Via Regulatory Portal

General Services Administration
Regulatory Secretariat (MCVB)
ATTN: Ms. Hada Flowers
1800 F Street NW, 2nd Floor
Washington, DC 20405-0001


Dear Ms. Flowers:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed rule in Federal Acquisition Regulation (“FAR”) Case 2015-017, Combating Trafficking in Persons—Definition of “Recruitment Fees,” 81 Fed. Reg. 29244 (May 11, 2016) (“Proposed Definition”). The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the policy of the ABA.

1 Mary Ellen Coster Williams, Section Delegate to the ABA, and Heather K. Weiner, member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topics “Battle Space and Contingency Contracting.”
I. INTRODUCTION

The Section wishes to express its continued support for the Government’s efforts to eradicate trafficking in persons and modern day slavery. The FAR Council is following the course set by the Administration nearly four years ago. Since then, the Government has taken significant steps to combat human trafficking in its contractors’ supply chains. The current federal Combating Trafficking in Persons (“CTIP”) policymaking efforts were initiated on September 25, 2012, when President Obama issued Executive Order (“E.O.”) 13627, “Strengthening Protections Against Trafficking in Persons in Federal Contracts,” to help ensure that U.S. government contracts are performed free of human trafficking and trafficking-related activities.

In the current rulemaking, the Section has two concerns about the FAR Council’s proposal to define “recruitment fees.” First, the Proposed Definition is so broad that costs associated with valid pre-conditions or pre-qualifications to employment are improperly classified as recruitment fees. Second, fees associated with recruiting for professional, highly-skilled jobs are treated the same as fees associated with recruiting for low-skilled jobs, which may increase costs and delays in providing professional, high-skilled workers to contracting agencies. The Section proposes two revisions to the Proposed Definition to alleviate these concerns.

II. BACKGROUND

E.O. 13627 tasked the FAR Council with providing U.S. government contracting agencies with the tools to enforce existing anti-trafficking policy and with further clarifying the steps that federal contractors and subcontractors must take to comply with anti-trafficking requirements. E.O. 13627 along with Title XVII of the National Defense Authorization Act for Fiscal Year 2013 (“NDAA”), known as the Ending Trafficking In Government Contracting Act (“ETGCA”), called for amending the FAR to prohibit a list of specific trafficking-related activities, including charging recruitment fees to employees, denying workers access to their passports and other identification documents, and using misleading recruitment practices.

In January 2015, the FAR Council issued a revised FAR CTIP policy and implementing provisions. See 80 Fed. Reg. 4967 (Jan. 29, 2015). The revised set of CTIP rules created a broad new compliance framework to cover trafficking in persons and trafficking-related activities, beyond the historical prohibitions on using trafficked labor. To accomplish that goal, the FAR Council rewrote the policy section of FAR 22.1703 and the FAR 52.222-50 clause, greatly increasing the protections and processes required to prevent and deter trafficking in persons and trafficking-related activities. The FAR CTIP rules left open, however, the definition of prohibited “recruitment fees.” The FAR Council, therefore, sought advance comments and
published a draft definition of “recruitment fees” for public comment in early 2015, at the same time it published the final FAR CTIP rules.  

The Proposed Definition expands on that 2015 draft definition for “recruitment fees,” including, as relevant to the Section’s comments, expanding the category of “fees charged as a condition of access to the job opportunity” to include the broad statement “additional certifications.”

The Proposed Definition, in pertinent part, states:

(1) Recruitment fees include, but are not limited to, fees, charges, costs, assessments, or other financial obligations assessed against employees or potential employees, associated with the recruiting process, regardless of the manner of their imposition or collection—

... 

(viii) Charged as a condition of access to the job opportunity, including procuring medical examinations and immunizations and obtaining background, reference and security clearance checks and examinations; additional certifications;

... .


The Proposed Definition specifically asks for public comments regarding several areas, two of which are relevant here:

- Are all costs/fees associated with bringing an employee on board properly treated as recruitment fees?
- Should the definition of a recruitment fee vary depending on whether the job is a professional high-paying, high-skill job or an unskilled, low-paying job? Is the location of the job a factor?

81 Fed. Reg. at 29245.

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III. COMMENTS

A. Proposed Exemption for Pre-Conditions of Access to Professional Employment.

As noted above, the Proposed Definition broadly defines recruitment fees to include costs associated with pre-qualifications for obtaining employment, terming them costs “[c]harged as a condition of access to the job opportunity” and listing several examples, including obtaining background, reference, and security clearance checks and examinations. Proposed FAR 22.1702(1)(viii), 81 Fed. Reg. at 29246. The provision also includes a catchall for “additional certifications” that are not defined in the Proposed Definition. Id. Any cost “charged as a condition of access to a job opportunity” is so broad that it could encompass any pre-condition or pre-qualification requirement for professional, high-skill positions—including educational or license requirements. The Section is concerned that by defining “recruitment fees” so broadly, the Proposed Definition may encompass not only the recruitment fees that are trafficking-related, but also the myriad customary pre-qualifications for professional employment that are not.

Federal agencies’ solicitations and contractors’ job listings for professional positions almost always include minimum qualifications. As examples, requirements may include that the candidates hold a security clearance, some form of professional certification, such as a Project Management Professional (“PMP”) certification, or both. In many cases, agencies establish these minimum qualifications, either explicitly or implicitly, to ensure that individuals staffing professional positions on certain federal government contracts have a minimum level of skill and ability to perform the professional functions required under the solicitation.

As a result, pre-qualifications are routinely part of many professional positions solicited by government contractors to comply with government requirements. Professional candidates generally understand that obtaining and maintaining clearances or certain professional certifications is required before even applying for these positions and, therefore, these pre-qualifications are not encompassed within the scope of the concerns that prompted the FAR Council to provide a comprehensive definition of the term “recruitment fees” to maximize worker protections. Rather, applying the broad definition to include security clearances and certifications for professional, high-skilled jobs could potentially have the unintended consequence of interfering with contractors’ recruitment of professional employees, something that the Council explicitly stated it wanted to avoid. See 81 Fed. Reg. at 29245 (“The divergence in public input [in response to the draft definition] highlighted the tension between providing a comprehensive definition of the term to maximize worker protections, and of ensuring that the definition does not elicit unintended consequences that interfere with contractor business operations.”).

For example, if the proposed rule is not revised, contractors may not be able to require minimum professional certifications in their job announcements out of a concern over violating the CTIP recruitment-fee prohibition. This change in practice would force contractors to pay to obtain the certifications for new employees at an increased cost to the Government. Considering the substantial time required to obtain many professional certifications, such a process change
could also cause substantial delays in staffing contracts when clearances or certifications are required by the requesting agency.

The FAR Council also asked, more broadly, whether the definition of a recruitment fee could vary depending on whether the job is a professional, high-paying, high-skill job or an unskilled, low-paying job? While the risk for human trafficking exists in many trades, affecting skilled and unskilled workers from a spectrum of educational backgrounds, research shows that the risk is more pronounced in industries that rely upon low-skilled or unskilled labor and those that are typically low-paying and undervalued by society. Research further shows that low-skilled workers are the most vulnerable group to be charged recruitment fees, paying a higher percentage of job-matching fees than higher-skilled workers. Given this disparity in the risk and vulnerability between low-skilled or unskilled workers and higher-skilled or professional workers, the need to include within the recruitment fee definition the above-described pre-qualifications for professional, highly skilled employment is not readily apparent.

Although the need for a wholesale exclusion of professionals from the recruitment fee definition has not been established at this time, based on the potential for unintended consequences and the lower risk for trafficking in professional labor, the Section recommends that the FAR Council exclude from the recruitment-fee definition those costs and charges associated with pre-conditions or pre-qualifications for professional, highly-skilled labor. In the alternative, the Section recommends that the FAR Council, at a minimum, exclude such costs from the definition of recruitment fees for professional, high-skill jobs when the requirement directly relates to an underlying solicitation requirement or when part of a recruitment effort in the continental United States, where the risk of trafficking in labor (particularly among the professional workforce) is far lower.

B. Proposed Exemption for Reasonable Pre-Qualification Costs.

Pre-qualification conditions are not limited to professional labor on U.S. government contracts. Pre-conditions or pre-qualifications exist for many positions and are frequently mandated not only by the terms of solicitations, but also by statutes and regulations that govern federal government contracting. In the case of workers being hired from third countries for performance of overseas federal government contracts, two prominent examples of pre-qualifications are that the worker (1) holds a valid passport and (2) can provide proof of no criminal convictions. Each of those pre-qualifications comes at a cost to the worker, such as the fees that the worker’s home government charges to obtain a passport. Such costs could arguably fall within the definition of recruitment fees under proposed FAR 22.1702(a)(1)(viii), fees “[c]harged as a condition of access to the job opportunity, including procuring medical

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examinations and immunizations and obtaining background, reference and security clearance checks and examinations; additional certifications.”

To avoid the potential delay in staffing agency requirements and increased costs that would result if contractors could not establish minimum pre-qualifications, reasonable pre-qualification costs should be exempted from the definition of recruitment fees. An exemption for pre-qualification-related costs could establish limits on the costs that would qualify for the exemption, including reasonableness of the costs that candidates must bear, and prohibitions on loans and indentured servitude and similar prohibited practices related to these pre-qualification items. Such an exemption would maintain efficiency in contractors’ hiring practices without diminishing the protections against coercive practices that the rule was intended to address.

IV. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

David G. Ehrhart
Chair, Section of Public Contract Law

cc:
James A. Hughes
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Council Members, Section of Public Contract Law
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