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FEATURE COMMENT: The FAR Ban On Human Trafficking—A 20-Year Journey From Mere Rhetoric To Meaningful Enforcement

The U.S. Government actively uses its unique leverage as a major purchaser of goods and services—Government contracts were valued at an estimated \$560 billion in 2019 alone—to regulate business practices in the private sector by way of the federal contracting process. In 2006, as part of an effort to curb human trafficking around the globe, the Federal Government implemented subpart 22.17 and clause 52.222-50 of the Federal Acquisition Regulation, generally requiring federal contractors, subcontractors, and their employees and agents (collectively “contractors”) to comply with the Trafficking Victims Protection Act of 2000 (TVPA).

Though the provisions of the TVPA and FAR applicable to federal contractors have long been heavy on well-intentioned anti-trafficking rhetoric, enforcement mechanisms allowing the Government to ensure that contractors are not engaged in trafficking-in-persons violations and to take action against those that are have only begun to take shape in recent years. As a result, after a long period of lax enforcement and largely symbolic compliance efforts, the Federal Government appears to be keeping a closer eye on its contractors and is moving much more decisively to impose repercussions on contractors found to be involved in trafficking offenses. With that in mind, now is an ideal time for contractors to brush up on the requirements imposed on them by the Government so as to avoid the loss of employees or subcontractors, termination

of contracts, or any of a variety of other penalties for trafficking violations.

The TVPA was enacted by Congress in 2000 in an effort to address the international problem of human trafficking, a widespread and severe modern-day form of slavery. The Act sought to target trafficking through a variety of policy actions, including the enhancement of federal criminal laws applicable to traffickers and the issuance of domestic grants to state and local law enforcement agencies to combat trafficking generally and to aid victims of sex trafficking. Though the TVPA itself did not directly impact Government contractors after its original enactment, President George W. Bush in 2002 signed Executive Order 13257, establishing an inter-agency task force to monitor and combat trafficking, as well as Presidential Directive 22, establishing a Government-wide zero-tolerance policy against Government employees and contractors engaging in trafficking in persons. After that time, the focus on Government contractors and their role in trafficking offenses would only increase.

Congress amended the TVPA in 2003 to bolster the original legislation and provide additional funding for initiatives like training and service programs. Also included in the 2003 amendments was a requirement that any “grant, contract, or cooperative agreement” entered into by a federal agency under which funds “are to be provided to a private entity” shall include a condition authorizing the Government to terminate the contract without penalty in the event the private party engages in trafficking offenses deemed unlawful by the TVPA. That mandate is today codified at 22 USCA § 7104(g).

President Bush amended Executive Order 13257 in March 2004 to direct regulatory implementation of these new requirements in the FAR. As a result, subpart 22.17 and clause 52.222-50 relating to Federal Government contractors were added to the FAR in April 2006. Those provisions required that any contracts entered into by federal agencies would stipulate that the associated contractors were prohibited from supporting or promoting any form of hu-

man trafficking or forced labor. Further, contracts were required to include the provision set out within clause 52.222-50, stating that the Federal Government has a zero-tolerance policy toward the support of trafficking in persons by contractors; that contractors must implement compliance programs ensuring employees do not engage in trafficking; that contractors must self-report any policy violations; and that violations of the clause may result in contract termination, suspension of payments, termination of the contractor or a subcontractor or employee, or suspension or debarment.

It quickly became clear that there was a major shortcoming inherent in these regulations: compliance with the terms of the TVPA was largely left to contractors themselves, with self-reporting serving as the main enforcement mechanism. Commentators did not waste time in pointing out that an in-name-only “zero-tolerance policy” would not go far if enforcement was left to voluntary disclosures made by violators themselves. See Carp, Feature Comment, “The FAR And DFARS Ban On Human Trafficking—Heavy On Rhetoric, Light On Enforcement,” 49 GC ¶ 12; Carp, Practitioner’s Comment, “Compliance With FAR And DFARS Ban On Human Trafficking,” 49 GC ¶ 49.

Skepticism about the muscle behind the 2006 FAR provisions did not turn out to be misplaced. Both formal TVPA enforcement actions and private repercussions against federal contractors engaged in trafficking—for instance the termination of a contract or forced termination of an employee—have been fairly rare since the early 2000s.

Government publications tracking the Federal Government’s efforts to respond to and prevent human trafficking domestically and abroad, like the State Department’s Trafficking in Persons Report, have often included lengthy discussions of anti-trafficking personnel training, risk assessment, and the like, but little in the way of actual actions taken against contractors violating the TVPA and the zero-tolerance policy. A 2012 report published by the American Civil Liberties Union (ACLU), assessing the history of U.S. Government contractors’ involvement in trafficking overseas workers, suggested a near-total lack of interest on the part of federal agencies in investigating and combating trafficking by private contractors. According to the report, as of 2012, “Government agencies have yet to enforce [anti-trafficking-in-persons] measures in any meaningful way; although they possess ample authority to do so, they have yet to fine or prosecute a single contractor for trafficking- or labor-related offenses.”

That pattern began to change, however, soon after the publication of the ACLU report. Though the TVPA has been amended many times since its original enactment, amendments in 2013, paired with an Executive Order in 2012, led to changes to the FAR in 2015 that have since prompted a reversal in the trend lines of contractor trafficking enforcement.

President Barack Obama issued Executive Order 13627 in September 2012, aiming to strengthen the prohibition on trafficking occurring within the scope of federal contracts. The Order directed that the FAR be updated to impose additional restrictions on contractor conduct and to require most contractors to develop anti-trafficking compliance programs, certify their compliance with the terms of those programs annually, self-report any discovered violations, and importantly, provide access for Government investigations as requested. Shortly thereafter, the National Defense Authorization Act of 2013 amended the TVPA’s § 106(g) to impose heightened compliance program requirements on contractors and authorize federal agencies to terminate contracts if a contractor or subcontractor uses recruiters, brokers, or other agents engaging in the trafficking of persons.

Together, these changes to the law resulted in a series of sizable amendments to subpart 22.17 and clause 52.222-50 of the FAR in 2015. These regulations as they currently exist require contractors to design compliance programs meeting certain criteria and to submit annual certifications of their compliance, and further prohibit contractors from denying access to employee identification documents, using misleading or fraudulent practices in recruitment, charging employees recruitment fees, arranging housing that fails to meet safety standards, and failing to provide employment contracts in writing. Further, self-reporting of possible trafficking violations based upon “credible information” must be made to the relevant agency’s inspector general, and critically, reasonable access must be provided by the contractor to facilitate Government investigations and audits. The 2015 modifications included a specific recommendation that the Government engage in proactive audits of contractor compliance, conducting random unannounced interviews with employees to ensure that violations are not taking place.

The 2015 FAR amendments’ provisions relating to contractor reporting, compliance certification, and cooperation with Government investigations appear to together be leading to an uptick in TVPA enforce-

ments and repercussions against contractors found to be engaged or involved in trafficking offenses. Annual reports describing any “activities or actions by Federal departments and agencies to enforce” to § 7104(g) of the TVPA required to be submitted to Congress by the Attorney General tend to suggest that, on the whole, enforcement activities have picked up substantially since 2015. Much of that activity appears to be emanating from the Department of Defense, which accounts for a major portion of the Federal Government’s contracts.

The first annual trafficking-in-persons report from the Attorney General was published in 2003, but it was not until 2007 that the report included discussion of trafficking engaged in by Federal Government contractors or subcontractors. The 2007 report describes only one such instance, describing DOD’s Multinational Forces Iraq Commanding General ordering contractors in Iraq to return passports confiscated from workers on U.S. bases after other violations, including deceptive hiring practices and substandard living conditions, were discovered.

The reports filed by the Attorney General between 2008 and 2012 did not list any specific actions taken against contractors; only assertions that federal agencies were complying with all applicable TVPA and FAR provisions were included. The 2013 report included only one instance of enforcement, relating to a DOD subcontractor providing workers with substandard housing in Kuwait; the contractor involved ultimately agreed to pay all employees a housing stipend. Neither the 2014 nor 2015 annual report included any particular contractor enforcement activities.

After 2015, however, the annual reports quickly changed in tone. The Attorney General’s 2016 report included at least six discrete enforcement actions taken against contractors, relating to subcontractors in Germany allegedly seizing the passports and wages of employees, similar allegations in Kuwait and Qatar, a subcontractor failing to use the FAR 52.222-50 contractual provisions, instances of contractors facilitating prostitution, and at least one criminal action instituted by the Department of Justice pertaining to illicit sexual contact with minors. In 2017, DOD entered into an Administrative Compliance Agreement with a dining services prime contractor located in southwest Asia which was alleged to have engaged in physical assault of its employees, debt bondage, and a variety of other trafficking offenses. The agreement imposed a series of restrictions on the contractor’s future operations and mandated continuing compliance

with Government investigators. Separately, the U.S. Central Command took several Administrative Corrective Actions against security company contractors in Afghanistan withholding passports and wages from their workers, and increased surveillance of security companies in the region was instituted.

The most recent report from the Attorney General indicates that enforcement activities continued to rise in 2018, with DOD conducting 24 investigations into contractors for possible trafficking violations, resulting in 22 non-judicial administrative actions, one pending action, and one instance of no action being taken. Specific repercussions included the debarment of a DOD subcontractor in Kuwait for withholding employment agreements and wages, a U.S. civilian DOD contractor being fired and banned from military installations in Korea after arranging for an apartment in which to house Thai trafficking victims, the termination of a contract with a DOD contractor in Saudi Arabia when the contractor was discovered to have withheld the visa and wages of an employee, and a pending investigation into an Army contractor alleged to have charged recruitment fees and to have withheld passports from employees.

In sum, the Federal Government’s approach to trafficking-in-persons offenses engaged in by Government contractors is not what it used to be. Since the TVPA’s original enactment in 2000, and especially since the amendments to the FAR in 2015, the Government has taken an increasingly firm stance in enforcing its “zero-tolerance policy” barring contractors from engaging in or endorsing trafficking. No longer is enforcement left to the imposition of a toothless obligation on contractors to self-report violations of the TVPA and FAR. Instead, federal agencies are taking matters into their own hands, cutting ties with contractors found to have engaged in any form of human trafficking. If the trend in favor of decisive action and away from turning a blind eye to trafficking holds, Federal Government contractors would be well advised to assess the state of their compliance with federal laws banning involvement in human trafficking.



This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Tenley A. Carp, a partner and leader of the Government Contracts practice at Arnall Golden Gregory LLP. She wishes to thank J. Lincoln Wolfe, Eunice C. Lim, and Daniel Koblenz for their contributions to this article.