

Dated: January 22, 2015.

Richard Ginman,

Director, Defense Procurement and Acquisition Policy.

Dated: January 22, 2015.

Jeffrey A. Koses,

Senior Procurement Executive/Deputy CAO, Office of Acquisition Policy, U.S. General Services Administration.

Dated: January 21, 2015.

William P. McNally,

Assistant Administrator, Office of Procurement National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 9, 12, 22, 42, and 52

[FAC 2005-80; FAR Case 2013-001; Item I; Docket 2013-0001; Sequence No. 1]

RIN 9000-AM55

Federal Acquisition Regulation; Ending Trafficking in Persons

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to strengthen protections against trafficking in persons in Federal contracts. These changes are intended to implement Executive Order (E.O.) 13627, entitled “Strengthening Protections Against Trafficking in Persons in Federal Contracts,” and title XVII of the National Defense Authorization Act for Fiscal Year 2013.

DATES: *Effective:* March 2, 2015.

Applicability: Contracting officers shall modify, on a bilateral basis, existing indefinite-delivery/indefinite-quantity contracts to include the clause for future orders, if additional orders are anticipated.

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, at 202-219-0202, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-80, FAR Case 2013-001.

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II. Background

The United States has long had a policy prohibiting Government employees and contractor personnel from engaging in trafficking in persons activities, including severe forms of trafficking in persons. “Severe forms of trafficking in persons” is defined in section 103 of the Trafficking Victims Protection Act of 2000 (TVPA) (22 U.S.C. 7102) to include 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, and sex trafficking.

FAR subpart 22.17 strengthens the efficacy of the policy prohibiting trafficking in persons by codifying trafficking-related prohibitions for Federal contractors and subcontractors. It provides for the use of a clause that requires contractors and subcontractors to notify Government employees of trafficking in persons violations and puts parties on notice that the Government may impose remedies, including termination, for failure to comply with the requirements. Recent studies of trafficking in persons, including findings made by the Commission on Wartime Contracting and agency Inspectors General, as well as testimony provided at congressional hearings, have identified a need for

additional steps to prohibit trafficking in Government contracting—including regulatory action.

E.O. 13627, entitled “Strengthening Protections Against Trafficking in Persons in Federal Contracts,” issued on September 25, 2012 (77 FR 60029, October 2, 2012), and title XVII, entitled “Ending Trafficking in Government Contracting,” of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 (Pub. L. 112-239, enacted January 2, 2013) create a stronger framework to eliminate trafficking in persons from Government contracts. The E.O. and statute provide new policies applicable to all contracts that prohibit contractors and subcontractors from engaging in prohibited practices such as destroying, concealing, confiscating, or otherwise denying access by an employee to his or her identity or immigration documents; using misleading or fraudulent recruitment practices; charging employees recruitment fees; and providing or arranging housing that fails to meet the host country housing and safety standards. Additionally, the E.O. and statute provide new policies for contracts performed outside the United States that exceed \$500,000, including a requirement for a compliance plan and annual certifications.

Contractors and subcontractors are reminded of their responsibilities associated with H-1B, H-2A, and H-2B Programs or Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and should act accordingly. Nothing in this rule shall be construed to permit a contractor or subcontractor from failing to comply with any provision of any other law, including, for example, the requirements of the MSPA, as amended, 29 U.S.C. 1801, *et seq.* and the Immigration and Nationality Act, in particular nonimmigrants entering the country under 8 U.S.C. 1101(a)(15)(H)(i)(b) (“H-1B Program”), 8 U.S.C. 1101(a)(15)(H)(ii)(a) (“H-2A Program”), or 8 U.S.C. 1101(a)(15)(H)(ii)(b) (“H-2B Program”). The requirements of these programs were not incorporated into the FAR because this rule is implementing a specific statute and E.O. which are separate and apart from the immigration laws cited and because all of the responsibilities that employers have under H-1B, H-2A, and H-2B Programs or MSPA are already enumerated in law and separate regulations.

The Federal Acquisition Regulatory Council, on March 5, 2013, sponsored a public meeting and request for comment on the implementation of E.O. 13627 and title XVII of the NDAA for FY 2013. Feedback from that meeting has been

used to help inform the development of regulations and other guidance to implement the E.O. and new statutory provisions and to strengthen existing prohibitions on trafficking in persons.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 78 FR 59317 on September 26, 2013, to implement E.O. 13627 and title XVII of the NDAA for FY 2013. This final rule amends the FAR to promote the United States policy prohibiting trafficking in persons activities and creates a stronger framework and additional requirements for awareness, compliance, and enforcement—to prevent trafficking in persons in Government contracts. Twenty respondents submitted comments on the proposed rule.

III. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments is provided as follows:

A. Summary of Significant Changes to the Proposed Rule

- Revised FAR 9.104–6, Federal Awardee Performance and Integrity Information System (FAPIIS), to notify contractors that any information about a subcontractor is posted to the record of the prime contractor; however, prime contractors will have the opportunity to post in FAPIIS any mitigating factors or information.

- Revised FAR 22.1701, Applicability and 52.222–50, Combating Trafficking in Persons, to clarify the applicability of the subpart.

- Revised FAR 22.1702, Definitions, and FAR 52.222–50, Combating Trafficking in Persons, to add the definitions of “agent,” “subcontract,” and “subcontractor.”

- Revised FAR 22.1703, Policy, and FAR 52.222–50, Combating Trafficking in Persons, to—

- Require contractors to use recruiters that comply with local labor laws of the country in which the recruiting takes place;

- Require contractors to provide employees with a work document if it is required by law or contract;

- Clarify the certification and compliance plan requirements, including the posting and submission of the plan;

- Clarify contractor and subcontractor requirements for disclosing information to the agency Inspector General and cooperating fully in an investigation; and

- Remove the requirement for contractors to interview employees suspected of being victims or witnesses of trafficking in persons. Clarify the requirement to provide them return transportation.

- Revised FAR 22.1704, Violations and remedies, and FAR 52.222–50 to—

- Clarify contracting officer actions upon receipt of credible information of a trafficking in persons violation;

- Provide for an administrative proceeding upon receipt of a report from the agency Inspector General that provides support for the allegations with regard to violation of trafficking in person policies;

- Clarify in FAR 22.1704 that if the administrative proceeding is conducted by the suspending and debarring official, he or she may use the suspension and debarment procedures in FAR subpart 9.4, and continues to have suspending and debarring authority;

- Provide that imposition of remedies by the contracting officer shall occur after a final determination that an allegation is substantiated, although the suspending and debarring official has the authority, at any time before or after the final determination as to whether the allegations are substantiated, to use the suspension and debarment procedures in FAR subpart 9.4 to suspend, propose for debarment, or debar the contractor, if appropriate; and

- Clarify mitigating and aggravating factors that the contracting officer may consider, including whether the contractor has taken appropriate action for violations such as reparation to victims and whether the contractor failed to abate a violation or enforce requirements of its compliance plan (also affects FAR 52.222–50(f)).

- Revised FAR 42.1503(h) to—

- Require entry of substantiated allegations into FAPIIS; and

- Clarify that the information to be posted in FAPIIS in accordance with FAR 42.1503(h)(1) will be available to the public.

- Revised FAR 52.222–50 to—

- Require contractors to notify agents as well as employees about the policy prohibiting trafficking in persons described in FAR 52.222–50(b), and actions that will be taken for violations;

- Add a State Department Web site link for further information, including examples of awareness programs;

- Add a requirement for a compliance plan to include making available to all workers the hotline number for the Global Human Trafficking Hotline, and its email address;

- Clarified the contractor's responsibility to post the compliance plan at the worksite or on its Web site.

B. Analysis of Public Comments

Introduction: General Support for the Rule

Comment: Half of the respondents expressed explicit support for the proposed rule. For example, one respondent expressed its continued support for the Government's efforts to eradicate trafficking in persons and modern day slavery. Another respondent stated that the proposed amendments to the FAR are “overall great steps to ensure the protection of potential victims of trafficking.”

Response: Noted.

1. Applicability

a. Applicability to Commercial Items and COTS Items

Comment: Several respondents commented on the applicability of the rule to commercial items and commercially available off-the-shelf (COTS) items. Respondents also commented on inclusion of FAR 52.222–50 in all solicitations and contracts, and inclusion in FAR 52.212–5 for acquisition of commercial items. One respondent noted that the proposed rule would amend FAR 12.301 to add FAR 52.222–56 in all solicitations prescribed in FAR 22.1705(b), including those for commercial items and COTS items. According to the respondent, this is a blanket application of the certification requirements, particularly to COTS items domestically.

Response: The rule does apply to the acquisition of commercial items, including COTS items. However, COTS items are exempt from the requirements for a compliance plan and the certification. Although the clause at 52.222–50 is included in each solicitation and contract, including for the acquisition of COTS items, and flows down to all subcontracts, COTS items are exempt from the compliance plan and certification requirements.

The provision at FAR 52.222–56 is only included in solicitations that may meet the requirement for applicability of the certification requirement, *i.e.*, it is possible that at least \$500,000 of the contract may be performed outside the United States and the acquisition is not entirely for COTS items. The provision has been revised in the final rule to clarify that it only imposes a requirement on the apparently successful offeror if any portion of the contract is for purchase of supplies, other than COTS items, to be acquired outside the United States or services to

be performed outside the United States, and that portion of the contract has an estimated value that exceeds \$500,000.

The Councils note that E.O. 13627 applies to all contracts except at Sec. 2, paragraph (a)(3) where it expressly specifies that the requirements in section 2(a)(2) of the E.O. (relating to compliance plan and certification) shall not apply to contracts or subcontracts for COTS items. The Councils also note that both title XVII of the NDAA for FY 2013 and 22 U.S. Code Chapter 78—Trafficking Victims Protection, are silent on the applicability of the statute to commercial contracts in general and COTS items in particular.

In accordance with 41 U.S.C. 1906 and 1907, the FAR Council has determined that it is not in the best interest of the Government to exempt contracts for the acquisition of commercial items from the requirements of title XVII of the NDAA for FY 2013, and the Administrator for Federal Procurement Policy has determined that it is not in the best interest of the Government to exempt acquisitions of COTS items from the requirements of title XVII of the NDAA for FY 2013, except for the requirements for certification and a compliance plan.

Comment: Several respondents recommended eliminating the COTS item exclusion or ensuring that the exclusion does not apply to commercial services, only to supply items, because this is where the unskilled labor force is most vulnerable.

Response: By definition, COTS items do not include services (see FAR 2.101).

Comment: One respondent stated that the exemptions for contracts for COTS items could be interpreted to apply to base-support operations, which is a pernicious source of human trafficking in Government contracting.

Response: Base-support operations contracts are not primarily COTS items. COTS items are a small sub-set of commercial items and do not include services. Any COTS items on a contract for base-support services will only be exempt from the requirements for a compliance plan and certification.

b. Thresholds and Flowdown Requirement (FAR 52.222–50(i))

Comment: Two respondents asked for clarification of the flowdown to subcontracts. The respondents objected to application of the flowdown on very low dollar subcontracts, and recommended application only above the micro-purchase threshold.

One respondent pointed out that the clause must be flowed down at any dollar level, but questioned whether the paragraph (h) requirements for a

certification and compliance plan only apply if the portion of the contract performed overseas exceeds \$500,000. One respondent recommended that contractors and subcontractors should be required to have a compliance plan and certify if the value of the contract or subcontract exceeds \$500,000, even if only a portion is conducted outside the United States.

Some respondents were concerned about flowing down the clause at FAR 52.222–50 to subcontracts at every tier, regardless of dollar value, as being too burdensome.

One respondent objected to the subcontract certification flowdown being set at \$500,000, and recommended that the requirement apply to all service contracts that exceed \$25,000 and flow down to all subcontracts. The respondent pointed out that there are service subcontracts overseas which are below the \$500,000 level, which the respondent recommends be covered. Another respondent noted that contractors would break subcontracts into smaller dollar amounts to avoid the \$500,000 threshold. The respondent recommended that the requirement apply to all contracts and subcontracts exceeding \$500,000 if any portion is conducted outside the United States.

Response: The thresholds are set in the statute and the E.O. The final rule at FAR 52.222–50(h)(1) clarifies that the paragraph (requiring a compliance plan and certification) applies to any portion of the contract that (i) is for supplies, other than COTS items, acquired outside the United States, or services to be performed outside the United States, and (ii) has an estimated value that exceeds \$500,000. The flow-down to subcontracts at FAR 52.222–50(i) has a similar clarification. For subcontracts that do not require a compliance plan or certification, the clause expresses how the policy prohibiting trafficking in persons works (e.g., no recruitment fees, no confiscating passports, no material misrepresentations about salary and work location), and requires full cooperation with agency investigations. With these clarifications, the Councils do not consider these anti-trafficking steps to be overly burdensome.

c. Editorial Comments on Applicability

Comment: One respondent recommended revising FAR 22.1701 for clarity, deleting the commas after the phrase “value of the supplies to be acquired” and after the phrase “services required to be performed.”

Response: The section has been restructured for clarity, and a

corresponding change made at FAR 52.222–50(i).

Comment: One respondent recommended that FAR 22.1703(d) should read: “Except for contracts and subcontracts for commercially available off-the-shelf items, where the estimated value of the supplies to be acquired or the services required to be performed under the contract outside the United States exceeds \$500,000—”, and then delete the applicability language in FAR 22.1703(d)(1).

Response: The final rule has been revised at former paragraph (d)(1) (now paragraph (c)(1)) to clarify its applicability to the apparent successful offeror.

Comment: One respondent noted that the phrase “if applicable” at FAR 52.222–50(i)(2) is ambiguous and should be clarified to explain whether a contractor should require the subcontractor compliance plan only in support of a CO’s request or should the contractor always require submittal of the plan when the plan is “applicable.”

Response: The text at FAR 52.222–50(i)(2) has been clarified, that if any subcontractor is required by this clause to submit a certification, the Contractor shall require submission prior to the award of the subcontract and annually thereafter.

d. Foreign Military Sales

Comment: One respondent asked if foreign military sales would be covered.

Response: The FAR does not address foreign military sales. Under the Defense Federal Acquisition Regulation Supplement, the contracting officer is required to conduct foreign military sale acquisitions under the same acquisition and contract management procedures used for other defense acquisitions (see 48 CFR 225.7301(b)).

2. Definition or Clarification of Terms (FAR 22.1702, 22.1703, 52.222–50, and 52.222–56)

a. “Abuses”

Comment: One respondent recommended clarifying the term “abuses” as it is used at FAR 22.1703(d)(1)(ii), 52.222–50(h)(5)(ii)(B) and 52.222–56 by adding after “abuses” the explanatory phrase “relating to any of the prohibited activities identified in FAR 52.222–50(b).” The respondent also noted that the term is used in the E.O. but not further defined and is not used in the statute.

Response: The final rule has been revised to incorporate this recommendation. (Note that paragraph FAR 22.1703(d) is now paragraph (c).)

b. "Agent"

Comment: Several respondents recommended defining the term "agent". One respondent recommended use of the definition in the clause at FAR 52.203-13, Contractor Code of Business Ethics.

Response: The final rule incorporates at FAR 22.1702 and FAR 52.222-50 the definition of "agent" used in 52.203-13. The term has not been added to FAR 2.101, because this definition is not necessarily applicable to the term as it is used in multiple locations throughout the FAR, without definition.

c. "Due Diligence"

Comment: Some respondents requested clarification and/or definition of the term "due diligence" at FAR 22.1703(d)(3), 52.222-50(h)(5)(ii), 52.222-56.

Response: The Councils note that the level of "due diligence" required depends on the particular circumstances. This is a business decision, requiring judgment by the contractor.

d. "Procurement of Commercial Sex Act"

Comment: One respondent requested more precise definitions of "procurement" and "sex act."

Response: The term "commercial sex act" is defined in FAR 22.1702 and the prohibition of its procurement was not added or affected by the changes in this case but was already in FAR 22.1703(a)(2) and 52.222-50(b)(2) since 2006, based on 22 U.S.C. 7102 and 7104. The Councils do not believe that additional definitions are necessary.

e. "Subcontract"

Comment: One respondent requested a definition of "subcontract," and recommended use of the definition at FAR 44.101.

Response: This definition has been incorporated in the final rule, along with the definition of "subcontractor," consistent with the definition of those terms at FAR 3.1001.

3. Policy Prohibitions (FAR 22.1703(a) and 52.222-50(b))

a. Identity or Immigration Documents (FAR 22.1703(a)(4) and 52.222-50(b)(4))

Comment: One respondent expressed strong support for the requirements of FAR 22.1703(a)(4), which prohibits contractors from destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity or immigration documents. The respondent noted that this requirement gives the employee

greater autonomy while working on the contract, and reduces the worker's vulnerability to possible exploitation.

Response: Noted.

Comment: One respondent recommended conducting spot checks on and off-site of contractor workplaces in Middle Eastern countries to ensure that contractor employees have both their civilian ID and passports.

Response: The final rule requires contractors to cooperate fully in providing reasonable access to their facilities and staff (both inside and outside the United States) to allow contracting agencies and other responsible enforcement agencies to conduct audits, investigations, or other actions to ascertain compliance with the Trafficking Victims Protection Act (22 U.S.C. chapter 78), E.O. 13627, or any other applicable law or regulation establishing restrictions on trafficking in persons. This general auditing and compliance requirement allows an agency to evaluate workplace conditions and suspected trafficking in persons violations within the terms of the contract where it identifies the greatest needs.

Comment: One respondent recommended creating a database of owners and managers of companies that have been withholding passports, and prohibiting further Government business with those companies in violation.

Response: FAR 22.1704(b) requires contracting officers to notify, in accordance with agency procedures, the agency Inspector General, the agency debarring and suspending official, and if appropriate, law enforcement officials with jurisdiction over the alleged offense, of credible information regarding violations. The section also requires the contracting officer to include in FAPIIS any allegation substantiated by the agency Inspector General in its report, after a final agency determination (see FAR 22.1704(d)). This requirement ensures that violations are catalogued, and that the agency suspending and debarring official is aware of all suspected violations.

b. Recruitment Practices (FAR 22.1703(a)(5) and 52.222-50(b)(5))

i. Basic Information

Comment: One respondent commented that the proposed language makes any failure to provide "basic information" about "key" employment terms a violation of the U.S. Government trafficking in persons policy, which could potentially apply to employment matters with no connection to trafficking in persons.

Response: Failure to provide basic information and making material misrepresentations are examples of the overarching violation of using misleading or fraudulent recruiting practices. E.O. 13627 section 2(a)(1)(A)(i) creates a duty to inform prospective employees of basic employment information and provides remedies if that duty is breached. It also provides remedies when employers make material misrepresentations to prospective employees of key terms and conditions. FAR 22.1703(a)(5) mirrors language in E.O. 13627 section 2(a)(1)(A)(i) and 22 U.S.C. 7104(g)(iv)(III).

Comment: One respondent sought clarification of the requirement to provide "basic information" about the "hazardous nature of the work" at FAR 22.1703(a)(5) and 52.222-50(b)(5). Specifically, the respondent requested guidance on the level of detail required.

Response: The level of detail sufficient to comply with the rule will vary based upon individual circumstances associated with the work environment.

Comment: One respondent suggested that the terms "misleading or fraudulent" taken from E.O. 13627 section 2(a)(1)(A)(i) be replaced with the terms "materially false or fraudulent pretenses" from 22 U.S.C. 7104(g)(iv)(III). The respondent notes that the terms "misleading or fraudulent" are broader than the terms "materially false or fraudulent pretenses."

Response: The Councils agree that the terms "misleading or fraudulent" are broader than the terms "materially false or fraudulent pretenses," with the scope of the former terms encompassing the latter. With the objective of implementing both the E.O. and the statutory provisions, the terms "misleading or fraudulent" are retained. Since the terms from the E.O. are broader than the terms used in the statute, use of the terms from the E.O. will encompass situations contemplated by both documents thereby effectively implementing both provisions.

ii. Hire Contractors Directly

Comment: One respondent recommended encouraging prime contractors to hire workers directly, including third country nationals, and a preference should be given to bidders who can prove they do so. According to the respondent, this would create an employee-employer relationship creating greater responsibility.

Response: The Federal Government cannot require prime contractors to hire workers directly for their company. See

section III.B.9. of this preamble for available training related to hiring practices.

iii. Require Licensed Recruiters

Comment: Several respondents recommended incorporating the requirement for licensed recruiters into the final rule. One respondent stated that requiring a plan that includes the identity of recruitment companies being used and proof that the company and/or recruiter is licensed under laws of the country of recruitment could be vital to identifying potential persons involved in human trafficking and preventing further victims. Another respondent recommended prohibiting the use of agents, subagents or consultants or anyone other than a bona fide employee of the recruiting company to recruit workers. The respondent also recommended using only licensed recruiters. Another respondent recommended that FAR 52.222–50(h)(3)(iii) should be amended to require licensed recruiters be used by contractors, and to stipulate that no agents or subagents of those recruiters may be utilized. According to the respondent, the current rule requires only trained recruiters, which does not go far enough.

Response: The final rule has been revised to specify that recruiters must comply with local labor laws of the country in which the recruiting takes place. The statute and E.O. do not specifically require licensing of recruiters. Practices regarding recruiting vary greatly from country to country.

iv. Editorial Comment on Recruitment Practices

Comment: One respondent recommended adding “or offering employment” after “during the recruitment of employees” in FAR 22.1703(a)(5) and 52.222–50(b)(5) to better integrate E.O. 13627 section 2(a)(1)(A)(i) and 22 U.S.C. 7104(g)(iv)(III). The respondent further recommended moving the place of the revised phrase to come after a modified lead-in phrase “Using misleading or fraudulent practices.”

Response: The Councils accepted the recommendations and have incorporated the changes into the final rule.

c. Recruitment Fees (FAR 22.1703(a)(6) and 52.222–50(b)(6))

Comment: Several respondents supported the unequivocal stance of prohibiting charging employees recruitment fees. One respondent commented that the final rule should align with the language in the statute

and prohibit “charging unreasonable placement or recruitment fees.”

One respondent recommended defining the term “recruitment fees” using the definition of recruitment costs found at FAR 31.205–34.

Another respondent recommended prohibiting other types of fees being charged to the employee such as travel, hiring, administrative, handling, or any other types of fees assessed against the employee.

Response: In order to comply with both the E.O. and the statute, the rule applies the most stringent requirement (*i.e.*, no recruitment fees). The Councils note public support for prohibiting employees from being charged recruitment fees. Prohibiting recruitment fees for employees is a key anti-trafficking in persons principle, since being charged any recruitment fees increases workers’ vulnerability to debt bondage or involuntary servitude. Additionally, monitoring and enforcing “unreasonable” recruitment fees is burdensome for Federal agencies and contractors and requires evidence to evaluate whether the amount of money that an employee is charged is “reasonable.”

The rule prohibits charging employees any recruitment fees, not just those recruitment fees that are considered allowable costs under a contract. Expanding the types of prohibited fees beyond recruitment fees is beyond the scope of this case.

Comment: One respondent was concerned that the prohibition of certain kinds of fees may be construed to prohibit program fees through the State Department Exchange Visitor Program, which is a fee-for-service program.

Response: The E.O. prohibits recruitment fees charged by employers, contractors, and/or subcontractors, which are different than program fees. Program fees for the J nonimmigrants (*i.e.*, students, exchange visitors, and their dependents) are fees mandated by Congress to support the program office and the Student and Exchange Visitor Program automated system (*i.e.*, the Student and Exchange Visitor Information System). This system is used to track students and exchange visitors while in the United States. The Department of State collects these program fees when it redesignates program sponsor organizations, usually every two years.

Recruitment fees are quite different from program fees. Recruitment/placement/housing fees are payments made by individual exchange visitors to the sponsor organization or a related third party organization for services provided to the exchange visitor during

his/her program. The Department of State took action in 2012 to address weaknesses in the Summer Work Travel program by, among other things, publishing new regulations to implement safeguards that expand the list of ineligible positions, enhancing oversight and vetting of sponsors and third parties, and better defining cultural activities. Notably, the Department of State has conducted more than 1500 site visits in the past two years, required comprehensive orientation materials for participants, and has made available a 24-hour toll free helpline. The Department of State continues to examine ways to further strengthen the program. As part of this effort, the Department of State through regulation requires sponsors to submit annual participant price lists each year, breaking down the costs that exchange visitors must pay to both sponsors and foreign third party entities to participate in the program.

d. Return Transportation (FAR 22.1703(a)(7) and 52.222–50(b)(7))

Comment: One respondent recommended adding at FAR 22.1703(a)(7) the statutory modifier as follows: “if requested by the employee at the end of employment, failing to provide return transportation . . .”.

Response: If the employer brought the employee into a country where the employee is not a national, then the employer cannot leave the employee in that country at the end of employment. Unless an exception applies (see FAR 22.1703(a)(7)(ii) and 52.222–50(b)(7)(ii)), the employer is required to provide the employee return transportation; this is not contingent on the employee requesting it. For employees not aware of their right to return transportation, the concern is that the employer would use that as an excuse to claim the employee did not formally request return transportation. The rule allows an employee to refuse return transportation, if that employee is otherwise allowed to stay in the country; however, the rule does not state that employees who do not request transportation are not entitled to it.

Comment: Two respondents sought clarification on the conditions regarding the “provide or pay” provision at FAR 22.1703(a)(7): Would the contractor be required to “pay” only at the end of the period of employment? What mode of transportation is required? Must the payment be in the form of a non-transferrable and non-refundable ticket? Can it be in cash in the currency of the country where the work is being performed or can it be a voucher for the employee to use as they see fit?

Referencing FAR 31.205–35, which permits contractors to recover relocation costs on Government contracts, would an employee's return relocation be allowable even if the employee resigns, is terminated, or the project unexpectedly ends within 12 months of hire?

Response: The contractor must make a reasonable decision on whether to provide or pay for transportation and then what mode of transportation to provide or how to reimburse an employee for transportation. This decision should be based on any existing requirements to provide or pay for return transportation for temporary nonimmigrant workers, the contractor's established travel policies and procedures, the modes and cost of transportation available, and other factors related to the unique circumstances for the employees, the location they work in and the country to which they are returning. There are no exemptions to the "provide" or "pay" requirements of the rule for employees who are terminated or who want to leave before one year of employment. While FAR 31.205–35, Relocation costs, addresses relocation costs incident to the permanent change of assigned work location, the transportation costs referred to in the rule are not the same as relocation costs in the FAR. The rule refers to travel only to and from the place of employment. It does not include all the costs listed in FAR, such as moving family and furnishings, real estate sales, etc. The rule puts no limits on the length of employment or whether the employment was ended for cause. Indeed, for an unscrupulous employer, these limitations could be used as an excuse not to pay for or provide return fare for its employees.

Comment: One respondent noted that the exemption "by the Federal department or agency providing the contract," is only addressed at FAR 22.1703(a)(7)(ii)(B) and not included in the contract clause at FAR 52.222–50. Two respondents noted there is no guidance in the regulation as to how, when or from whom within the agency such exception is to be obtained and that this could create a significant loophole because there are no listed criteria that would circumscribe the agency's discretion to exempt contractors.

Response: The exemption has been added to the list of exemptions at FAR 52.222–50(b)(7)(ii)(B). By its nature, this exemption is unique to individual agencies and their particular situation. Any guidance on the use of this exemption should be addressed in

individual agency guidance and regulations. Agencies may also choose not to use this exemption.

Comment: Two respondents had questions concerning return transportation for victims or witnesses of human trafficking. One asked if the country of employment or the U.S. Government will provide the means for the victims or witnesses to return to their home countries. One respondent states that the rule does not consistently address the return of workers to their country of origin. According to the respondent, the rule states that contractors merely have to interview suspected victims and witnesses prior to repatriation. Elsewhere in the rule, the contractors' requirement to provide return transportation or costs is waived for victims of or witnesses to trafficking in persons. This respondent recommended, because repatriation could be a form of retaliation against workers, once a contractor notifies Government authorities of suspected trafficking in persons, the contractor should first obtain authorization from appropriate Government officials prior to repatriating a witness or victim.

Response: It is beyond the scope of this rule to set requirements for an agency or another entity to pay for a victim or witness' return transportation or to require prior approval for the repatriation of victims or witnesses. However, the rule has been clarified that the contractor shall provide the return transportation or pay the cost of return transportation in a way that does not obstruct the victim services, legal redress, or witness activity. For example, the contractor shall also offer return transportation to a witness at a time that supports the witness' need to testify. Also, the rule has been revised to delete the requirement for interviewing (FAR 52.222–50(g)(1)(iv)).

e. Housing Arrangement (FAR 22.1703(a)(8) and 52.222–50(b)(8))

Comment: A respondent recommended adding a requirement to prohibit employees from being charged an excess portion of their wages as payment for housing. One respondent suggested that such a requirement would prevent traffickers from keeping their employees in a perpetual state of indebtedness.

Response: It is beyond the scope of this rule to regulate the costs charged for housing. However, the final rule has been modified at FAR 22.1703(a)(5)(i) and (a)(9) and 52.222–50(b)(5)(i) and (b)(9) to require disclosure of housing costs. The employer should provide this disclosure during the recruiting process and as part of any required work

documents, prior to relocation of the employee.

Comment: A respondent expressed concern that the housing requirements established at FAR 22.1703(a)(8) and at 52.222–50(b)(8) were inconsistent with the housing plan requirements at FAR 52.222–50(h)(3)(iv). Specifically, the respondent noted that the clause at FAR 52.222–50(h)(3)(iv) allows the contractor to explain any variance from the host country housing standards, while the language at FAR 22.1703(a)(8) and 52.222–50(b)(8) does not.

Response: Following the principle of compliance with the most stringent requirement in order to comply with both the statute and the E.O., the final rule has been amended at FAR 52.222–50(h)(3)(iv) to be consistent with FAR 22.1703(a)(8) and 52.222–50(b)(8) and the statute. The statute requires that contractors meet the host country housing and safety standards (22 U.S.C. 7104(g)(iv)(V)). It does not provide the opportunity for contractors to explain any variances from host-country housing standards, even though the E.O. would allow such explanation of variance in the housing plan (sec 2(a)(2)(A)(iv)).

Comment: One respondent recommended deleting the phrase "housing (if employer provided or arranged)" in FAR 22.1703(a)(5) from the list of employment terms and conditions that the contractor may not misrepresent or fail to disclose material information about. The respondent commented that FAR 22.1703(a)(8) and 52.222–50(b)(8) already preclude "providing or arranging housing that fails to meet the host country housing and safety standards," rendering the phrase in FAR 22.1703(a)(5) unnecessary.

Response: The phrases at FAR 22.1703(a)(5) and 52.222–50(b)(5) serve different purposes than the similar phrases at FAR 22.1703(a)(8) and 52.222–50(b)(8). The former requirement governs false representations during the employee recruitment process, while the prohibitions at FAR 22.1703(a)(8) and 52.222–50(b)(8) govern the condition and safety of the employee housing arrangements once the employee is working on the contract. Therefore, the Councils have retained the phrases at FAR 22.1703(a)(5) and 52.222–50(b)(5). f. Employment Contract (FAR 22.1703(a)(9) and 52.222–50(b)(9))

Comment: Two respondents recommended always requiring an employment contract for workers participating in a Federal contract, and therefore removing the qualifying "if

required” language in FAR 22.1703(a)(9). The respondents argued that this uniform requirement for a written contract would allow contractors to more effectively implement the FAR 22.1703(a)(5) requirement that contractors not use misleading or fraudulent recruitment practices.

Response: Neither the Trafficking Victims Protection Act (22 U.S.C. chapter 78), as modified by the NDAA for FY 2013, nor the E.O. require a written employment contract or other work documents. The rule has clarified that written work documents are mandated only when required by law or contract. This provides the contracting officer the option of requiring written work documents in situations where the compliance provisions contained in this rule do not adequately manage the risk of trafficking in persons.

A written employment contract or other work documents are not a panacea to trafficking in persons and may in some circumstances work to the detriment of the employee. This situation can arise when verbal inducements conflict with written terms and the written terms accurately reflect key terms and conditions of employment. Not all potential employees are literate, able to fully understand an artfully drafted contract, or actually read the entire document before signing it. Additionally, compliance monitoring will require additional resources and enforcement could be challenging, since failure to provide a written employment contract is not one of the listed acts or omissions in 22 U.S.C. 7104(g) for which a remedy is provided under 22 U.S.C. 7104b(c). Employees are afforded the protection of this rule whether or not they have a signed employment contract.

Comment: One respondent recommended that employment contracts require disclosure of the following: identity of the employer and identity of the person conducting the recruiting on behalf of the employer, including any subcontractor or agent involved in such recruiting; the period of employment; any withholdings or deductions from compensation, whether on behalf of a government, the employer, or a third party; any penalties for early termination of employment; and if applicable, the type of visa under which the foreign worker is to be employed, the length of time the visa is valid, the terms and conditions under which this visa may be renewed with a clear statement that there is no guarantee that the visa will be renewed, and an itemized list detailing the “significant costs to be charged to the

employee” as indicated in FAR 22.1703(a)(5).

Response: The Trafficking Victims Protection Act (22 U.S.C. chapter 78) and Executive Order 13627 do not require a written employment contract. The list of items for inclusion into work documents is not intended to be a comprehensive list. Rather, it is a nonexclusive list which contractors are encouraged to expand as needed. The scope and specificity of covered terms and conditions will likely vary based on factors such as the sophistication of the employee and country in which the contract is to be performed. A contract or work document covering the employment of a professional from one European Union (EU) country in another EU country may not require the same level of detail and coverage as a laborer from one developing country employed in another developing country or an area of military operations. Additionally, contractors and subcontractors must always comply with any contract or disclosure requirements under any other law, including, for example, the requirements of the Migrant & Seasonal Agricultural Worker Protection Act and the Immigration and Nationality Act, and applicable regulations for temporary nonimmigrant workers.

Comment: One respondent was supportive of the FAR 22.1703(a)(9) requirement for written employment contracts when required, but noted that one common scam used by traffickers was to give the worker his/her contract while either at the airport, on the plane or at the ultimate destination. The respondent therefore recommended revising the language to include a requirement that the contract be provided to the workers at least five days in advance of his/her deployment, thus allowing the worker adequate time to make a reasoned and well-informed decision.

Response: The recommendation is accepted and has been incorporated into the final rule.

4. Compliance Plan/Certification (FAR 22.1703(d) (Now at Paragraph (c)), 52.222–50(h), and 52.222–56)

a. Positive Support

Comment: One respondent stated that the certification and compliance plan requirements are important for the purposes of adding the crucial implementation element to the rule, and are a proactive measure for all contractors involved in Federal contracts to participate.

Response: Noted.

b. Compliance Plan Requirements

i. Appropriate to Size and Complexity

Comment: One respondent stated that the E.O. in one place required a compliance plan that was appropriate for the size of the contract, but in another place required the plan to include procedures to prevent subcontractors “at any tier” from engaging in trafficking in persons. The respondent pointed out the proposed rule went even further by requiring the plan procedures to prevent trafficking in persons “at any tier and at any dollar level.”

Response: The E.O. was more specific in the place where “at any tier” language was used. The FAR Council does not consider this to be an ambiguity. The clause added the words “at any dollar level” to clarify that although the lesser-dollar subcontractors are not expected to implement a formal plan, they are not allowed to engage in trafficking, and the prime contractor and higher-tier subcontractors are expected to pay attention to what the lower-tier subcontractors are doing. The Federal Government’s policy prohibits trafficking in persons activities.

Comment: One respondent noted that section 1703(b) of the NDAA for FY 2013 provides that any compliance plan or procedure shall 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 or supplies susceptible to trafficking in persons. The respondent stated that this language was missing from the FAR 52.222–50 clause and asserted that the language should also appear in the FAR 22.1705 prescription.

Response: The Councils note that this language, from the statute and the E.O., does, in fact, already appear in paragraph (h)(2) of clause at FAR 52.222–50. It is not appropriate to also include that language in the FAR 22.1705 prescription. In accordance with FAR drafting principles, the clause prescription is to direct when the clause is to be used, not to address the terms the clause contains.

ii. Provide More Guidance

Comment: One respondent stated that the rule does not establish minimum guidelines for the compliance plan, which would make it difficult for contractors and subcontractors to know what is a “good plan”, and recommended identifying agency

experts to provide technical assistance to the contractors.

Another respondent recommended that the proposed requirement for a code of conduct for suppliers should at a minimum require contractors to adhere to the international core labor standards and provide decent conditions at work, including compensation, hours of work, occupational safety and health, industrial hygiene, emergency preparedness, safety equipment, sanitation, and access to food and water.

Response: As noted in FAR 22.1703(d)(5), any compliance plan or procedures needs to 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 or supplies susceptible to trafficking in persons. In addition, 52.222–50(h)(3) lists the minimum requirements for any compliance plan. The Councils do not consider it necessary to state that the contractor should not negligently expose its employees to unhealthy or unsafe conditions, beyond the requirements already listed in the statute and the E.O.

Comment: One respondent recommended providing additional guidance (either in the final rule or discussion and analysis section) for contractors on creating an anti-trafficking in persons compliance plan and guidance for contracting officers on what compliance plans should include. The respondent also provided detailed proposed guidance on assessing the trafficking in persons risk, based on Department of Labor and Department of State lists of countries and industries involved in trafficking in persons, number of non-United States citizens expected to be employed, as well as the skill and labor mix to be used for the contracted effort.

Response: The FAR includes general policies and procedures and does not include detailed guidance. The respondent's proposed guidance on risk-based compliance plan will be shared with State and Labor Departments for their review. The Department of Labor's Office of Child Labor, Forced Labor, and Human Trafficking Web site at <http://www.dol.gov/ilab/child-forced-labor/index.htm> has a Toolkit for Responsible Businesses, which contains extensive information and guidance on trafficking in persons. This information will be useful to contractors and includes a step-by-step process for developing a social compliance plan to address forced labor in supply chains. The FAR

clause at 52.222–50(h)(3) sets forth the minimum requirements for an acceptable compliance plan that is appropriate to the size and complexity of the contract. Many of the respondent's recommendations concerning flow down provisions, compliance plans from subcontractors, and review of the plan, are contained in the FAR clause. E.O. 13627 also requires guidance and training for Federal employees awarding and administering contracts subject to anti-trafficking in persons statutes and regulations.

Additionally, the E.O. also called on the President's Interagency Task Force to Monitor and Combat Trafficking in Persons member agencies to establish a process for identifying industries or sectors where there is either a history or evidence of trafficking in persons or trafficking-related activities, in the context of Federal contracts performed substantially in the United States. In support of this effort, the Department of State is collaborating with a non-governmental organization and leader in supply chain management to strengthen protections against trafficking in persons in federal and corporate supply chains. The project will collect data and identify areas and industries at greatest risk of trafficking in persons in global supply chains. It will also develop a tool for businesses to analyze the potential risk of trafficking in persons in their supply chains and adopt compliance plans that align with the language of the E.O. This Interagency Task Force is evaluating and identifying industries and sectors with a history of trafficking in persons and will publish appropriate safeguards, guidance and compliance assistance to prevent trafficking in persons under Federal contracts.

iii. Reporting Requirement

Comment: Two respondents recommended establishing minimum requirements or guidance governing the employee reporting process to ensure that the process remains confidential and that employees do not fear retaliation.

Response: The FAR rule outlines the minimum criteria for compliance plans. The rule requires a process for employees to report without fear of retaliation, but does not specify the process. However, the final rule has added the requirement to make available to all employees the Global Human Trafficking Hotline phone number and email address.

Comment: Two respondents expressed concern that contractors might dissuade employees from speaking up about trafficking in persons abuses and argued that only an

independent and confidential complaint mechanism would be effective in surfacing abuses. One respondent further suggested that the certification of a contractor or subcontractor should require identification of how an independent complaint mechanism will be operated and by whom.

Response: FAR clause 52.222–50(h) requires that the contractor's compliance plan include a process for employees to report, "without fear of retaliation." When the contractor fails in its responsibilities, the Government may impose one or more of the available remedies as contained in FAR 22.1704 and 52.222–50(e).

Comment: One respondent recommended that contractors and subcontractors be required to provide all workers with the phone number (1–888–373–7888), texting number (233733), email address, and Web site address for the National Human Trafficking Resource Center (NHTRC) hotline posted in a place that is clearly conspicuous and visible to workers, and it should be provided in a language understood by workers, describing human trafficking and labor exploitation in non-technical and accessible ways. Another respondent said that they currently supply their employees with appropriate communication means, such as a phone number, operable 24/7, by which an employee may inform law enforcement authorities regarding their observation of activities that, pursuant to their company training program, appear to resemble human trafficking.

Response: FAR 52.222–50(h)(3) requires that as a part of the compliance plan, there be a process for employees to report activity inconsistent with the Government's policy prohibiting trafficking in persons. A number of Federal agencies provide information through posters, pamphlets, and other means to ensure that workers have a way to report such activity through specific anti-trafficking in persons or anti-exploitation related hotlines or through Office of Inspector General hotlines. Several agencies, such as the Department of Justice, Department of Homeland Security, and Department of State, also publicize the National Human Trafficking Resource Center (NHTRC) hotline number including the Department of State's "Know Your Rights" pamphlet and the Department of Homeland Security's Blue Campaign materials. To comply with the rule's mandate of a reporting process, the final rule has been revised to require that as part of the compliance plan contractors must provide, at a minimum, the Global Human Trafficking hotline and its email

address. However, contractors may also exceed this requirement and provide additional ways for employees to report.

iv. Other Requirements

Comment: One respondent recommended that contractors be required to establish and implement, and/or cause subcontractors to establish and implement, managerial systems, rules, and procedures to ensure they have the ability to guarantee compliance. The respondent further recommended that these systems address pricing, order schedules, and other purchasing practices that impact suppliers' capacity to comply with labor standards.

Response: The respondent's recommendations go beyond the scope of this case. The Councils implemented the requirements of the E.O. and statute in the least burdensome manner. The clause at FAR 52.222–50 establishes the requirements for contractor and subcontractor compliance in paragraphs (c), (d), (g), (h) and (i).

v. Contractor/Subcontractor Responsibilities

Comment: One respondent stated that FAR 22.1703(d)(3) (now (c)(3)) fails to differentiate the responsibilities of the contractor and the subcontractor. The respondent recommended deleting the duplicative coverage for contractors and revising the paragraph as follows: "Require the contractor to obtain a certification from each subcontractor, prior to award of a subcontract, for work that will be subject to the threshold, that the subcontractor (a) has a compliance plan that addresses the substantive elements of paragraph (d)(1) and (b) after conducting due diligence, either (i) to the best of the subcontractor's knowledge and belief neither it nor its agents, has engaged in any such activities or (ii) if abuses have been found, the subcontractor has taken the appropriate remedial and referral actions;"

Response: The Councils have rewritten FAR 22.1703(c)(3) to increase the clarity in the final rule.

Comment: One respondent commented that the requirements for contractors to cooperate fully with Government officials during audits, investigations or other actions, apply to subcontractors.

Response: Subcontractors are required to cooperate fully with Government officials during audits, investigations or other actions, see FAR 52.222–50(g). Also, contractors are required to include the substance of the clause at FAR 52.222–50 in all of their subcontracts (see FAR 52.222–50(i)). As a result,

subcontractors are covered by FAR 52.222–50(g).

vi. Products Included on the E.O. 13126 List

Comment: One respondent recommended that all suppliers and their subcontractors who are supplying goods that contain more than \$500,000 worth of a product included on the E.O. 13126 List produce a compliance plan before being awarded a contract.

Response: The requirement for a compliance plan is based on the criteria in the statute and E.O. 13627, which do not provide for special treatment of suppliers of products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor (E.O. 13126 List) (see FAR subpart 22.15, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor); such offerors are already required to submit certifications regarding the use of forced or indentured child labor. The apparently successful offeror is required by FAR 52.222–56 to submit a certification in advance of award regarding the compliance plan. However, the contracting officer may consider that buying products on the E.O. 13126 List presents a risk that the contract or subcontract may involve supplies susceptible to trafficking in persons. The contracting officer can request a copy of the compliance plan at any time after contract award.

c. Communication

Comment: One respondent provided feedback on the question concerning a requirement for facilitating regular contact with family and embassies. The respondents suggested that workers who are able to keep in touch with families and embassies are less likely to be trafficked. The respondents also suggested that employers who are aware that their employees are communicating with others about their living and working conditions are less likely to engage in human trafficking in persons. The respondent was concerned that it might be difficult to facilitate contact when workers are in remote locations.

Another respondent suggested that the regulations should include a process to facilitate direct contact by the contracting officer with contractors' and subcontractors' employees using email and social media.

Response: The FAR includes general policies and procedures. The respondent's recommendation is encouraged in other guidance documents issued by the State Department and other agencies. E.O. 13627 and title XVII of the NDAA for FY

2013 do not require the Federal Government to facilitate regular contact between those employed on Federal contracts and their families or embassies. Similarly, there is no requirement that the Federal Government facilitate regular contact between contracting officers and the contractor/subcontractor employees.

However, the E.O. and NDAA for FY 2013 do require contractor compliance plans and specify that there are minimum elements of the compliance plan (see FAR 52.222–50(h)), but contractors may go beyond those minimum elements and incorporate further measures that promote ending trafficking in persons. The President's Interagency Task Force to Monitor and Combat Trafficking in Persons is developing public awareness materials to inform those employed on Federal contracts overseas of their rights under the E.O., the NDAA for FY 2013, and this rule and to provide information on where to call should an employee be subject to trafficking in persons.

Existing related efforts to track workers serving on contracts overseas include the Department of Defense's Synchronized Pre-Deployment and Operational Tracker (SPOT), also used by the Department of State and other agencies. This system requires tracking of data on contract employees from any country working in Afghanistan and Iraq and other designated operational areas. The State Department also uses the mandatory E-Clearance system to register Government personnel and contractors working as support personnel within the Department of State traveling to a post under Chief of Mission authority. E-Clearance helps posts understand how much support will be needed by visiting personnel. A subset of all workers serving on U.S. Government contracts would be tracked by these two systems.

Other State Department efforts to make individuals aware of their rights and to provide information on where to call for help could serve as models for future outreach. Existing efforts to protect employment and education-based nonimmigrant visa applicants intending to reside in the United States include: The State Department's "Know Your Rights" pamphlet and video developed in consultation with several Federal agencies, which is given to recipients in certain visa classes vulnerable to trafficking in persons available at: <http://travel.state.gov/content/visas/english/general/rights-protections-temporary-workers.html>; and the development of an informational video that will complement the pamphlet. Embassies

and consulates overseas will play the video in consular waiting rooms as appropriate, in languages spoken by the greatest concentrations of those applicants. Non-governmental organizations have commended the Federal Government for the effectiveness of the "Know Your Rights" pamphlet in reaching those in exploitative and abusive situations.

d. Posting

Comment: A number of respondents were supportive of the posting requirement.

Response: Noted.

Comment: Several respondents provided feedback on requiring posting notices on trafficking in persons in workers' living and work areas. Respondents expressed concern that the posting requirement is burdensome and that some companies' wage and recruiting plans may contain proprietary information. They also expressed the concern that the appropriate audience for such plans is employees and not the public-at-large. Respondents also questioned how information would be posted if work is performed in the field or not in a fixed location. Respondents suggested that an alternative would be posting on the contractor's and/or subcontractor's internal (non-public) Web site(s), so long as the Web site is accessible to covered employees. Respondents also suggested that greater flexibility be given to the contractor on what it determines to be relevant content and on how to obtain such content in any such notice that is posted conspicuously where work is performed, consistent with the nature of its compliance plan, the nature and location of the work performed, and the number of employees performing work.

Response: As required by the statute, FAR 52.222-50(h)(4) requires the contractor, to post the relevant contents of the compliance plan at the workplace and on the Web site (if one is maintained), as appropriate. The regulations do not specify that the Web site must be available to the public. The final rule has been modified to provide that if posting at the worksite or on the Web site is impracticable (*i.e.*, the work is to be performed in the field or not in a fixed location and there is no Web site available), the relevant contents of the compliance plan may be presented to the employee in writing. The rule provides flexibility in determining what relevant content to post. However, given that the compliance plan consists of five components, it is logical that, at a minimum, a summary of the five components should be posted, with the option for the employee to request and

receive additional details. Contractors may also go beyond a summary of the five components and provide additional information to achieve the purpose of the rule.

e. Submission

Comment: One respondent stated that the compliance plan should be available when the solicitation process is open, so that contracts are awarded to those who are both qualified and most likely to avoid prohibited conduct.

Response: Section 1703 of the NDAA for FY 2013 requires the potential recipient of a contract, prior to receiving award, to provide certification to the contracting officer that the recipient has implemented a plan to prevent prohibited trafficking in persons activities, and is in compliance with that plan. The statute only requires disclosure of the plan to the contracting officer upon request.

Comment: One respondent seeks clarification regarding when or how a subcontractor must submit a compliance plan to the prime prior to award.

Response: In the final rule, the Councils have revised FAR 52.222-50(i)(2) to delete the requirement for subcontractors to submit the compliance plan prior to subcontract award.

f. Monitoring

Comment: Several respondents, asked for clarification and further guidance on what constitutes adequate monitoring of subcontractors and employees. One respondent recommended that contractors release the results of audits and inspection results and that Federal agencies share information about independent entities which perform monitoring and conduct investigations. This respondent also recommended a contractor prequalification for contractors which work proactively to eliminate trafficking in persons.

Response: There are a variety of agencies and organizations that provide guidance on monitoring for trafficking in persons, including the Department of Labor's Reducing Child and Forced Labor toolkit at <http://www.dol.gov/ilab/child-forced-labor/index.htm>, which has extensive information on developing, communicating and monitoring a comprehensive social compliance system. The State Department's Office to Monitor and Combat Trafficking in Persons at <http://www.state.gov/j/tip/id/index.htm>, the United States Agency for International Development at <http://www.usaid.gov/trafficking>, and the Department of Homeland Security at <https://www.dhs.gov/end-human-trafficking> have general information about trafficking in persons, including

the indicators of human trafficking and how to identify potential. The prime contractor's monitoring efforts will vary based on the risk of trafficking in persons related to the particular product or service being acquired and whether the contractor has direct access to a work site or not. Where a prime contractor has direct access, the prime contractor would be expected to look for signs of trafficking in persons at the workplace, and if housing is provided, inspect the housing conditions. For cases where the employees and subcontractors are distant, or for lower tier subcontractors, the prime contractor must review the plans and certifications of its subcontractors to ensure they include adequate monitoring procedures, and to compare this information to public audits and other trafficking in persons data available. The plans must include a process for employees to report, without fear of retaliation, any prohibited activities. The contractor may use this process to monitor employees' concerns.

It is beyond the scope of this rule to require that contractors release the results of audits and inspections. While Federal agencies do share information about their activities related to trafficking in persons, they are not allowed to make recommendations or referrals to private or independent entities.

Establishing a program to prequalify contractors that work proactively to eliminate trafficking in persons is beyond the scope of this rule.

Comment: One respondent recommended modifying the regulations to eliminate the requirement that the prime contractor directly monitor each subcontractor at any tier and any dollar value and alternatively require each contractor to be responsible for monitoring its direct subcontractor, with each subcontractor being responsible to monitor its direct subcontractors. Additionally, if a risk assessment reveals credible evidence that there is a material risk of labor trafficking with a specific subcontractor, additional due diligence and monitoring beyond the first tier may be required. This respondent alternatively proposed a good faith effort approach similar to the certification requirements in FAR subpart 22.15, regarding the Prohibition of Acquisition of Products Procured by Forced or Indentured Child Labor.

Response: The Councils consider the responsibilities of the prime contractor to prevent subcontractors at any tier from engaging in trafficking in persons and to monitor, detect, and terminate any subcontractors or subcontractor employees that have engaged in such

activities at any tier, to be one of the key contractual requirements to ensuring compliance. Public comments on this rule reveal that some subcontractor employees take kickbacks from traffickers, and of course will not report their own violations or those of their agents or lower tier subcontractors. Accordingly, vigilance by the prime contractor is necessary.

Comment: One respondent questioned whether it is appropriate for the Federal Government to require contractors to regulate the procuring of commercial sex by its employees, stating that prostitution is a state rather than a Federal responsibility and it is not the function of the FAR to monitor.

Response: The final FAR rule is implementing the requirements of statute and Executive Order regarding the prohibition of trafficking in Federal Government contracts. The coverage of commercial sex is not new in this rule; see the explanation of this statutory implementation in the final rule published January 15, 2009 (74 FR 2741).

Comment: One respondent recommended implementing government-wide requirements to audit contractor trafficking in persons compliance and random unannounced interviews with workers to ensure that trafficking in persons violations are not occurring.

Response: Agencies may institute such auditing and interviewing tactics now, as they deem appropriate, but are often constrained by resources from performing this type of oversight.

g. Enforcement

Comment: Two respondents commented that contractors should not be allowed to design and implement compliance plans that are structured around self-disclosure on their part. The respondent recommended that the FAR regulations should require independent and accessible grievance mechanisms, independent verification of practices, and sufficient resources and mechanisms to ensure meaningful enforcement.

Response: FAR 52.222–50(h)(3)(ii) requires contractors to have a process for employees to report, without fear of retaliation, activity inconsistent with the policy prohibiting trafficking in persons. In addition, during administration of the contract, the contracting officer has access to contract administration organizations and various Federal enforcement agencies to provide assistance in the enforcement of anti-trafficking in persons requirements. The policy at FAR subpart 3.9, Whistleblower Protections for

Contractor Employees, further protects contractor employees against reprisal for certain disclosures of information related to a contract.

h. Use as Evaluation Factor

Comment: One respondent recommended mandating that the evaluation of the corporate compliance program be a part of the evaluation criteria found in section “M” of the solicitation to encourage contractors to develop and implement effective compliance programs.

Response: It is not appropriate to mandate consideration of the corporate compliance program in every acquisition. FAR 15.304, Evaluation factors and significant subfactors, states that the contract award decision is based on evaluation factors that are tailored to the instant acquisition and that these evaluation factors must represent the key areas of importance and emphasis to be considered in the source selection decision as well as support meaningful comparison and discrimination between and among competing proposals. In accordance with established FAR procedures, the source selection authority determines the key discriminators in evaluating proposals based on the unique requirements of a given acquisition and how to best assess an offeror’s ability to meet those requirements.

The Councils note that the rule does not preclude having the compliance plan as a source selection factor, where it is a key discriminator, but leaves this decision to the discretion of the source selection authority.

i. Pre-Award Certification

Comment: Some respondents commented that the pre-award certification requirements (now at FAR 22.1703(c)(1) and 52.222–56) would be impossible for a contractor to comply with, since the contractor may not know who all of their subcontractors are at all tiers prior to award.

Response: The requirement for each contractor and subcontractor that meets the criteria to certify, prior to receiving an award, that they have implemented a plan to prevent prohibited trafficking in persons activities is expressly required in the E.O. and statute.

The offeror is certifying to the proposed subcontracts it has at the time. At FAR 22.1703(c), the prime contractor is required to certify annually to this information and to require its subcontractors to certify as well, when applicable. Any subcontractors that meet the criteria are required to complete the certification. If a prime adds a subcontractor after award of the

prime contract, the prime is required to obtain the certification from the subcontractor at the time of subcontract award.

Comment: One respondent commented that the requirement in the statute at section 1703(a) to obtain a “recipient certification” should be moved to the opening of subparagraph (d)(1).

Response: The Councils have moved the language “apparent successful offeror” to the beginning of the paragraph (FAR 22.1703(c)(1)), as recommended.

5. Full Cooperation (FAR 22.1703(d) and 52.222–50(g))

a. Rights Against Self-Incriminations, etc.

Comment: Several respondents expressed concern that disclosure requirements and “full cooperation” should be structured so as not to infringe on fundamental individual rights against self-incrimination, attorney-client privilege, and the company’s right to conduct an internal investigation. These respondents recommended aligning this rule with the FAR Business Ethics rules.

Response: The requirement for “full cooperation” at FAR 52.222–50(g) has been augmented with a second paragraph, which incorporates the rights in the second paragraph of the definition of “full cooperation” at FAR 52.203–13(a).

In addition, two types of full cooperation listed in the definition at FAR 52.203–13(a) have been added to FAR 22.1703(d)(1) and (2) and FAR 52.222–50(g)(1)(i) and (ii)—the responsibility to disclose sufficient information to the contracting officer and the agency Inspector General to identify the nature and extent of the offense, and provide timely and complete response to Government auditors’ and investigators’ request for documents. A reminder is added at FAR 52.222–50(d)(1) that in contracts that contain FAR 52.203–13 “Contractor Code of Business Ethics and Conduct”, paragraph (b)(3)(i)(A) requires disclosure to the agency Office of Inspector General when the contractor has credible evidence of fraud.

b. “Federal Agencies”

Comment: Three respondents requested clarification on what constitutes “other responsible enforcement agencies” and recommended aligning FAR 22.1703(e) (now (d)) with the provisions of the NDAA for FY 2013 to specify “Federal agencies” and remove the “other

responsible enforcement agencies” language.

Response: Efforts to prohibit trafficking in persons under Federal Government contracts is a collaborative effort that requires cooperation among Federal agencies, state and local agencies, foreign governments, non-governmental organizations, faith-based communities, private industry, and private citizens. However, “other responsible enforcement agency” was written broadly in the E.O. to mean Federal agencies such as an agency Office of Inspector General, the Department of Justice, Department of State, Department of Homeland Security, or Department of Labor that are responsible for conducting audits, investigations, or other actions to ascertain compliance with trafficking in persons laws or regulations. The final rule changes FAR 22.1703(d)(3) and FAR 52.222–50(g)(1)(iii) to read “other responsible Federal agencies to conduct . . .”.

c. Interviews

Comment: Two respondents commented that the contractor should not have primary responsibility for interviewing the witness, but rather the contractor should notify Government authorities about the existence of such persons and make such persons available to be interviewed by Government law enforcement agents. Another respondent commented that interviews should be conducted only by employees who have been properly trained in the identification of trafficking in persons and trafficking victims, and those who are interviewed should have access to interpreters. Another respondent commented that access to facilities and staff by the contracting agencies or responsible enforcement agencies should not be required before a contractor performs its own investigation; and that the contractor has a right to have a representative present during any access and interviews.

Response: The Councils have removed the requirement for contractors to interview all employees suspected of being victims of or witnesses to prohibited trafficking in persons activities because it is not a requirement of the E.O. or the statute. Therefore, FAR 22.1703(d) and 52.222–50(g) have been modified to delete the word “interview”.

Comment: One respondent recommended that the rule should require that the contracting officer and the agency Inspector General be notified of suspected trafficking in persons in all sections, including FAR 22.1703(e)

(now (d)) and 52.222–50(g), which only requires contractors to interview workers before returning to their country of origin.

Response: The primary requirement for the contractor to notify the contracting officer and the agency Inspector General is at FAR 52.222–50(d). However, the Councils have added at FAR 22.1703(d)(1) and 52.222–50(g)(1), the requirement that the contractor disclose to the contracting officer and the agency Inspector General information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct. The requirement to interview has been removed.

Comment: One respondent requested clarification on “reasonable access.”

Response: As with any other Government investigation or audit, the contractor and any of its employees or subcontractor employees are required to cooperate fully with Government agents and allow access to their facilities and staff in a way that does not impede, obstruct or influence the investigation or audit.

6. Violations and Remedies (FAR 22.1704 and 52.222–50(e) and (f))

a. “May” to “Shall”

Comment: Several respondents recommended changing the word from “may” to “shall” at FAR 22.1704.

Response: The final rule has been revised at FAR 22.1704(d)(2) to require the contracting officer to consider taking the specified remedies. The E.O. was silent on this issue, but the statute was clear (22 U.S.C. 7104b(c), Remedial actions).

b. Mitigating and Aggravating Factors

Comment: One respondent supported the requirement for the contracting officer to address both mitigating and aggravating factors in a remedy determination. (See also section III.B.6.c.ii. below on “stronger remedies”).

Response: Noted.

c. Remedies

i. Safe Harbor

Comment: Two respondents suggested that a provision be included absolving prime contractors from responsibility for acts of its subcontractors. Alternatively, it was suggested that an affirmative defense be established for the prime contractor where it has implemented its own compliance plan, flowed down the required clause, affirmatively communicated to subcontractors the requirements of the rule and reports trafficking in persons

activity of a subcontractor if and when it becomes known to the contractor.

Response: Neither the statute nor the E.O. fully shield a prime contractor or create an affirmative defense. Culpability is determined on a case-by-case basis.

ii. Stronger Remedies

Comment: One respondent commented that contractors who use forced labor or victims of severe forms of trafficking in the persons should not get paid for their work.

Response: Withholding payment, loss of award fee, contract termination, and suspension and debarment are remedies already available to the Government if the contractor fails to comply with the trafficking in persons provisions (see FAR 52.222–50(e)).

Comment: One respondent commented that debarment should be mandatory when a contractor violates the prohibition against forced labor and trafficking in persons. Another respondent recommended suspending and debarring any entity that withholds passports.

Response: FAR 9.402(b) states that debarment and suspension are not imposed for punishment. The Suspending and Debarring Official (SDO) has discretion to address suspension or debarment cases with individualized analysis and uses a broad range of preliminary and final actions to balance the need to protect the Government against the need to treat fairly the contractors involved. FAR 22.1703(e) requires the Government to impose suitable remedies, including termination, on contractors that fail to comply with the requirements to combat trafficking in persons.

Comment: One respondent commented that through an enforceable contract provision, contractors should pay liquidated damages in a manner to help compensate the victim harmed by the breach.

Response: While neither the E.O. nor statute provide a basis for requiring the contractors to pay liquidated damages to compensate victims, the FAR text at FAR 22.1704(d)(2)(i) and 52.222–50(f)(1) was changed to more clearly identify that if the contractor has taken appropriate remedial actions for violations, including reparations to victims, those actions will be considered as a mitigating factor.

iii. Due Process

Comment: One respondent was concerned that FAR 22.1704(b) (now (d)) violates the principle of due process, because the contracting officer only requires adequate evidence to

suspect a violation in order to pursue remedies against the contractor.

Response: The Councils have revised the final rule to require substantiation of the allegations prior to consideration of remedies. This is consistent with section 1704(c) of the NDAA for FY 2013.

7. Posting in the Federal Awardee Performance and Integrity Information System (FAPIS)

a. Support Posting in FAPIS

Comment: One respondent supported the addition of FAR 9.104–6(e), requiring contracting officers to include substantiated trafficking in persons allegations in the Federal Awardee Performance and Integrity Information System (FAPIS).

Response: Noted. However, while retaining the content, the Councils have moved the proposed text at FAR 9.104–6(e), because FAR 9.104–6 addresses the use of FAPIS, not actions relating to entry of the data into FAPIS. The requirements for agency head notification to the contracting officer are now located at FAR 22.1704(c)(1). The requirement for entry of the information into FAPIS was moved to FAR 42.1503(h)(1)(v), with a cross-reference at FAR 22.1704(d)(1), because the former section addresses entry of post-award contractor performance information (other than past performance reviews). Information entered in accordance with FAR 42.1503(h) will be made available to the public after 14 days (see FAR 9.105–2(b)(2)).

b. Standards for Review by the Agency Inspector General

Comment: One respondent stated that the proposed rule fails to set forth the due process requirements for establishing whether allegations are “substantiated” and does not provide any process for review. The respondent recommended establishing a framework by which the agency Inspector General determines whether the allegation is substantiated, including the applicable standard of proof.

The respondent also stated that the FAR regulations should provide procedures for the contractor to review and rebut the agency Inspector General report, including establishing time periods for review and comment prior to posting in FAPIS. The respondent stated that there should be an affirmative requirement that rebuttal evidence be reviewed and taken into consideration prior to reporting into FAPIS.

Response: The FAR does not regulate the procedures of the agency Inspectors

General. The agency Inspectors General establish the criteria by which they conduct reviews and the procedures for providing an opportunity for the contractor to rebut the allegations, prior to completions of the investigation.

However, the Councils have addressed the requirement of section 1704(d)(2) of the NDAA for FY 2013 (codified at 41 U.S.C. 2313(c)(1)(E)) that entry into FAPIS of a substantiated allegation pursuant to section 1704(b) of the NDAA for FY 2013 shall be based on the outcome of an administrative proceeding. Therefore, the final rule provides at FAR 22.1704(c)(2), that upon receipt of a report from the agency Inspector General that provides support for the allegations relating to violation of the trafficking in persons prohibitions, the head of the agency, in accordance with agency procedures, shall delegate to an authorized agency official, such as the agency suspending or debarring official, the responsibility to expeditiously conduct an administrative proceeding, allowing the contractor the opportunity to respond to the report. The authorized official shall then make a final determination as to whether the allegations are substantiated.

c. Contractor Right To Comment After Posting

Comment: One respondent stated that while the proposed amendment to FAR 9.104–6 repeats the statutory language it does not provide meaningful guidance to the contracting officer or contractors. The respondent recommended referencing the existing provisions of FAR 9.104–6 that provide that the contractor shall be given a reasonable opportunity to review and comment on the report (in this case by the agency Inspector General) that substantiated the violation in advance of the report being posted in FAPIS and to have the contractor’s comments appended to and made part of the information posted. Another respondent also requested that the final rule establish a right for the contractor to post rebuttal documents in FAPIS along with the agency Inspector General report.

Response: Revised FAR 22.1704(c) provides for an administrative proceeding that allows the contractor the opportunity to respond to the report, prior to a final determination as to whether the allegations are substantiated.

If the allegations are substantiated and the violation is posted in FAPIS, FAPIS provides contractors an opportunity to comment on any data that has been entered relating to the contractor. However, FAPIS does not

currently provide the capability for contractors to append documents. It is possible for contractors to post documents at their own Web site, and provide the URL to that Web site in their posted comments in FAPIS.

The Councils did not find any language at FAR 9.104–6 that provides the contractor such opportunity to comment on information in FAPIS, prior to posting. FAR 9.105–2(b)(2)(iv) only addresses the narrow situation in which any information posted to FAPIS is covered by a disclosure exemption under the Freedom of Information Act. Information is first posted in FAPIS and only shared with the contractor, and this FAPIS information is not made available to the public until after 14 days. If the contractor asserts within 7 days to the Government official who posted the information, that some or all of the information is covered by a disclosure exemption under the Freedom of Information Act, the Government official who posted the information must, within 7 days, remove the posting from FAPIS and resolve the issue in accordance with the Freedom of Information Act, prior to reposting any releasable information. The final rule clarifies that all such information entered in FAPIS in accordance with FAR 42.1503(h) (except for past performance reviews) will be made publicly available after 14 days, unless covered by a disclosure exemption under the Freedom of Information Act, with a cross-reference to FAR 9.105(b)(2).

FAPIS only contains records on entities that have been awarded a Federal contract or grant. Any information on subcontractor violations must be entered against the record of the prime contractor. The prime contractor is required to have procedures in place to prevent subcontractors from engaging in trafficking in persons. The Councils have added, at FAR 9.104–6(b)(2), guidance to the contracting officer in assessing adverse information posted regarding subcontractor violations of the trafficking in persons prohibitions. The contracting officer is directed to consider any mitigating factors, such as the degree of compliance by the prime contractor with the terms of FAR clause 52.222–50 (including disclosure of the violation to the Government, full cooperation with an investigation, and remedial actions taken).

d. Reporting of Unsubstantiated Allegations

Comment: One respondent commented that only including in FAPIS allegations substantiated by the Inspector General does not go far

enough to implement the E.O., since Inspector General investigations and reports are rare and those affected by trafficking in persons do not have the resources to get a complaint investigated by the Inspector General. Therefore, any allegations of trafficking in persons should be put into the database.

Response: FAPIIS includes violations regarding a contractor's integrity where there was a finding of fault. Section 1704(d) of the NDAA for FY 2013, requires inclusion in the FAPIIS database of substantiated allegations of violations of the prohibitions in 22 U.S.C. 7104(g), after an administrative proceeding.

e. Change Reference to E.O. and Statute

Comment: One respondent recommended replacing at FAR 9.104–6(e) “. . . a violation of the trafficking in persons prohibitions in E.O. 13627 or the Trafficking Victims Protection Act of 2000, as amended, (22 U.S.C. chapter 78)” with “a violation of the trafficking in persons prohibitions in FAR 22.1704 or agency-specific supplemental provisions.” This change was recommended because the E.O. is not substantive law and its provisions do not provide an independent basis for establishing trafficking in persons violations.

Response: This issue is now addressed at FAR 22.1704(c)(1) and 42.1503(h)(1)(v), and the reference has been revised to address the trafficking in persons prohibitions in FAR 22.1703(a) and 52.222–50(b). It is not appropriate to address in the FAR prohibitions that are in agency-specific supplemental provisions.

8. Harmonize With Contractor Code of Business Ethics and Conduct (FAR Subpart 3.10 and 52.203–13)

a. Contractor Notifications (FAR 52.222–50(d))

i. Credible Information/Evidence

Comment: Several respondents commented regarding the standard for triggering the reporting of apparent violations. The respondents noted an internal inconsistency in the rule and suggested that the standard be harmonized with the credible evidence standard in FAR subpart 3.10 Contractor Code of Business Ethics and Conduct. Some respondents also expressed a preference for the inclusion of a definition of the term “credible information.”

Response: Pursuant to 22 U.S.C. 7104b(a)(1) and 22 U.S.C. 7104c(1), contracting or grant officers and recipients of grants, contracts, or cooperative agreements shall inform

appropriate agency Inspectors General upon receipt of “credible information of a violation”. While the proposed clause at FAR 52.222–50(d)(1) accurately reflects that standard, the proposed text at FAR 22.1704(c) used the term “credible violations.” In the final rule FAR 22.1704(b) has been modified to reflect the standard set forth in 22 U.S.C. 7104b(a)(1) and the related reporting requirement at 22 U.S.C. 7104c(1). Since the credible information standard is dictated by statute and modification of the reporting standard under FAR subpart 3.10 is beyond the scope of this case, harmonization of the terms “credible information” and “credible evidence” under this FAR case is not possible.

It is not necessary to include a definition of the term “credible information.” Under the plain meaning of the term, if believable information is presented, the matter shall be referred to the appropriate Inspector General. Although this standard presents a low threshold, contractors' interests are protected through a mandatory and independent review by the appropriate Inspector General prior to opening an investigation (22 U.S.C. 7104b(2)). The low threshold for initial referral, conversely, upholds the policy to prevent human trafficking.

ii. Immediate/Timely

Comment: Several respondents commented on the requirement at FAR 52.222–50(d) for “immediate” notification to the contracting officer and the agency Inspector General of any credible information alleging a violation. Both respondents mentioned that the requirement under the contractor Code of Business Ethics and Conduct at FAR 52.203–13 only requires “timely” notification of credible evidence. One respondent recommended that the final rule should make it clear that the requirement for immediate notification permits a contractor some period of time to conduct its own investigation into the credibility of information it receives.

Response: The Councils note that, prior to this final rule, the clause at FAR 52.222–50 already included the requirement for the contractor to inform the contracting officer immediately of any information it receives from any source that alleges conduct that violates the policy on trafficking in persons.

Section 1705 of the statute (22 U.S.C. 7104c) requires immediate notification to the agency Inspector General of any information from any source that alleges credible information regarding violations of the prohibition in 22 U.S.C. 7104(g). On the other hand, 41

U.S.C. 3509 requires “timely notification” with regard to the Code of Business Ethics and Conduct.

Because of these separate statutory requirements, the different notification requirements in FAR 52.203–13 and 52.222–50 have not been conformed to match.

iii. Tie to Contract or Subcontract

Comment: One respondent stated that the notification requirement (FAR 52.222–50(d)) does not tie to the “award, performance or closeout of [a] contract or any subcontract thereunder,” which differs from the Business Ethics Rule. This lack of clarity in tying the requirement to an individual contract could result in a contractor having to notify every contracting officer with whom it has a contract.

Response: FAR 52.222–50(d) requires the contractor to inform the contracting officer of credible information that alleges a contractor employee, subcontractor, or subcontractor employee, or their agent has engaged in conduct that violates the policy at paragraph (b) of the clause. This is consistent with the statutory requirement. A trafficking in persons violation by a contractor employee may not be associated with a specific contract. The final rule has added the clarification at FAR 52.222–50(d) that, if the allegation may be associated with more than one contract, the contractor shall inform the contracting officer for the contract with the highest dollar value.

b. False Claims

Comment: One respondent stated that the rule should contain a provision at FAR 52.222–50(e) that advises that filing a false certification or other trafficking in persons record could constitute a false claim under 31 U.S.C. 3729, and thereby trigger the False Claims Act. According to the respondent, with the newly added criminal violation at 18 U.S.C. 1351, linking the trafficking in persons provision mandatory disclosure and the False Claims Act would prompt compliance and ensure timely trafficking in persons disclosures and cooperation from all within the labor supply chain.

Response: The FAR does not specify what constitutes a false claim. Nor does it specify what, or what constitutes a crime, especially where this would require a decision on the application of United States criminal laws outside the United States. The Councils consider expansion of the list of remedies at paragraph (e) of the clause to be unnecessary because the final rule

already states that the remedies listed in paragraph (e) are “in addition to any other remedies available to the United States Government” (FAR 22.1704(d)(2)).

c. Integrate Into FAR Subpart 3.10 and 52.203–13

Comment: Several respondents recommended integrating Trafficking in Persons reporting requirements into the list of violations covered by FAR 3.1003(a) and (b) and 52.203–13. According to the respondent, the regulations should expressly state that fraudulent hiring of labor constitutes a “violation of Federal criminal law involving fraud, conflict of interest, bribery, gratuity, or trafficking in persons violations found in Title 18 of the United States Code”. According to the respondents, including trafficking in persons violations under the mandatory disclosure rule pursuant to 52.203–13 will ensure proper authorities are notified and will better protect victims. One respondent commented, however, that harmonizing the rule and related reporting of misconduct with the Code of Business Ethics, does not necessitate identical provisions.

Response: The Councils have not integrated the trafficking in persons disclosure requirements into the Contractor Code of Business Ethics and Conduct (FAR 3.1003(a) and (b) and 52.203–13) because this rule implements a statute and E.O. with specific detailed requirements relating to trafficking in persons violations. Trying to integrate the separate requirements relating to thresholds, compliance plans, mandatory disclosure, full cooperation, etc. may result in confusion or inconsistent and conflicting requirements.

Comment: One respondent commented that violation of the Foreign Labor Act (18 U.S.C. 1351) will trigger the mandatory reporting requirement in FAR subpart 3.10 and the clause at 52.203–13, and therefore should be specifically referenced in the listing of offenses mandated to be reported so that contractors will be put on notice.

Response: As recognized by the respondent, 18 U.S.C. 1351 is already included under 3.1003(b) and 52.203–13(b)(3)(i)(A) as a “violation of Federal criminal law involving fraud . . . found in title 18 of the U.S.C.” There are many such laws, none of which are listed individually. The Councils, however, have added a cross reference at FAR 52.222–50(d)(1) to this law when addressing the prohibitions at FAR 52.222–50(b)(5).

9. Training

a. Enhanced Training for Contracting Officers

Comment: Two respondents recommend enhancing training requirements for contracting officers.

Response: The FAR does not include training. Section 3 of the E.O. requires the Administrator of the Office of Federal Procurement Policy, in consultation with the Federal Acquisition Institute (FAI) and appropriate councils, such as the Chief Acquisition Officers Council, to implement training requirements, to ensure that the Federal acquisition workforce is trained on the policies and responsibilities for combating trafficking in persons. Training will be established in accordance with the E.O. requirements.

Many agencies, currently, offer training on combating trafficking in persons (CTIP). For example, DoD policy on CTIP requires heads of all DoD components to conduct an annual CTIP awareness training program for all Component members and provide data to OSD (P&R) needed to compile its annual CTIP report. Trafficking in Persons General Awareness Training is mandatory for all DoD military members and civilian employees. DoD has developed five trainings, offered on the Department of Defense Combating Trafficking in Persons Web site at <http://ctip.defense.gov/Training.aspx>. These include—

(1) *General Awareness Training* for those who have never taken the CTIP General Awareness Training;

(2) *Law Enforcement Training* for those working in law enforcement and investigative agencies;

(3) *Refresher Training* for those who have previously taken the CTIP General Awareness Training, a 15-minute “refresher” course;

(4) *Leadership Training* for those in leadership positions; and

(5) *Contracting and Acquisition Training*—for acquisition professionals and those working in contracting and acquisition. The Contracting and Acquisition Training is also available from Defense Acquisition University at <http://www.dau.mil/default.aspx>.

The Departments of State and Homeland Security developed an interactive training for the Federal acquisition workforce on combating trafficking in persons in 2011. The 35-minute training module articulates the U.S. Government’s policy prohibiting trafficking in persons; defines and identifies forms of trafficking in persons; describes vulnerable populations, indicators, and relevant

legislation; and articulates specific remedies available to acquisition professionals if contractors engage in trafficking in persons, including suspension or debarment. The training is available to all members of the Federal acquisition workforce through the Federal Acquisition Institute’s Web site. (This training is not yet updated to reflect the new law and policy promulgated in this rule.) During FY 2013, 1,351 professionals, including 704 acquisition professionals, had completed the training from 26 Federal agencies.

The Department of State’s Office to Monitor and Combat Trafficking in Persons and the Department’s Foreign Service Institute developed and released an interactive online course, “Human Trafficking Awareness Training” to enhance State Department personnel’s understanding of the signs of human trafficking and Department reporting obligations. This training has information on the Department’s standards of conduct related to trafficking in persons.

b. Contractor’s Awareness Program

Comment: One respondent recommended the final rule remain flexible with respect to tailoring the contractor’s training to the contractor’s compliance plan and awareness program.

Response: The FAR does not require contractors to tailor training to the contractor’s compliance plan and awareness program. The FAR requires—

(1) An awareness program as part of the compliance plan (see FAR 52.222–50(h)(3)(i)); and

(2) Contracting officers to consider, as a mitigating factor, whether the contractor had a Trafficking in Person compliance plan or an awareness program at the time of the violation (see FAR 22.1704(d), Remedies).

Comment: One respondent recommended permitting agencies to make available to contractors the training provided to the Federal acquisition workforce.

Response: The FAR does not specify trafficking in person training details for the Federal acquisition workforce. However, various agencies have made on-line training for the Federal acquisition workforce available to contractors as well. For example:

- The Department of Defense hosts on its Web site a basic training for acquisition professionals. It is available to the public at <http://ctip.defense.gov/Training/ContractingAcquisition.aspx>.
- The Department of Homeland Security training is specifically tailored for the U.S. Government acquisition

workforce on combating trafficking in persons using the pertinent provisions of the FAR.

- The Department of Defense Combating Trafficking in Persons Web site, at <http://ctip.defense.gov/>, offers extensive information and guidance to prime contractors on how to ensure hiring practices comply with the law and prevent trafficking in persons. In particular, see CTIP Trainings at <http://ctip.defense.gov/Training.aspx>.

Comment: One respondent recommended that contractors hold educational workshops before work begins and throughout employment for employees about modern slavery so that an employee will know what to look for and how to spot potential trafficking in persons situations.

Response: Such recommendations may be included in the contractor's awareness program required by the E.O. and the statute.

10. Other

Comment: One respondent recommended the additional requirements set forth in the Discussion and Analysis section of the proposed rule at 78 FR 59317 be promulgated in the rule.

Response: The proposed rule preamble contained a summary of comments from the public meeting on Trafficking in Persons on March 5, 2013. Most of the recommendations at this meeting were also submitted as comments to the proposed rule and have been addressed separately through this section.

Comment: One respondent recommended implementing a requirement to create and distribute documentation (all recruiting papers, signed recruiting and employment contracts, posters, training materials, as well as victim and witness statements) up the labor supply chain.

Response: While the prime contractor may, and in some cases should, ask for these items, requiring submission of this much paperwork as a matter of course would greatly increase the paperwork burden under Federal contracts and create a significant reporting burden on businesses. The prime contractor is provided the flexibility to determine which documentation is needed based on the place of performance, e.g., in a country and industry group with a high level of trafficking in persons.

Comment: One respondent recommended that agencies continue to work with transportation industry representatives to ensure that companies transporting Government freight under Federal contracts adopt or establish a companywide trafficking in

persons awareness program and supply their employees a means to inform law enforcement of suspected trafficking in persons activities.

Response: FAR clause 52.222–50, Combating Trafficking in Persons, currently requires contractors to notify its employees of the United States Government's policy prohibiting trafficking in persons and to inform the contracting officer immediately of any information it receives regarding violations of this policy. Additionally, outside of the Federal acquisition process, other Government agencies, such as the Department of Homeland Security, the Department of Labor, and the State Department, have awareness programs and points of contact for assistance or to report potential human trafficking activity (see responses at section III.B.4.b.ii, III.B.4.f., and III.B.9 of this preamble).

Comment: One respondent recommended that prohibitions on employer actions include a general prohibition on limiting employees' freedom of association since unionized workers are less vulnerable to employer coercion and less vulnerable to conditions that lead to forced labor and trafficking in persons.

Response: This FAR rule implements requirements to prohibit trafficking in Federal Government contracts. The respondent's comment is outside the scope of this rule.

Comment: One respondent recommended that setting aside contracts for U.S. small business and then only allowing American workers on the contract would end human trafficking.

Response: The Small Business Act does not apply overseas. Even if an acquisition is set aside for small businesses or awarded to a small local business overseas, that does not enable the Government to dictate the nationality of the workers, unless security considerations or contingency operations require U.S. citizenship.

Comment: A comment was received recommending that offerors disclose the names and location of all suppliers and subcontractors prior to award.

Response: The FAR already provides for a responsibility determination on prospective subcontractors. In accordance with FAR 9.104–4, prospective prime contractors are required to assess the responsibility of their prospective subcontractors, which includes a satisfactory record of integrity and business ethics.

FAR subpart 44.2 provides that if a contractor has an approved purchasing system, consent to subcontract is required only for subcontracts

specifically identified by the contracting officer in the subcontracts clause of the contract. The Government relies on review and approval of a contractor's purchasing system, rather than separately managing each subcontractor and supplier.

11. Paperwork Reduction Act

Comment: Several respondents commented that the four hour estimate per contract to prepare and submit an annual certification underestimates the burden because it does not take into consideration the time required to monitor, detect and terminate any agent subcontractors or subcontractor employees who have engaged in trafficking in persons at all tiers.

Response: The Councils performed an analysis and have determined that the certification process should require minimal additional attention if a company is taking the time required to maintain a sound compliance plan. Therefore, the Councils have not increased the estimated number of burden hours.

Comment: One respondent commented that the 24 hour estimate to prepare the compliance plan underestimates the burden.

Response: The Councils performed an analysis, taking into account that this is a one-time submission only to be updated, as necessary, to align with the size, scope and complexity of the procurement. The estimated burden associated with writing the compliance plan takes into consideration that this is a one-time requirement, to be updated as necessary, to align with the size, scope, and complexity of later procurements. The Councils have not increased the estimate.

12. Regulatory Flexibility Act

Comment: One respondent separately submitted comments on the reporting burden to the Chief Counsel for Advocacy at the Small Business Administration, in conjunction with comments that the information collection requirements of the rule are understated. Another respondent recommended that the FAR Council should conduct a thorough and complete regulatory flexibility analysis of the global reach of the proposed rule.

Response: DoD, GSA, and NASA did an analysis of the burdens associated with this rule. Small business cannot be excluded from the requirements of this rule, because violations of the trafficking in persons prohibitions often occur at various subcontract tiers and frequently involve small businesses. However, the rule does provide maximum flexibility to small

businesses. The compliance and certification requirements only apply to any portion of the contract or subcontract that is for supplies (other than COTS items) to be acquired outside the United States, or for services to be performed outside the United States; and only if such portion has an estimated value that exceeds \$500,000. Furthermore, if a compliance plan is required, it shall be appropriate to the size and complexity of the contract or subcontract and the nature and scope of the activities under the contract or subcontract.

IV. Determinations

The Federal Acquisition Regulatory (FAR) Council has made the following determinations with respect to the rule's application of title XVII, entitled "Ending Trafficking in Government Contracting (ETGCA)," of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2013 to contracts in amounts not greater than the simplified acquisition threshold (SAT), contracts for the acquisition of commercial items, and contracts for the acquisition of commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Pursuant to 41 U.S.C. 1905 contracts or subcontracts in amounts not greater than the SAT will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1905 and states that the law applies to contracts and subcontracts in amounts not greater than the SAT; or (iii) the Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding (D&F) that it would not be in the best interest of the Federal Government to exempt contracts and subcontracts in amounts not greater than the SAT from the provision of law. If none of these conditions are met, the Federal Acquisition Regulation (FAR) is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to contracts and subcontracts in amounts not greater than the SAT.

The ETGCA requires that the FAR must be amended to provide certain protections against trafficking in persons, including the following:

1. A clause that prohibits contractors and subcontractors from engaging in the following types of trafficking-related activities:

- Destroying, concealing, removing, confiscating, or otherwise denying access to the employee's identity or immigration documents.

- Failing to provide return transportation for an employee from a country outside the United States to the country from which the employee was recruited upon the end of employment unless the contractor is exempted from the requirement or the employee is a victim of human trafficking and is seeking redress in the country of employment or a witness in a human trafficking enforcement action.

- Soliciting a person for the purposes of employment, or offering employment by means of materially false or fraudulent pretenses, representations, or promises regarding that employment.

- Charging recruited employees unreasonable placement or recruitment fees such as fees equal to or greater than the employee's monthly salary, or recruitment fees that violate the laws of the country from which an employee is recruited;

- Providing or arranging housing that fails to meet the host Country housing and safety standards.

2. A requirement that contractors and subcontractors fully cooperate with any Federal agencies responsible for audits, investigations or corrective actions relating to trafficking in persons. The head of an executive agency must ensure that any substantiated allegation in the report be included in the Federal Awardee Performance and Integrity Information System (FAPIIS) and the contractor has an opportunity to respond.

3. A requirement for a compliance plan appropriate to the size and complexity of the contract and a certification, upon award and annually thereafter, which provides that after conducting due diligence the contractor has implemented a plan to prevent any prohibited trafficking in persons activities and implemented procedures to prevent any prohibited trafficking in persons activities. These requirements for a certification and compliance plan apply to contracts and subcontracts, if any portion of the contract or subcontract—

- Is for services to be performed outside the United States; and
- The estimated value exceeds \$500,000.

The contractor must provide a copy of the plan to the contracting officer, upon request, and post useful and relevant contents of the plan on its Web site and at the workplace.

Several months prior to the enactment of the ETGCA, the President signed E.O. 13627, *Strengthening Protections Against Trafficking In Persons In Federal Contracts* (September 25, 2012). The E.O. imposed similar requirements. There are some differences. For

example, the E.O. expressly prohibits federal contractors and subcontractors from charging employees recruitment fees.

Section 1 of E.O. 13627, explaining the government's policy against trafficking in persons, states: The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior. As the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons. By providing our Government workforce with additional tools and training to apply and enforce existing policy, and by providing additional clarity to Government contractors and subcontractors on the steps necessary to fully comply with that policy, this order will help to protect vulnerable individuals as contractors and subcontractors perform vital services and manufacture the goods procured by the United States.

In addition, the improved safeguards provided by this order to strengthen compliance with anti-trafficking laws will promote economy and efficiency in Government procurement. These safeguards, which have been largely modeled on successful practices in the private sector, will increase stability, productivity, and certainty in Federal contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions.

The ETGCA is silent on the applicability of the requirements set forth in paragraphs 1 and 2 of section IV.A. of this preamble to contracts and subcontracts in amounts not greater than the SAT and does not provide for criminal or civil penalties. Therefore, under 41 U.S.C. 1907 the ETGCA does not apply to contracts and subcontracts not greater than the SAT unless the FAR Council makes a written determination that such application is in the best interest of the Federal Government.

In contrast to the ETGCA, E.O. 13627 applies most of its strengthened prohibitions (other than the requirement for compliance plans and certifications) to acquisitions in any dollar amount. (The requirements for compliance plans and certifications apply only to acquisitions valued above \$500,000 for services performed outside the United States.)

The final FAR rule mirrors the implementation approach taken by E.O. 13627 regarding the handling of small dollar procurements. Specifically, the rule applies the general prohibitions

described in paragraphs 1 and 2 to contracts and subcontracts of a value equal to or less than the SAT. By applying the general prohibitions, the rule, like the E.O., most effectively furthers the policy, including economy and efficiency in procurement, described in the E.O. and quoted above and avoids creation of an exception that could undermine this policy and the ability to enforce the prohibition.

The provisions listed above will apply to acquisitions for commercial items. They will also apply to acquisitions for commercially available off-the-shelf items, except for the requirements for a compliance plan and certification. Separate D&Fs outline the rationale for those additional determinations, as required in 41 U.S.C. 1906 and 1907, respectively.

B. Applicability to Contracts for the Acquisition of Commercial Items

Pursuant to 41 U.S.C. 1906, acquisitions of commercial items (other than acquisitions of commercially available off-the-shelf (COTS) items, which are addressed in 41 U.S.C. 1907) are exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1906 and states that the law applies to acquisitions of commercial items; or (iii) the Federal Acquisition Regulatory Council (FAR Council) makes a written determination and finding (D&F) that it would not be in the best interest of the Federal Government to exempt contracts (or subcontracts under a contract) for the procurement of commercial items from the provision of law. If none of these conditions are met, the Federal Acquisition Regulation (FAR) is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of commercial items.

The ETGCA requires that the FAR must be amended to provide certain protections against trafficking in persons, including the following:

1. A clause that prohibits contractors and subcontractors from engaging in the following types of trafficking-related activities:

- Destroying, concealing, removing, confiscating, or otherwise denying access to the employee's identity or immigration documents.
- Failing to provide return transportation for an employee from a country outside the United States to the country from which the employee was recruited upon the end of employment unless the contractor is exempted from the requirement or the employee is a victim of human trafficking and is seeking redress in the country of

employment or a witness in a human trafficking enforcement action.

- Soliciting a person for the purposes of employment, or offering employment by means of materially false or fraudulent pretenses, representations, or promises regarding that employment.

- Charging recruited employees unreasonable placement or recruitment fees such as fees equal to or greater than the employee's monthly salary, or recruitment fees that violate the laws of the country from which an employee is recruited;

- Providing or arranging housing that fails to meet the host Country housing and safety standards.

2. A requirement that contractors and subcontractors fully cooperate with any Federal agencies responsible for audits, investigations or corrective actions relating to trafficking in persons. The head of an executive agency must ensure that any substantiated allegation in the report be included in the Federal Awardee Performance and Integrity Information System (FAPIS) and the contractor has an opportunity to respond.

3. A requirement for a compliance plan appropriate to the size and complexity of the contract and a certification, upon award and annually thereafter, which provides that after conducting due diligence the contractor has implemented a plan to prevent any prohibited trafficking in persons activities and implemented procedures to prevent any prohibited trafficking in persons activities. These requirements for a certification and compliance plan apply to contracts and subcontracts, if any portion of the contract or subcontract—

- Is for services to be performed outside the United States; and
- The estimated value exceeds \$500,000.

The contractor must provide a copy of the plan to the contracting officer, upon request, and post useful and relevant contents of the plan on its Web site and at the workplace.

Several months prior to the enactment of the ETGCA, the President signed E.O. 13627, *Strengthening Protections Against Trafficking In Persons In Federal Contracts* (September 25, 2012). The E.O. imposed similar requirements. However, there are some differences. For example, the E.O. expressly prohibits Federal contractors and subcontractors from charging employees recruitment fees.

Section 1 of E.O. 13627, explaining the government's policy against trafficking in persons, states: The United States has long had a zero-tolerance policy regarding Government employees

and contractor personnel engaging in any form of this criminal behavior. As the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons. By providing our Government workforce with additional tools and training to apply and enforce existing policy, and by providing additional clarity to Government contractors and subcontractors on the steps necessary to fully comply with that policy, this order will help to protect vulnerable individuals as contractors and subcontractors perform vital services and manufacture the goods procured by the United States.

In addition, the improved safeguards provided by this order to strengthen compliance with anti-trafficking laws will promote economy and efficiency in Government procurement. These safeguards, which have been largely modeled on successful practices in the private sector, will increase stability, productivity, and certainty in Federal contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions.

The ETGCA is silent on the applicability of the requirements set forth above to contracts for commercial items and does not provide for criminal or civil penalties. Therefore, under 41 U.S.C. 1906 the ETGCA does not apply to acquisitions for commercial items unless the FAR Council makes a written determination that such application is in the best interest of the Federal Government.

In contrast to the ETGCA, E.O. 13627 applies the strengthened requirements described above to commercial items. The final FAR rule mirrors the approach taken by E.O. 13627 and applies the restrictions and requirements described above to commercial item acquisitions. By doing so, the rule, like the E.O., most effectively furthers the policy, including economy and efficiency in procurement, described in the E.O. and quoted above and avoids creation of an exception that could undermine this policy and the ability to enforce the prohibition.

The provisions listed above, except for the requirements for a compliance plan and certification, will also apply to contracts and subcontracts in amounts not greater than the simplified acquisition threshold and acquisitions for COTS items. Separate D&Fs outline the rationale for those additional determinations, as required in 41 U.S.C. 1905 and 1907, respectively.

C. Applicability of Contracts for the Acquisition of COTS Items

Pursuant to 41 U.S.C. 1907, acquisitions of commercially available off the shelf (COTS) items will be exempt from a provision of law unless the law (i) contains criminal or civil penalties; (ii) specifically refers to 41 U.S.C. 1907 and states that the law applies to acquisitions of COTS items; (iii) concerns authorities or responsibilities under the Small Business Act (15 U.S.C. 644) or bid protest procedures developed under the authority of 31 U.S.C. 3551 *et seq.*, 10 U.S.C. 2305(e) and (f), or 41 U.S.C. 3706 and 3707; or (iv) the Administrator for Federal Procurement Policy makes a written determination and finding (D&F) that it would not be in the best interest of the Federal Government to exempt contracts for the procurement of COTS items from the provision of law. If none of these conditions are met, the Federal Acquisition Regulation (FAR) is required to include the statutory requirement(s) on a list of provisions of law that are inapplicable to acquisitions of COTS items.

The ETGCA requires that the FAR must be amended to provide certain protections against trafficking in persons, including the following:

1. A clause that prohibits contractors and subcontractors from engaging in the following types of trafficking-related activities:

- Destroying, concealing, removing, confiscating, or otherwise denying access to the employee's identity or immigration documents.
- Failing to provide return transportation for an employee from a country outside the United States to the country from which the employee was recruited upon the end of employment unless the contractor is exempted from the requirement or the employee is a victim of human trafficking and is seeking redress in the country of employment or a witness in a human trafficking enforcement action.

- Soliciting a person for the purposes of employment, or offering employment by means of materially false or fraudulent pretenses, representations, or promises regarding that employment.

- Charging recruited employees unreasonable placement or recruitment fees such as fees equal to or greater than the employee's monthly salary, or recruitment fees that violate the laws of the country from which an employee is recruited;

- Providing or arranging housing that fails to meet the host Country housing and safety standards.

2. A requirement that contractors and subcontractors fully cooperate with any

Federal agencies responsible for audits, investigations or corrective actions relating to trafficking in persons. The head of an executive agency must ensure that any substantiated allegation in the report be included in the Federal Awardee Performance and Integrity Information System (FAPIIS) and the contractor has an opportunity to respond.

3. A requirement for a compliance plan appropriate to the size and complexity of the contract and a certification, upon award and annually thereafter, which provides that after conducting due diligence the contractor has implemented a plan to prevent any prohibited trafficking in persons activities and implemented procedures to prevent any prohibited trafficking in persons activities. These requirements for a certification and compliance plan apply to contracts and subcontracts, if any portion of the contract or subcontract—

- Is for services to be performed outside the United States; and
- The estimated value exceeds \$500,000.

The contractor must provide a copy of the plan to the contracting officer, upon request, and post useful and relevant contents of the plan on its Web site and at the workplace.

Several months prior to the enactment of the ETGCA, the President signed E.O. 13627, *Strengthening Protections Against Trafficking In Persons In Federal Contracts* (September 25, 2012). The E.O. imposed similar requirements, including a requirement for the development of compliance plans and certifications. There are some differences. For example, the E.O. expressly prohibits Federal contractors and subcontractors from charging employees recruitment fees.

Section 1 of E.O. 13627, explaining the government's policy against trafficking in persons, states: The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior. As the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons. By providing our Government workforce with additional tools and training to apply and enforce existing policy, and by providing additional clarity to Government contractors and subcontractors on the steps necessary to fully comply with that policy, this order will help to protect vulnerable individuals as contractors and subcontractors perform vital services

and manufacture the goods procured by the United States.

In addition, the improved safeguards provided by this order to strengthen compliance with anti-trafficking laws will promote economy and efficiency in Government procurement. These safeguards, which have been largely modeled on successful practices in the private sector, will increase stability, productivity, and certainty in Federal contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions.

The ETGCA is silent on the applicability of its requirements to COTS items. In addition, the ETGCA does not provide for criminal or civil penalties. Nor does it concern authorities or responsibilities under the Small Business Act or bid protest procedures. Therefore, the ETGCA does not apply to the acquisition of COTS, pursuant to 41 U.S.C. 1907, unless the Administrator for Federal Procurement Policy makes a written determination that such application is in the best interest of the Federal Government.

In contrast to the ETGCA, E.O. 13627 expressly applies its strengthened requirements to all acquisitions, including those for commercial items and COTS. In addition, the E.O. expressly excludes application of the requirement for compliance plans and certifications to COTS.

The final FAR rule mirrors the implementation approach taken by E.O. 13627 regarding the acquisition of COTS products. Specifically, the rule applies the general prohibitions described in paragraphs 1 and 2 of section IV.C. of this preamble to COTS but not the requirements for a compliance plan and certification described in paragraph 3 of section IV.C. of this preamble. This approach is reflected in FAR clause 52.222-50 and 52.212-5. By applying the general prohibitions, the rule, like the E.O., most effectively furthers the policy, including economy and efficiency in procurement, described in the E.O. and quoted above and avoids creation of an exception that could undermine this policy and the ability to enforce the prohibition. At the same time, by excluding the requirements for providers of COTS items to develop a compliance plan and execute a certification, the rule avoids the cost and complexity that contractors selling COTS may face tracing the origin of component parts in a global supply chain.

The provisions listed above will apply to acquisitions for commercial items. They will also apply to contracts and subcontracts not greater than simplified

acquisition threshold, except for the requirements for a compliance plan and certification. Separate D&Fs outline the rationale for those additional determinations, as required in 41 U.S.C. 1905 and 1906, respectively.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

The objective of the final rule is to strengthen protections against trafficking in persons in Federal contracting by providing the Government workforce with additional tools to enforce existing policy and provide additional clarity to Government contractors and subcontractors on the steps necessary to comply with that policy. While the goal is to implement the E.O. and statute to the maximum extent practicable in the FAR to strengthen protections against trafficking in persons, the FAR Council has taken steps to minimize the burden associated with this rule.

One respondent separately submitted comments on the reporting burden to the Chief Counsel for Advocacy at the Small Business Administration, in conjunction with comments that the information collection requirements of the rule are understated. Another respondent recommended that the FAR Council should conduct a thorough and complete regulatory flexibility analysis of the global reach of the proposed rule.

DoD, GSA, and NASA conducted an analysis of the burdens associated with this rule that considers that global nature including the flowdown requirements of this rule. Small business concerns cannot be excluded from the requirements of this rule, because violations of the trafficking in persons prohibitions often occur at the lower subcontract tiers and frequently involve small businesses. However, the rule does provide maximum flexibility to small businesses. The compliance and certification

requirements only apply to any portion of the contract or subcontract that is for supplies (other than COTS items) to be acquired outside the United States, or services to be performed outside the United States; and if such portion has an estimated value that exceeds \$500,000. Furthermore, if a compliance plan is required, it shall be appropriate to the size and complexity of the contract or subcontract and the nature and scope of the activities under the contract or subcontract.

Any entity of any size that violates the U.S. Government's policy prohibiting trafficking in persons will be impacted by this rule. New policies prohibit denying an employee access to his/her identity or immigration documents; using misleading or fraudulent recruitment practices or charging recruitment fees; providing or arranging housing that fails to meet the host country housing and safety standards; and failing to provide return transportation or requiring payment for the cost of return transportation for certain employees. There are also requirements for a compliance plan and certification; this will impact only entities where the estimated value of supplies acquired or services to be performed outside the United States exceeds \$500,000. There is no requirement for a compliance plan or certification if the supplies to be furnished outside the United States involve solely commercially available off-the-shelf items. DoD, GSA, and NASA anticipate that these certification and written compliance plan exceptions will significantly reduce the impact on small entities.

Using Fiscal Year 2011 data from the Federal Procurement Data System (FPDS) and Electronic Subcontractor Reporting System (eSRS), DoD, GSA, and NASA estimate that about 1,622 of the entities impacted will be small entities. This number is the number of small businesses with a prime contract or subcontract of \$500,000 or more that is performed outside the U.S.

The rule requires the following projected reporting and recordkeeping burdens for access to information:

- a. Compliance Plan: (1,622 recordkeepers × 24 hours per record = 38,928 hours)
- b. Certification: (1,622 respondents × 4 hours per response = 6,488 hours)

For the certification process, DoD, GSA, and NASA estimate that the respondents will be high-level administrative/legal employees earning an average of approximately \$83.00 an hour (\$60.47 + 36.45% overhead). For the compliance plan, DoD, GSA, and NASA estimate that the respondents will be high-level administrative/program manager employees earning an average of approximately \$68.00 per hour (\$50.05 + 36.45% overhead).

DoD, GSA, and NASA have taken steps in this rule to minimize the impact on small entities by allowing contractors to tailor the compliance plan requirements to the appropriate size and complexity of the contract and subcontract and the nature and scope of the activities performed, including number of non-U.S. citizens expected to be employed and the risk that these activities will involve services or supplies susceptible to trafficking in persons.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000-0188, titled: Ending Trafficking in Persons.

List of Subjects in 48 CFR Parts 1, 2, 9, 12, 22, 42, and 52

Government procurement.

Dated: January 22, 2015.

William Clark,

Director, Office of Government-wide Acquisition Policy, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 2, 9, 12, 22, 42, and 52 as set forth below:

- 1. The authority citation for 48 CFR parts 1, 2, 9, 12, 22, 42, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

- 2. Amend section 1.106, in the table following the introductory text, by adding in numerical sequence, FAR segments “22.17”, “52.222–50”, and “52.222–56” and their corresponding OMB Control No. “9000–0188”.

PART 2—DEFINITIONS OF WORDS AND TERMS

- 3. Amend section 2.101 in paragraph (b)(2), in the definition “United States”, by redesignating paragraphs (7) through (11) as paragraphs (8) through (12), respectively, and adding a new paragraph (7) to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

United States * * *

- (7) For use in subpart 22.17, see the definition at 22.1702.

* * * * *

PART 9—CONTRACTOR QUALIFICATIONS

- 4. Amend section 9.104–6 by revising paragraph (b) to read as follows:

9.104-6 Federal Awardee Performance and Integrity Information System.

(b) The contracting officer shall consider all the information in FAPIIS and other past performance information (see subpart 42.15) when making a responsibility determination. For source selection evaluations of past performance, see 15.305(a)(2). Contracting officers shall use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present acquisition.

(1) Since FAPIIS may contain information on any of the offeror's previous contracts and information covering a five-year period, some of that information may not be relevant to a determination of present responsibility, *e.g.*, a prior administrative action such as debarment or suspension that has expired or otherwise been resolved, or information relating to contracts for completely different products or services.

(2) Because FAPIIS is a database that provides information about prime contractors, the contracting officer posts information required to be posted about a subcontractor, such as trafficking in persons violations, to the record of the prime contractor (see 42.1503(h)(1)(v)). The prime contractor has the opportunity to post in FAPIIS any mitigating factors. The contracting officer shall consider any mitigating factors posted in FAPIIS by the prime contractor, such as degree of compliance by the prime contractor with the terms of FAR clause 52.222-50.

PART 12—ACQUISITION OF COMMERCIAL ITEMS**12.103 [Amended]**

■ 5. Amend section 12.103 by removing from the third sentence the words “; the components test of the Buy American statute, and the two recovered materials certifications in subpart 23.4, do not apply to COTS items”.

■ 6. Amend section 12.301 by redesignating paragraphs (d)(4) and (5) as paragraphs (d)(5) and (6), respectively, and adding new paragraph (d)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(d) * * *

(4) Insert the provision at 52.222-56, Certification Regarding Trafficking in

Persons Compliance Plan, in solicitations as prescribed at 22.1705(b).

■ 7. Amend section 12.505 by adding paragraph (c) to read as follows:

12.505 Applicability of certain laws to contracts for the acquisition of COTS items.

(c) Compliance Plan and Certification Requirement, section 1703 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), Title XVII, Ending trafficking in Government Contracting (see 52.222-50(h) and 52.222-56).

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 8. Revise section 22.1700 to read as follows:

22.1700 Scope of subpart.

This subpart prescribes policy for implementing 22 U.S.C. chapter 78 and Executive Order 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts, dated September 25, 2012.

■ 9. Revise section 22.1701 to read as follows:

22.1701 Applicability.

(a) This subpart applies to all acquisitions.

(b) The requirement at 22.1703(c) for a certification and compliance plan applies only to any portion of a contract or subcontract that—

(1) Is for supplies, other than commercially available off-the-shelf (COTS) 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.

■ 10. Amend section 22.1702 by adding, in alphabetical order, the definitions “Agent”, “Subcontract”, “Subcontractor”, and “United States” to read as follows:

22.1702 Definitions.

Agent means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, and outlying areas.

■ 11. Amend section 22.1703 by—

■ a. Revising the introductory text and paragraph (a);

■ b. Removing from the end of paragraph (b) “; and” and adding “;” in its place;

■ c. Revising paragraph (c); and

■ d. Adding paragraphs (d) and (e).

The revisions and additions read as follows:

22.1703 Policy.

The United States Government has adopted a policy prohibiting trafficking in persons, including the trafficking-related activities below. Additional information about trafficking in persons may be found at the Web site for the Department of State's Office to Monitor and Combat Trafficking in Persons at <http://www.state.gov/j/tip/>. Government solicitations and contracts shall—

(a) Prohibit contractors, contractor employees, subcontractors, subcontractor employees, and their agents from—

(1) Engaging in severe forms of trafficking in persons during the period of performance of the contract;

(2) Procuring commercial sex acts during the period of performance of the contract;

(3) Using forced labor in the performance of the contract;

(4) Destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity or immigration documents, such as passports or drivers' licenses, regardless of issuing authority;

(5)(i) Using misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language accessible to the worker, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work;

(ii) Using recruiters that do not comply with local labor laws of the country in which the recruiting takes place;

(6) Charging employees recruitment fees;

(7)(i)(A) Failing to provide return transportation or pay for the cost of return transportation upon the end of employment, for an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a U.S. Government contract or subcontract, for portions of contracts and subcontracts performed outside the United States; or

(B) Failing to provide return transportation or pay for the cost of return transportation upon the end of employment, for an employee who is not a United States national and who was brought into the United States for the purpose of working on a U.S. Government contract or subcontract, if the payment of such costs is required under existing temporary worker programs or pursuant to a written agreement with the employee for portions of contracts and subcontracts performed inside the United States; except that—

(ii) The requirements of paragraph (a)(7)(i) of this section do not apply to an employee who is—

(A) Legally permitted to remain in the country of employment and who chooses to do so; or

(B) Exempted by an authorized official of the contracting agency, designated by the agency head in accordance with agency procedures, from the requirement to provide return transportation or pay for the cost of return transportation;

(iii) The requirements of paragraph (a)(7)(i) of this section are modified for a victim of trafficking in persons who is seeking victim services or legal redress in the country of employment, or for a witness in an enforcement action related to trafficking in persons. The contractor shall provide the return transportation or pay the cost of return transportation in a way that does not obstruct the victim services, legal redress, or witness activity. For example, the contractor shall also offer return transportation to a witness at a time that supports the witness' need to testify. This paragraph does not apply when the exemptions at paragraph (a)(7)(ii) of this section apply.

(8) Providing or arranging housing that fails to meet the host country housing and safety standards; or

(9) If required by law or contract, failing to provide an employment contract, recruitment agreement, or other required work document in writing. Such written document shall be in a language the employee understands. If the employee must relocate to perform the work, the work document shall be provided to the employee at least five days prior to the

employee relocating. The employee's work document shall include, but is not limited to, details about work description, wages, prohibition on charging recruitment fees, work location(s), living accommodations and associated costs, time off, roundtrip transportation arrangements, grievance process, and the content of applicable laws and regulations that prohibit trafficking in persons. The contracting officer shall 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 require work documents in the contract;

* * * * *

(c) With regard to certification and a compliance plan—

(1)(i) Require the apparent successful offeror to provide, before contract award, a certification (see 52.222–56) that the offeror has a compliance plan if any portion of the contract or subcontract—

(A) Is for supplies, other than COTS items (see 2.101), to be acquired outside the United States, or services to be performed outside the United States; and

(B) The estimated value exceeds \$500,000.

(ii) The certification must state that—

(A) The offeror has implemented the plan and has implemented procedures to prevent any prohibited activities and to monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities; and

(B) After having conducted due diligence, either—

(1) To the best of the offeror's knowledge and belief, neither it nor any of its agents, proposed subcontractors, or their agents, has engaged in any such activities; or

(2) If abuses relating to any of the prohibited activities identified in 52.222–50(b) have been found, the offeror or proposed subcontractor has taken the appropriate remedial and referral actions;

(2) Require annual certifications (see 52.222–50(h)(5)) during performance of the contract, when a compliance plan was required at award;

(3)(i) Require the contractor to obtain a certification from each subcontractor, prior to award of a subcontract, if any portion of the subcontract—

(A) Is for supplies, other than COTS items (see 2.101), to be acquired outside the United States, or services to be performed outside the United States; and

(B) The estimated value exceeds \$500,000.

(ii) The certification must state that—

(A) The subcontractor has

implemented a compliance plan; and

(B) After having conducted due diligence, either—

(1) To the best of the subcontractor's knowledge and belief, neither it nor any of its agents, subcontractors, or their agents, has engaged in any such activities; or

(2) If abuses relating to any of the prohibited activities identified in 52.222–50(b) have been found, the subcontractor has taken the appropriate remedial and referral actions;

(4) Require the contractor to obtain annual certifications from subcontractors during performance of the contract, when a compliance plan was required at the time of subcontract award; and

(5) Require that any compliance plan or procedures shall 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 or supplies susceptible to trafficking in persons. The minimum elements of the plan are specified at 52.222–50(h);

(d) Require the contractor and subcontractors to—

(1) Disclose to the contracting officer and the agency Inspector General information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct;

(2) Provide timely and complete responses to Government auditors' and investigators' requests for documents;

(3) Cooperate fully in providing reasonable access to their facilities and staff (both inside and outside the U.S.) to allow contracting agencies and other responsible Federal agencies to conduct audits, investigations, or other actions to ascertain compliance with the Trafficking Victims Protection Act (22 U.S.C. chapter 78), Executive Order 13627, or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor; and

(4) Protect all employees suspected of being victims of or witnesses to prohibited activities, prior to returning to the country from which the employee was recruited, and shall not prevent or hinder the ability of these employees from cooperating fully with Government authorities; and

(e) Provide suitable remedies, including termination, to be imposed on contractors that fail to comply with the requirements of paragraphs (a) through (d) of this section.

■ 12. Revise section 22.1704 to read as follows:

22.1704 Violations and remedies.

(a) *Violations.* It is a violation of the Trafficking Victims Protection Act of 2000, as amended, (22 U.S.C. chapter 78), E.O. 13627, or the policies of this subpart if—

(1) The contractor, contractor employee, subcontractor, subcontractor employee, or agent engages in severe forms of trafficking in persons during the period of performance of the contract;

(2) The contractor, contractor employee, subcontractor, subcontractor employee, or agent procures a commercial sex act during the period of performance of the contract;

(3) The contractor, contractor employee, subcontractor, subcontractor employee, or agent uses forced labor in the performance of the contract; or

(4) The contractor fails to comply with the requirements of the clause at 52.222–50, Combating Trafficking in Persons.

(b) *Credible information.* Upon receipt of credible information regarding a violation listed in paragraph (a) of this section, the contracting officer—

(1) Shall promptly notify, in accordance with agency procedures, the agency Inspector General, the agency debarring and suspending official, and if appropriate, law enforcement officials with jurisdiction over the alleged offense; and

(2) May direct the contractor to take specific steps to abate the alleged violation or enforce the requirements of its compliance plan.

(c) *Receipt of agency Inspector General report.* (1) The head of an executive agency shall ensure that the contracting officer is provided a copy of the agency Inspector General report of an investigation of a violation of the trafficking in persons prohibitions in 22.1703(a) and 52.222–50(b).

(2)(i) Upon receipt of a report from the agency Inspector General that provides support for the allegations, the head of the executive agency, in accordance with agency procedures, shall delegate to an authorized agency official, such as the agency suspending or debarring official, the responsibility to—

(A) Expeditiously conduct an administrative proceeding, allowing the contractor the opportunity to respond to the report;

(B) Make a final determination as to whether the allegations are substantiated; and

(C) Notify the contracting officer of the determination.

(ii) Whether or not the official authorized to conduct the

administrative proceeding is the suspending and debarring official, the suspending and debarring official has the authority, at any time before or after the final determination as to whether the allegations are substantiated, to use the suspension and debarment procedures in subpart 9.4 to suspend, propose for debarment, or debar the contractor, if appropriate, also considering the factors at 22.1704(d)(2).

(d) *Remedies.* After a final determination in accordance with paragraph (c)(2)(ii) of this section that the allegations of a trafficking in persons violation are substantiated, the contracting officer shall—

(1) Enter the violation in FAPIIS (see 42.1503(h)); and

(2) Consider taking any of the remedies specified in paragraph (e) of the clause at 52.222–50, Combating Trafficking in Persons. These remedies are in addition to any other remedies available to the United States Government. When determining the appropriate remedies, the contracting officer may consider the following factors:

(i) *Mitigating factors.* The contractor had a Trafficking in Persons compliance plan or awareness program at the time of the violation, was in compliance with the plan at the time of the violation, and has taken appropriate remedial actions for the violations, that may include reparation to victims for such violations.

(ii) *Aggravating factors.* The contractor failed to abate an alleged violation or enforce the requirements of a compliance plan, when directed by a contracting officer to do so.

■ 13. Revise section 22.1705 to read as follows:

22.1705 Solicitation provision and contract clause.

(a)(1) Insert the clause at 52.222–50, Combating Trafficking in Persons, in all solicitations and contracts.

(2) Use the clause with its Alternate I when the contract will be performed outside the United States (as defined at 22.1702) and the contracting officer has been notified of specific U.S. directives or notices regarding combating trafficking in persons (such as general orders or military listings of “off-limits” local establishments) that apply to contractor employees at the contract place of performance.

(b) Insert the provision at 52.222–56, Certification Regarding Trafficking in Persons Compliance Plan, in solicitations if—

(1) It is possible that at least \$500,000 of the value of the contract may be performed outside the United States; and

(2) The acquisition is not entirely for commercially available off-the-shelf items.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 14. Amend section 42.1503 by—

■ a. Removing from paragraph (h)(1)(iii) “; or” and adding “;” in its place;

■ b. Removing from paragraph (h)(1)(iv) “convenience,” and adding “convenience; or” in its place;

■ c. Adding a new paragraph (h)(1)(v);

■ d. Redesignating paragraphs (h)(2) and (3) as paragraphs (h)(3) and (4), respectively; and

■ e. Adding a new paragraph (h)(2).

The additions read as follows:

42.1503 Procedures.

* * * * *

(h) * * *

(1) * * *

(v) Receives a final determination after an administrative proceeding, in accordance with 22.1704(d)(1), that substantiates an allegation of a violation of the trafficking in persons prohibitions in 22.1703(a) and 52.222–50(b).

(2) The information to be posted in accordance with this paragraph (h) is information relating to contractor performance, but does not constitute a “past performance review,” which would be exempted from public availability in accordance with section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111–212). Therefore, all such information posted in FAPIIS will be publicly available, unless covered by a disclosure exemption under the Freedom of Information Act (see 9.105–2(b)(2)).

* * * * *

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 15. Amend section 52.212–5 by—

■ a. Revising the date of the clause;

■ b. Removing paragraph (a)(2);

■ c. Redesignating paragraphs (a)(3) and (4) as paragraphs (a)(2) and (3), respectively;

■ d. Redesignating paragraphs (b)(33) through (53) as paragraphs (b)(34) through (54), respectively;

■ e. Adding a new paragraph (b)(33);

■ f. Revising paragraph (e)(1)(x); and

■ g. Amending Alternate II by—

■ i. Revising the date of the Alternate; and

■ ii. Revising paragraph (e)(1)(ii)(I).

The revisions and additions read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (March 2, 2015)

* * * * *

(b) * * *
 (33)(i) 52.222–50, Combating Trafficking in Persons (March 2, 2015) (22 U.S.C. chapter 78 and E.O. 13627).

(ii) *Alternate I* (March 2, 2015) of 52.222–50 (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

(e)(1) * * *
 (x) (A) 52.222–50, Combating Trafficking in Persons (March 2, 2015) (22 U.S.C. chapter 78 and E.O. 13627).

(B) *Alternate I* (March 2, 2015) of 52.222–50 (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

Alternate II (March 2, 2015). * * *

* * * * *

(e)(1) * * *
 (ii) * * *
 (I) (1) 52.222–50, Combating Trafficking in Persons (March 2, 2015) (22 U.S.C. chapter 78 and E.O. 13627).

(2) *Alternate I* (March 2, 2015) of 52.222–50 (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

- 16. Amend section 52.213–4 by—
- a. Revising the date of the clause;
- b. Removing paragraph (a)(1)(iv);
- c. Redesignating paragraphs (a)(1)(v) through (vii) as paragraphs (a)(1)(iv) through (vi), respectively;
- d. Revising paragraph (a)(2)(viii);
- e. Redesignating paragraphs (b)(1)(viii) through (xiv) as paragraphs (b)(1)(ix) through (xv), respectively; and
- f. Adding a new paragraph (b)(1)(viii).

The revision and addition read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (March 2, 2015)

* * * * *

(a) * * *
 (2) * * *
 (viii) 52.244–6, Subcontracts for Commercial Items (March 2, 2015)

* * * * *

(b) * * *
 (1) * * *
 (i) * * *

(viii)(A) 52.222–50, Combating Trafficking in Persons (March 2, 2015) (22 U.S.C. chapter 78 and E.O. 13627) (Applies to all solicitations and contracts).

(B) *Alternate I* (applies if the Contracting Officer has filled in the following

information with regard to applicable directives or notices: Document title(s), source for obtaining document(s), and contract performance location outside the United States to which the document applies.

* * * * *

- 17. Amend section 52.222–50 by—
- a. Removing from the introductory paragraph “22.1705(a)” and adding “22.1705(a)(1)” in its place;
- b. Revising the date of the clause;
- c. Adding to paragraph (a), in alphabetical order, the definitions “Agent”, “Commercially available off-the-shelf (COTS) item”, “Subcontract”, “Subcontractor”, and “United States”;
- d. Revising paragraphs (b) through (e);
- e. Removing paragraph (f);
- f. Redesignating paragraph (g) as paragraph (f);
- g. Revising the newly designated paragraph (f);
- h. Adding new paragraphs (g), (h), and (i); and
- i. Amending *Alternate I* by—
- i. Revising the date of the *Alternate*, introductory paragraph, and paragraph (i)(A); and
- ii. Removing from paragraph (i)(B), in the table, third column, “Applies Performance to in/at”, and adding “Applies to performance in/at” in its place, and removing in the bracketed text, “U.S.” and adding “United States” in its place.

The revision and addition read as follows:

52.222–50 Combating Trafficking in Persons.

* * * * *

Combating Trafficking in Persons (March 2, 2015)

* * * * *

(a) * * *
Agent means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

Commercially available off-the-shelf (COTS) item means—

- (1) Any item of supply (including construction material) that is—
- (i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);
- (ii) Sold in substantial quantities in the commercial marketplace; and
- (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
- (2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

* * * * *

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes

supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, and outlying areas.

(b) *Policy*. The United States Government has adopted a policy prohibiting trafficking in persons including the trafficking-related activities of this clause. Contractors, contractor employees, and their agents shall not—

(1) Engage in severe forms of trafficking in persons during the period of performance of the contract;

(2) Procure commercial sex acts during the period of performance of the contract;

(3) Use forced labor in the performance of the contract;

(4) Destroy, conceal, confiscate, or otherwise deny access by an employee to the employee's identity or immigration documents, such as passports or drivers' licenses, regardless of issuing authority;

(5)(i) Use misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language accessible to the worker, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant cost to be charged to the employee, and, if applicable, the hazardous nature of the work;

(ii) Use recruiters that do not comply with local labor laws of the country in which the recruiting takes place;

(6) Charge employees recruitment fees;

(7)(i) Fail to provide return transportation or pay for the cost of return transportation upon the end of employment—

(A) For an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a U.S. Government contract or subcontract (for portions of contracts performed outside the United States); or

(B) For an employee who is not a United States national and who was brought into the United States for the purpose of working on a U.S. Government contract or subcontract, if the payment of such costs is required under existing temporary worker programs or pursuant to a written agreement with the employee (for portions of contracts performed inside the United States); except that—

(ii) The requirements of paragraphs (b)(7)(i) of this clause shall not apply to an employee who is—

(A) Legally permitted to remain in the country of employment and who chooses to do so; or

(B) Exempted by an authorized official of the contracting agency from the requirement to provide return transportation or pay for the cost of return transportation;

(iii) The requirements of paragraph (b)(7)(i) of this clause are modified for a victim of trafficking in persons who is seeking victim services or legal redress in the country of employment, or for a witness in an

enforcement action related to trafficking in persons. The contractor shall provide the return transportation or pay the cost of return transportation in a way that does not obstruct the victim services, legal redress, or witness activity. For example, the contractor shall not only offer return transportation to a witness at a time when the witness is still needed to testify. This paragraph does not apply when the exemptions at paragraph (b)(7)(ii) of this clause apply.

(8) Provide or arrange housing that fails to meet the host country housing and safety standards; or

(9) If required by law or contract, fail to provide an employment contract, recruitment agreement, or other required work document in writing. Such written work document shall be in a language the employee understands. If the employee must relocate to perform the work, the work document shall be provided to the employee at least five days prior to the employee relocating. The employee's work document shall include, but is not limited to, details about work description, wages, prohibition on charging recruitment fees, work location(s), living accommodations and associated costs, time off, roundtrip transportation arrangements, grievance process, and the content of applicable laws and regulations that prohibit trafficking in persons.

(c) *Contractor requirements.* The Contractor shall—

(1) Notify its employees and agents of—

(i) The United States Government's policy prohibiting trafficking in persons, described in paragraph (b) of this clause; and

(ii) The actions that will be taken against employees or agents for violations of this policy. Such actions for employees may include, but are not limited to, removal from the contract, reduction in benefits, or termination of employment; and

(2) Take appropriate action, up to and including termination, against employees, agents, or subcontractors that violate the policy in paragraph (b) of this clause.

(d) *Notification.* (1) The Contractor shall inform the Contracting Officer and the agency Inspector General immediately of—

(i) Any credible information it receives from any source (including host country law enforcement) that alleges a Contractor employee, subcontractor, subcontractor employee, or their agent has engaged in conduct that violates the policy in paragraph (b) of this clause (see also 18 U.S.C. 1351, Fraud in Foreign Labor Contracting, and 52.203-13(b)(3)(i)(A), if that clause is included in the solicitation or contract, which requires disclosure to the agency Office of the Inspector General when the Contractor has credible evidence of fraud); and

(ii) Any actions taken against a Contractor employee, subcontractor, subcontractor employee, or their agent pursuant to this clause.

(2) If the allegation may be associated with more than one contract, the Contractor shall inform the contracting officer for the contract with the highest dollar value.

(e) *Remedies.* In addition to other remedies available to the Government, the Contractor's failure to comply with the requirements of

paragraphs (c), (d), (g), (h), or (i) of this clause may result in—

(1) Requiring the Contractor to remove a Contractor employee or employees from the performance of the contract;

(2) Requiring the Contractor to terminate a subcontract;

(3) Suspension of contract payments until the Contractor has taken appropriate remedial action;

(4) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance;

(5) Declining to exercise available options under the contract;

(6) Termination of the contract for default or cause, in accordance with the termination clause of this contract; or

(7) Suspension or debarment.

(f) *Mitigating and aggravating factors.*

When determining remedies, the Contracting Officer may consider the following:

(1) *Mitigating factors.* The Contractor had a Trafficking in Persons compliance plan or an awareness program at the time of the violation, was in compliance with the plan, and has taken appropriate remedial actions for the violation, that may include reparation to victims for such violations.

(2) *Aggravating factors.* The Contractor failed to abate an alleged violation or enforce the requirements of a compliance plan, when directed by the Contracting Officer to do so.

(g) *Full cooperation.* (1) The Contractor shall, at a minimum—

(i) Disclose to the agency Inspector General information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct;

(ii) Provide timely and complete responses to Government auditors' and investigators' requests for documents;

(iii) Cooperate fully in providing reasonable access to its facilities and staff (both inside and outside the U.S.) to allow contracting agencies and other responsible Federal agencies to conduct audits, investigations, or other actions to ascertain compliance with the Trafficking Victims Protection Act of 2000 (22 U.S.C. chapter 78), E.O. 13627, or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor; and

(iv) Protect all employees suspected of being victims of or witnesses to prohibited activities, prior to returning to the country from which the employee was recruited, and shall not prevent or hinder the ability of these employees from cooperating fully with Government authorities.

(2) The requirement for full cooperation does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not—

(i) Require the Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine;

(ii) Require any officer, director, owner, employee, or agent of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; or

(iii) Restrict the Contractor from—

(A) Conducting an internal investigation; or

(B) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

(h) *Compliance plan.* (1) This paragraph (h) applies to any portion of the contract that—

(i) Is for supplies, other than commercially available off-the-shelf items, acquired outside the United States, or services to be performed outside the United States; and

(ii) Has an estimated value that exceeds \$500,000.

(2) The Contractor shall maintain a compliance plan during the performance of the contract that is appropriate—

(i) To the size and complexity of the contract; and

(ii) To the nature and scope of the activities to be performed for the Government, including the number of non-United States citizens expected to be employed and the risk that the contract or subcontract will involve services or supplies susceptible to trafficking in persons.

(3) *Minimum requirements.* The compliance plan must include, at a minimum, the following:

(i) An awareness program to inform contractor employees about the Government's policy prohibiting trafficking-related activities described in paragraph (b) of this clause, the activities prohibited, and the actions that will be taken against the employee for violations. Additional information about Trafficking in Persons and examples of awareness programs can be found at the Web site for the Department of State's Office to Monitor and Combat Trafficking in Persons at <http://www.state.gov/j/tip/>.

(ii) A process for employees to report, without fear of retaliation, activity inconsistent with the policy prohibiting trafficking in persons, including a means to make available to all employees the hotline phone number of the Global Human Trafficking Hotline at 1-844-888-FREE and its email address at help@befree.org.

(iii) 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.

(iv) A housing plan, if the Contractor or subcontractor intends to provide or arrange housing, that ensures that the housing meets host-country housing and safety standards.

(v) Procedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in trafficking in persons (including activities in paragraph (b) of this clause) and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.

(4) *Posting.* (i) The Contractor shall post the relevant contents of the compliance plan, no later than the initiation of contract performance, at the workplace (unless the work is to be performed in the field or not in a fixed location) and on the Contractor's Web site (if one is maintained). If posting at

the workplace or on the Web site is impracticable, the Contractor shall provide the relevant contents of the compliance plan to each worker in writing.

(ii) The Contractor shall provide the compliance plan to the Contracting Officer upon request.

(5) **Certification.** Annually after receiving an award, the Contractor shall submit a certification to the Contracting Officer that—

(i) It has implemented a compliance plan to prevent any prohibited activities identified at paragraph (b) of this clause and to monitor, detect, and terminate any agent, subcontract or subcontractor employee engaging in prohibited activities; and

(ii) After having conducted due diligence, either—

(A) To the best of the Contractor's knowledge and belief, neither it nor any of its agents, subcontractors, or their agents is engaged in any such activities; or

(B) If abuses relating to any of the prohibited activities identified in paragraph (b) of this clause have been found, the Contractor or subcontractor has taken the appropriate remedial and referral actions.

(i) **Subcontracts.** (1) The Contractor shall include the substance of this clause, including this paragraph (i), in all subcontracts and in all contracts with agents. The requirements in paragraph (h) of this clause apply only to any portion of the subcontract that—

(A) Is for supplies, other than commercially available off-the-shelf items, acquired outside the United States, or services to be performed outside the United States; and

(B) Has an estimated value that exceeds \$500,000.

(2) If any subcontractor is required by this clause to submit a certification, the Contractor shall require submission prior to the award of the subcontract and annually thereafter. The certification shall cover the items in paragraph (h)(5) of this clause.

(End of clause)

Alternate I (March 2, 2015). As prescribed in 22.1705(a)(2), substitute the following paragraph in place of paragraph (c)(1)(i) of the basic clause:

(i)(A) The United States Government's policy prohibiting trafficking in persons described in paragraph (b) of this clause; and

* * * * *

■ 18. Add section 52.222–56 to read as follows:

52.222–56 Certification Regarding Trafficking in Persons Compliance Plan.

As prescribed in 22.1705(b), insert the following provision:

Certification Regarding Trafficking in Persons Compliance Plan (March 2, 2015)

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

(b) The apparent successful Offeror shall submit, prior to award, a certification, as specified in paragraph (c) of this provision, for the portion (if any) of the contract 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.

(c) The certification shall state that—

(1) It 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'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 or proposed subcontractor has taken the appropriate remedial and referral actions.

(End of provision)

■ 19. Amend section 52.244–6 by revising the date of the clause and paragraph (c)(1)(ix) to read as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (March 2, 2015)

* * * * *

(c)(1) * * *

(i) * * *

(ix)(A) 52.222–50, Combating Trafficking in Persons (March 2, 2015) (22 U.S.C. chapter 78 and E.O. 13627).

(B) Alternate I (March 2, 2015) of 52.222–50 (22 U.S.C. chapter 78 and E.O. 13627).

* * * * *

[FR Doc. 2015–01524 Filed 1–28–15; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 37 and 52

[FAC 2005–80; FAR Case 2014–008; Item II; Docket No. 2014–0008; Sequence No. 1]

RIN 9000–AM84

Federal Acquisition Regulation; Management and Oversight of the Acquisition of Services

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement a recommendation to strengthen guidance on service acquisitions on uncompensated overtime.

DATES: *Effective:* March 2, 2015.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at 202–208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202–501–4755. Please cite FAC 2005–80, FAR Case 2014–008.

SUPPLEMENTARY INFORMATION:

I. Background

Section 865 of the Ike Skelton National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2011 (Pub. L. 111–383) directed the Secretary of Defense to submit, in consultation with the Office of Federal Procurement Policy (OFPP) and all other relevant Federal agencies, a review of the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulations Supplement (DFARS), to ensure that they have appropriate guidance for service acquisitions. As a result, the regulatory drafting teams for the FAR and DFARS reviewed current regulations related to services and considered the extent to which improvements might be needed.

In November 2011, DoD issued a report entitled *DoD Report to Congress on Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulations Supplement (DFARS) Review Regarding Services Acquisition*. This Report to Congress includes a series of recommendations on issues for strengthening existing guidance on services acquisition through addition, clarification, or expansion.

II. Analysis and Discussion

This FAR case implements a recommendation to create a definition of uncompensated overtime. Accordingly, the existing definitions of “uncompensated overtime” and “uncompensated overtime rate” at FAR 52.237–10(a) have been incorporated at FAR 37.101, with the defined term “uncompensated overtime rate” changing to “adjusted hourly rate (including uncompensated overtime).” Additionally, the definition of the new term “adjusted hourly rate (including uncompensated overtime)” clarifies that the proposed hours per week include