the fight against human trafficking is admirable, but must be viewed with a measure of skepticism. Only three years ago, a DOD inspector general report on human trafficking in Bosnia-Herzegovina and Kosovo stated that "contractor employees are more likely than military personnel to be involved in illegal prostitution and human trafficking activities," and that "contractors do not report ... allegations against their employees regarding involvement in human trafficking to U.S. military commanders." Although the FAR and DFARS ban on human trafficking is a policy victory, leaving enforcement to Contractors likely

will defeat the purpose of the regulations. Here, the regulations stop short of ensuring compliance. Thus, unless federal agencies or, at the very least, DOD begin to systematically audit Contractors for compliance with human trafficking regulations, the FAR and DFARS ban on human trafficking most likely will remain heavy on rhetoric, light on enforcement.

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Developments

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GAO Urges Congress To Ask Tough Questions About Iraq

The Government Accountability Office January 9 issued a 114-page report entitled *Securing, Stabilizing and Rebuilding Iraq: Key Issues for Congressional Oversight,* outlining considerations for Congress as it oversees the president's revised Iraq strategy. The report addresses overall strategy and costs, security conditions, Iraqi governance, reconstruction, U.S. military readiness and acquisition outcomes. It is a sobering summary by GAO of things gone wrong in Iraq, and includes approximately 75 new oversight questions for Congress to ask Government agencies responsible for activities in Iraq.

The Strategy and Its Costs—Issued before the president's recent troop increase announcement, the report states that the National Security Council's November 2005 National Strategy for Victory in Iraq (NSVI) is not comprehensive. Significantly, the NSVI does not delineate agencies' responsibilities or assess future costs of U.S. operations in Iraq. The Defense Department reports cumulative costs of $257.5 billion for military operations since 2003, with yearly amounts increasing steadily. Contracting costs increased from $8 billion to $14.1 billion for fiscal years 2003 to 2006; equipment procurement costs increased from $700 million to $13 billion for the same period. And going forward, the cost of increased troops, equipment reset, investment in Iraqi institutions and infrastructure, and contractor support likely will be hundreds of billions of dollars. GAO says Congress must press DOD and other agencies for honest estimates. Rather than obfuscate, agencies should factor more costs into the baseline budget to allow decision makers to weigh priorities and make trade-offs. See 48 GC ¶ 408.

Security Conditions, Iraqi Governance and Reconstruction—According to the report, security in Iraq deteriorated as the number of trained and equipped Iraqi security forces increased. The U.S. funds the Iraqi train and equip program from sources other than traditional security assistance programs. The report acknowledges the operational demands of equipping a force during war, but questions DOD's and the Multi-National Force-Iraq's inability to account for 90,000 rifles and 80,000 pistols. GAO believes Congress should investigate how U.S.-funded equipment is obtained by insurgents and militias, and how DOD and the State Department plan to transition to traditional security assistance. The report also notes that oil and electricity reconstruction projects are plagued by security, corruption and funding challenges. See 46 GC ¶ 267; 48 GC ¶ 362. Generally, GAO says, Congress should find out whether the Iraqi government can effectively absorb future U.S. and international assistance.

U.S. Military Readiness—Extended operations in Iraq and elsewhere have significant consequences for the U.S. military. GAO indicates problems with (1) DOD's ability to provide active and reserve forces, particularly in certain skilled areas, and to fill critical positions, including those requiring fluent Arabic; (2) defense policies and guidance on the availability of reservists; and (3) heavy wear and tear on equipment, and equipment shortages.

GAO also found fault with the supply chain, concluding acquisition delays lead to critical shortages of body and truck armor, batteries, meals and tires. See 48 GC ¶ 121. GAO also identified key issues for congressional review, including the readiness of the armed forces, the adequacy of the supply chain, the theater-wide risk of unsecured munitions storage sites, and the ability of the Joint