December 20, 2013

VIA REGULATORY PORTAL AND FACSIMILE

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

Re: FAR Case 2013-001; Federal Acquisition Regulation; Ending Trafficking in Persons, 78 Fed. Reg. 59317 (Sept. 26, 2013)

Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments on the proposed rule FAR Case 2013-001; Federal Acquisition Regulation; Ending Trafficking in Persons, 78 Fed. Reg. 59317 (Sept. 26, 2013) (“Proposed Rule”). The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing Council and substantive committees contain 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.1

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association’s Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.2

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

1 This letter is available in pdf format at: http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Battlespace and Contingency Procurements.”

2 Sharon L. Larkin, Section Chair, Jeri K. Somers, Section Budget Officer, and Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.
has followed the lead of the President and Congress and called for slightly broader and more detailed regulations to eradicate human trafficking in connection with all government contracts and grants.

A. Prior Congressional and FAR Council Efforts to Combat Trafficking In Persons

As the commentary accompanying the Proposed Rule discusses, the federal government has a long history of zero tolerance for trafficking in persons violations. The Trafficking Victims Protection Act of 2000 (TVPA) and subsequent reauthorizations, along with the FAR, have prohibited contractors, subcontractors, and their employees from engaging in severe forms of trafficking, procuring a commercial sex act, or using forced labor in the performance of a U.S. government contract or subcontract. Since 2006, the FAR has also required contractors to immediately inform their contracting officer (CO) if they receive “[a]ny information . . . from any source (including host country law enforcement) that alleges a Contractor employee, subcontractor, or subcontractor employee has engaged in” severe forms of trafficking, procuring a commercial sex act, or using forced labor in the performance of a contract.3 Nevertheless, the current FAR otherwise provides little specific guidance for contractors beyond the zero tolerance policy. In the past year, both the President and Congress have sought to remedy that gap by requiring new regulations both to strengthen protections against trafficking in persons in federal contracts and adding certain compliance requirements to the existing regulatory landscape.

B. Executive Order 13627, Strengthening Protections Against Trafficking In Persons In Federal Contracts, and the Ending Trafficking in Government Contracting Act (ETGCA)

On September 25, 2012, President Obama issued an 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 trafficking and forced labor.4 E.O. 13627 aims to provide U.S. government contractors with tools to enforce existing anti-trafficking policy and further clarify the steps that federal contractors and subcontractors must take to fully comply with anti-trafficking requirements. E.O. 13627 calls for the FAR Council to amend 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.

E.O. 13267 directs the FAR Council to adopt regulations requiring certain federal contractors and subcontractors to adopt anti-trafficking compliance programs,

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3 FAR Subpart 22.17; FAR 52.222-50.
certify their compliance with anti-trafficking regulations, and permit government anti-trafficking audits and investigations. In addition, the E.O. requires agencies to obtain certifications of compliance with anti-trafficking provisions from overseas contractors for any work performed outside of the United States and valued at more than $500,000. The E.O. also directs the Office of Federal Procurement Policy (OFPP) to “develop guidance to assist agencies in training the Federal acquisition workforce regarding the anti-trafficking obligations of contractors and subcontractors.”

Soon after E.O. 13267, President Obama signed the National Defense Authorization Act for Fiscal Year 2013 (NDAA). Title XVII of the NDAA, Ending Trafficking In Government Contracting (ETGCA), contains several anti-trafficking provisions, many similar to E.O. 13627. The ETGCA also implements notification mechanisms in cases where there is “credible information” that a contractor, subcontractor, or agent of a contractor or subcontractor has engaged in prohibited trafficking activities.

The Proposed Rule follows the FAR Council’s earlier request for input (Notice-MVC-2013-01) and seeks comments on proposed changes to the FAR implementing E.O. 13627 and the ETGCA. In the current Proposed Rule, the FAR Council has considered many topics suggested in the Section’s previous comments submitted on March 12, 2013 in response to the earlier Notice. Some of these comments expand upon and clarify the Section’s March 12, 2013 Comments. We also urge the FAR Council to engage in a dialogue with the Section and other stakeholders as the Council further develops the final rule and the other implementing regulations that address the requirements of E.O. 13627 and the ETGCA.

II. COMMENTS

A. Clarify Posting Requirements (Comment Area 2(e))

Proposed FAR 52.222-50(h)(4) requires posting of the contractor’s compliance plan:

(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 and on the Contractor’s Web site (if one is maintained).
(ii) The Contractor shall provide the compliance plan to the Contracting Officer upon request.

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5 Title XVII of the NDAA for Fiscal Year 2013, Pub. L. No. 112-239 (2013) is titled “Ending Trafficking in Government Contracting” after the separate bill with the same name, and is referred to herein as the ETGCA.
6 The Section’s March 12, 2013 Comments are also available in pdf format at: http://www.americanbar.org/groups/public_contract_law/resources/prior_section_commentshtml under the topic “Battlespace and Contingency Procurements.”
Similar to the Proposed Rule, both the E.O. and ETGCA required posting the contractor’s compliance plan, with the E.O. having the most specific requirements:

The compliance plan shall be provided to the contracting officer upon request, and relevant contents of the plan shall be posted no later than the initiation of contract performance at the workplace and on the contractor or subcontractor’s Web site (if one is maintained).

E.O. 13627, Sec 2(a)(2)(A). The E.O., the ETGCA, the Proposed Rule, and the accompanying commentary do not indicate whether the contractor is required to post the information on an external website. Because some companies’ wage and recruiting plans may contain proprietary information and the appropriate audience for such plans is employees, and not the public at large, the Section recommends that the FAR Council clarify that posting on the contractor’s and/or subcontractor’s internal (non-public) website(s) satisfies the posting requirement so long as the website is accessible to covered employees.

B. The FAR Council Should Provide Guidance for Contractors’ Anti-Trafficking Compliance Plans (Comment Area (2)(g))

The Section also believes that the final rule would be improved by providing more guidance for contractors on creating anti-trafficking compliance plans and to COs regarding what compliance plans must or should include. While E.O. 13627 contains some minimum requirements, neither the E.O. nor the Proposed Rule indicate whether those minimum requirements will satisfy all regulatory requirements, whether contractors and COs must look to their agency for further guidance, whether additional requirements will be imposed on a contract-by-contract basis, or what clauses should be flowed-down into subcontracts. Both contractors and COs would benefit from guidance on how to judge whether a plan is appropriate for a contract and how compliance plans should vary based on the location of performance, the type of services and supplies involved, and other factors.

E.O. 13627 requires that, for all contracts and subcontracts performed outside of the United States, each contractor and subcontractor must maintain a compliance plan “appropriate for the size and complexity of the contract . . . and the nature and scope of the activities performed.” E.O. 13627(III)(a)(2)(A). The E.O. also requires that contractors provide such a compliance plan to the CO upon request and that the plan include (1) an “awareness program” to inform employees about policies against trafficking; (2) a process for employees to report trafficking activities without fear of retaliation; (3) a recruitment and wage plan that permits recruitment companies to recruit only skilled employees; (4) a housing plan that meets host country standards, if the contractor provides housing; and (5) procedures to prevent any subcontractors from engaging in trafficking. Id.
The Proposed Rule uses much of the same language as the E.O., mandating that any required compliance plan must be maintained during contract performance and that the plan be “appropriate to the size and complexity of the contract and to the nature and scope of the activities performed, including the risk that the contract will involve services or supplies susceptible to trafficking.” This language provides flexibility to the contractor and permits a CO to use business judgment in determining whether a contractor’s compliance plan satisfies anti-trafficking requirements. Nonetheless, contractors have long stated a need for reference points or points for comparison to effectively design a trafficking in persons compliance program and monitor their subcontractors’ plans. In addition, COs need guidance to determine the main features of an effective compliance plan. Thus, while the minimums included in the Proposed Rule and E.O. 13627 provide guidance on some elements, the final rule would be improved by providing additional guidance to the government contracting community about the framework for a trafficking in persons compliance plan and how risk assessments should inform this framework.

Because risk is often difficult to define and fact-specific, following some guidelines created by U.S. government agencies will help ensure that the guidelines related to trafficking remain reasonably up-to-date and avoid duplication of work tracking such risks. For instance, the State Department publishes an annual “Trafficking in Persons Report” with narratives about each country’s efforts to combat trafficking and recommendations for improving efforts to eradicate trafficking. In this report, the State Department classifies countries according to their compliance with the minimum requirements of the TVPA. The list is organized by tiers:

- Tier 1 indicates that a country’s government fully complies with the TVPA’s minimum standards;
- Tier 2 indicates that a country’s government does not currently comply with TVPA standards, but is making significant efforts to comply;
- Tier 2 Watch List indicates that a country’s government does not comply with the TVPA minimum standards and, while it is making significant efforts to comply, some circumstance makes their compliance more difficult to determine; and
- Tier 3 indicates that the country’s government does not comply with TVPA standards and is not making significant efforts to do so.8

The extensive information available from the State Department can assist contractors and COs in assessing the risk of trafficking for a particular contract based, ...

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7 The three circumstances that make it more difficult to determine the level of effort being taken by a country’s government are (1) the absolute number of victims of severe forms of trafficking is significant or significantly increasing; (2) the country has failed to provide evidence of its increasing efforts from the previous year; or (3) the country has been credited with significant efforts based on commitments for actions to be taken in the future, rather than efforts already taken.

in part, on the location of contract performance and, if third-party nationals are expected to form a significant percentage of the workforce on a contract, the country from which workers may be recruited. Referring to the State Department information, as one factor a contractor might consider, would help a contractor and a CO determine if a specific contract or subcontract requires more stringent compliance mechanisms to related trafficking in persons. Although these geographic considerations are not the only considerations for determining the risk of trafficking on any given contract, a quick assessment of the risks of doing business in a given country can provide at least one important data point for a company’s due diligence and risk assessment.

Contractors and COs can also assess risk based on whether a contract or subcontract requires products or services in circumstances where there is a history of forced labor. For example, the U.S. Dept. of Labor, Bureau of International Labor Affairs (“ILAB”) maintains a “toolkit” to assist businesses in avoiding the use of child labor and forced labor. The ILAB also publishes risk assessment guidance that will be helpful to contractors seeking to establish or improve compliance programs and to COs seeking to determine whether a contractor’s compliance plan provides sufficient safeguards against trafficking.9 The ILAB’s list of goods produced by child labor or forced labor may assist a contractor in analyzing the potential risks of trafficking in its supply chain or, for instance, in its subcontracts for the provision of food or other products to the workers at its job site.10 As one factor for consideration, contractors and COs could consider instances where contracts will require direct or indirect sourcing of significant amounts of agricultural goods, mined minerals, and cheap manufactured goods.11

The Section, therefore, suggests that the FAR Council include some additional guidance to assist contractors and COs in evaluating circumstances that indicate an increased risk of trafficking in persons. Providing a list of examples for contractors and COs to consider, with language such as “including, but not limited to these sources,” would provide indicators of trafficking and, therefore, help companies focus their compliance programs to better prevent the use of trafficked labor. The Section suggests

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11 Another guideline is the type of labor needed for any given contract or subcontract. Information disseminated by ILAB, along with NGOs and organizations such as the United Nations Inter-agency Project on Human Trafficking (UNIAP) and the Walk Free Foundation, indicate that forced labor and debt bondage is most prevalent in labor-intensive industries that require a lot of unskilled labor. See Rep. on UNIAP Trafficking Estimates, Estimating Labor Trafficking: A Study of Burmese Migrant Workers in Samut Sakhon, Thailand, published by UNIAP Regional Management Office (Bangkok, Thailand), January 2011, available at http://www.nottrafficking.org/reports_docs/estimates/uniap_estimating_labor Trafficking_report.pdf; see also Global Slavery Index, published by the Walk Free Foundation (Executive Summary); available at http://www.globalslaveryindex.org/report/?download.
that the guidance in the final rule announcement provide U.S. government sources for contractors to consult in creating a compliance program and for COs to consult in determining whether a compliance program satisfies the rule. We offer the following proposed regulatory text for the FAR Council’s consideration and potential inclusion in FAR 52.222-50:

(a) If a compliance plan is required, it must be (1) maintained during the performance of the contract and (2) appropriate to the size and complexity of the contract and to the nature and scope of the activities performed, including the risk that the contract may involve services or supplies involving an increased risk of trafficking in persons.

(b) In determining whether a compliance plan is appropriate to the size and complexity of the contract, considerations for such risk factors may include, but are not limited to:

(1) a substantial part of the contract or subcontract performance occurs in, a substantial portion of the materials or supplies for performance originate in, or a substantial percentage of unskilled labor originates in a country designated as Tier II Watch List or Tier III in the Department of State’s annual Trafficking in Persons Report;

(2) a substantial percentage of materials for performance are included on the ILAB’s List of Goods Produced by Child Labor or Forced Labor or E.O. 13126’s List of Products and Countries produced by forced or indentured child labor;

(3) a substantial percentage of the labor or materials required for performance is low-skilled, low-wage labor, or the products of low-skilled, low-wage labor, such as agricultural goods, mined minerals, or low-cost manufactured goods, in accordance with the ILAB’s List of Goods Produced by Child Labor or Forced Labor;

(4) the number of non-United States citizens expected to be employed; or

(5) other risk factors included in ILAB’s risk assessment guidance.

Contractors, subcontractors, and contracting officers should consider these materials, as needed for their contract or subcontract, in creating and evaluating a compliance program to prevent trafficking in government contracting.

(c) If the risk assessment reveals risk factors for trafficking in persons, including those in paragraph (b), the contractor and any subcontractors should provide a compliance plan that addresses these risks by, among other alternatives, ensuring more explicit anti-trafficking flow-down provisions for any subcontractors, greater due diligence of supply chain practices, or increased monitoring.
(d) The compliance plan must be provided to the Contracting Officer upon request.

While such guidance would preferably be included in the final rule itself, placing it in the “Discussion and Analysis” that accompanies the final rule would at least provide guidance to the procurement community.

C. Harmonizing the Monitoring, Reporting, Detection, and Certification Requirements with Other Aspects of the Compliance Plan (Comment Areas (2)(h)(3) and (2)(h)(5))

As noted above, the Proposed Rule’s monitoring requirement in proposed FAR 52.222-50(h)(3)(v) states that, for contracts exceeding $500,000 in estimated value, performed outside the United States, the contractor shall maintain a trafficking in persons compliance plan that is appropriate for the contract based on an assessment of the risks inherent in the contract:

(2) The Contractor, shall maintain a compliance plan during the performance of the contract that is appropriate to the size and complexity of the contract and 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.

Proposed FAR 52.222-50(h)(2) (emphasis added). Given ambiguities in the scope of the rule, as discussed below, it is unclear how far these requirements apply down a contractor’s supply chain. The Proposed Rule provides:

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

* * * *

(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)) and to monitor, detect, and terminate any agents, subcontracts, or subcontractor employees that have engaged in such activities.

Proposed FAR 52.222-50(h)(3)(v). The contractor also must, upon contract award and at least annually, certify compliance with these requirements and, based on due diligence

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12 The Proposed Rule does not provide guidance on the definition of “performed outside the United States.” We note that this ambiguity appears elsewhere in the FAR, see e.g. FAR Subparts 25.1 and 25.3, and would suggest that the FAR Council consider that definitions could be based on the physical presence of employees, the cost of components mined, produced, or manufactured, or the substantial transformation of a product outside the United States.
conducted, certify “neither it nor any of its agents, subcontractors, or their agents is engaged in any such activities.” Like the compliance plan requirement, it is unclear what portion of the contractor’s supply chain is encompassed by this certification requirement. The certification requirement reads in full:

(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 have been found, the Contractor or subcontractor has taken the appropriate remedial and referral actions.

Proposed FAR 52.222-50(h)(5).

This requirement is potentially broad and burdensome because the scope of the prevention, monitoring, detection, and certification is seemingly unlimited and potentially applies across the company’s entire supply chain. For example, companies selling commercial supplies and services to the Government could face particularly burdensome requirements to investigate their entire supply chain. For example, a commercial company’s suppliers provide raw materials for both commercial and government contracts and may have no idea that the sourced materials are being sold to the Government or may be unwilling to put the necessary compliance systems in place to ensure their supply chains have not engaged in prohibited activities. Furthermore, under the Proposed Rule, these commercial companies not only must develop and implement a compliance plan with procedures for the prevention, monitoring, and detection of trafficking in persons, but they must also certify, at contract award and annually thereafter, that based on these procedures and other due diligence their supply chain is free from prohibited practices. Without limitation to these requirements, the Proposed Rule could impose unduly burdensome compliance and monitoring obligations on companies, particularly for commercial companies that may not be able to as readily recover these increased compliance costs.

A prudent limiting principle is a risk assessment based approach that is stated earlier in the general description of the compliance plan requirement (proposed FAR 52.222-50(h)(2)). This risk assessment approach is similar to the approach that was utilized by the ABA Section of Business Law in the development of a proposed ABA Resolution adopting the black letter *ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor*, dated February 2014 (“Proposed ABA Model
In the Introduction to the Proposed ABA Model Policies, the ABA Business Law Section explained the concept this way:

The business enterprises that adopt and implement a form of these Model Policies should identify general areas where the risk of Labor Trafficking or Child Labor is more significant so they can prioritize those for greater Due Diligence, Monitoring, Verification or appropriate action under a given Model Policy.

This approach is facilitated by Risk Assessments conducted by a Business or Supplier to ascertain whether or not in a given circumstance there is a risk of Labor Trafficking or Child Labor. Risk Assessments are part of Due Diligence, the scope of which may appropriately vary depending on the Risk Assessment conducted in a given circumstance. Similarly the scope of Monitoring and Verification and the decision on utilizing either specially-trained Employees or Qualified Independent Third Party Monitors to conduct them, may appropriately vary depending on the Risk Assessment conducted in a given case. The Risk Assessment considers factors such as the type of business being conducted, where the business will be conducted, the history of Labor Trafficking or Child Labor in an industry or sector, operating context, the particular Operations, products or services involved, and any other factors a Business deems relevant.

A risk based approach to prevention, monitoring, detection, and certification would limit the burden of compliance to areas where there have been identified risks or, in the event no risks are identified, limit the compliance requirements for prevention, monitoring, detection, and certification for the contractor and its agents and first-tier subcontractors and their agents. To this end, the ABA Business Law Section has included language in its above-referenced Introduction explaining the limited scope of the Proposed ABA Model Policies after the risk assessment is conducted:

These Model Policies are specifically intended to apply to only the Business and its first tier Suppliers, unless:

1. After conducting a Risk Assessment, or upon receipt of other credible information as a result of Monitoring, Due Diligence, Verification or other activities, the Business or Supplier determines  

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13 The ABA House of Delegated is expected to consider and vote on the ABA Business Law Section’s proposed Resolution adopting the black letter *ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor*, at its next meeting in February 2014. Unless and until the proposed Resolution is formally approved by the House of Delegates, however, it shall not be considered to be the policy of the American Bar Association. If the Resolution is adopted by the ABA House of Delegates, then only the eight black letter Principles contained in the Model Policies and applicable portions of the Model Glossary that define terms used in the Principles—not the Introduction or Commentary and Guidance portions of the Model Policies—will constitute official ABA policy.
that there is a material risk of Labor Trafficking or Child Labor with a specific Supplier, or elsewhere in the Supply Chain; and

2. Taking appropriate action (e.g. Monitoring, Verification, or Remediation) with respect to the finding of a material risk of Labor Trafficking or Child Labor is practicable and not cost prohibitive in comparison to the value of the materials purchased from those Suppliers. This could also be done through broader industry initiatives; and

3. The product or service involved is material to the Business or their Operations.

However, consistent with UN Guiding Principle 19, even if the Business or Supplier does not have an obligation under these Model Policies to cause a business enterprise lower in the Supply Chain to Remedy a Labor Trafficking or Child Labor impact, the Business or Supplier should still use whatever leverage it does have with that business enterprise or others dealing with this enterprise to encourage the business enterprise that caused the impact to Remedy the impact.

A risk based approach to prevention, monitoring, detection, and certification is consistent with the ETGCA (and E.O. 13627) and the limitation that compliance plans to prevent trafficking in persons and monitor and detect such activities “shall be appropriate to the size and complexity of the [contract] and to the nature and scope of its activities, including the number of non-United States citizens expected to be employed.” As noted above, a discussion of potential risk factors could be included in the final rule or the “Discussion and Analysis” that accompanies the final rule.

D. The FAR Council should clarify the scope of the flow-down requirements for subcontractors and agents. (Comment Area 2(g))

The Proposed Rule requires flow down in all subcontracts and contracts with “agents.” See Proposed FAR 22.1703(d) & 52.222-50(i). Yet neither the regulatory text nor the accompanying commentary define or refer to a definition of “subcontractor” or “agent.” The scope of the definition of “subcontractor” and “agent” will affect the scope of the rule and the various compliance requirements that it will impose on contractors and their supply chains. We recommend that the FAR Council adopt the standard definition of subcontractor as used in FAR 44.101, “‘Subcontractor’ means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.” We further recommend that the final rule separately define agents as recruiting agents, which may in some circumstances fall within the definition of Subcontractor.
E. The FAR Council should provide guidance concerning the return transportation requirements.

Proposed FAR 22.1703(a)(7) mirrors E.O. 13267 with regard to return transportation for employees. Both the Proposed Rule and the E.O. generally require that contractors pay for return transportation for an employee who is not a national of the country in which the work is being performed and who was brought into the country for purposes of performing that work. The Proposed Rule states that employers need not provide for or pay return transportation for victims or witnesses of human trafficking. See Proposed FAR 22.1703(a)(7)(ii)(C). This exception, however, raises several questions, including whether there is an expectation that the country of employment or the United States will provide these costs for the victim or witness. The commentary accompanying the Proposed Rule focuses on the protection of victims and witnesses prior to return to their country of origin, but neither the commentary nor the regulatory text specifies how they will return to their home countries.

FAR 31.205-35 permits contractors to recover (either directly or indirectly) both outgoing and return relocation costs for employees performing on government contracts. Under this provision, however, the contractor can claim costs for return relocation only if (1) the term of employment is greater than a year, or (2) the employment agreement states that the employee will be released from employment upon termination of a field assignment (even if that is shorter than a year). Since return relocation is required by the Proposed Rule, FAR 22.1703(a)(7), the final rule should clarify whether costs of this return relocation will be allowable even if the employee resigns, is terminated, or the project unexpectedly ends within 12 months of hire.

In the Section’s comments on the earlier rule, we noted the following concern: “[A]n exception to the rule addressing victims of human trafficking and witnesses in trafficking-related enforcement actions, as written in the E.O., will serve to punish, rather than protect, victims of human trafficking and witnesses in human trafficking investigations.” (Section II.D) We reiterate this concern and ask the FAR Council to address the open issue of return travel for victims of human trafficking and address the allowability of return transportation costs.

F. Harmonize the Requirements of FAR 52.203-13 with the Requirements of E.O. 13627 and the ETGCA (Comment Area (3))

The Proposed Rule does not address some of the Section’s concerns related to notification and cooperation requirements, or the Section’s more general desire to avoid unnecessary compliance burdens and confusion by harmonizing the anti-trafficking requirements with the FAR’s Code of Business Ethics and Conduct Rule in FAR subpart 3.10 and FAR 52.203-13 (“Business Ethics Rule”). The Section recommends that the final rule make clear that the requirement for immediate notification when a
contractor receives “credible information” permits a contractor some period of time to conduct its own investigation into the credibility of information it receives. Recognizing that the statute refers to “credible information,” we believe that it would be helpful to clarify whether the FAR Council equates “credible information” with “credible evidence,” as that term is used in the Business Ethics Rule. Similarly, the notification requirement in FAR 52.203-13 is tied to the “award, performance, or closeout” of a particular contract; therefore, the Section would recommend that the notification provisions in the final rule be similarly moored. Finally, we note concerns with the requirements for “full cooperation,” below.

1. Clarify the Notification Requirements

As noted in the Section’s prior comments and above, it is unclear if there is a difference between “credible information” and “credible evidence.” FAR 52.203-13 requires that a contractor disclose to an agency Office of Inspector General if it has “credible evidence” of a covered violation, including certain violations of Title 18 involving fraud, bribery or gratuities, violations of the Civil False Claims Act and significant overpayments. The Preamble to the Business Ethics Rule made clear that, before reporting, a contractor has some opportunity to investigate and determine whether a violation has occurred, without fear that its disclosure will be deemed untimely due to delays inherent in conducting an investigation. 73 Fed. Reg. 67074. (“credible evidence…implies that the contractor will have the opportunity to take some time for preliminary examination of the evidence to determine its credibility before deciding to disclose”). We acknowledge that the ETGCA ties the contractor’s notification requirement to “credible information,” rather than “credible evidence,” but there is nothing in the statute that suggests Congress intended a different standard than the “credible evidence” standard set forth in FAR 52.203-13. Thus, there is no impediment to the FAR Council affirmatively indicating that the two standards are the same.

Practically speaking, unless the “credible” modifier is surplusage, we believe that there must be some level of investigation before a contractor can reach the “credible” threshold. A contrary interpretation (i.e., that the “credible information” standard is somehow less than the “credible evidence” standard) would lead to increased effort for both for contractors and the Government with no apparent benefit. If different standards applied, a contractor would not only have to revise its business practices, but it would need to provide additional training to explain to its employees the differences in the standards. For the Government, different standards could potentially lead to increased investigative costs, at times unnecessarily, because once a report is made, an Inspector General must review the referral or information and determine whether to initiate an investigation of the matter. ETGCA § 1704(a)(2). If the Inspector General decides not to initiate an investigation, the rationale for such decision must be documented, further increasing the administrative burden. Id. The final rule should, like the guidance preceding the Business Ethics Rule, make clear that
contractors have some opportunity to examine the credibility of information received before they must provide notice to the Government.

The Proposed Rule also does not appear to tie the notification requirement to the “award, performance or closeout of [a] contract or any subcontract thereunder.” Again this differs from the Business Ethics Rule without any explanation or apparent benefit to the Government. The lack of a nexus to a particular contract also causes practical concerns. For instance, a contractor would reasonably expect to notify the CO and the Inspector General associated with the contract if the contractor received information about human trafficking. If the notification is not tied to a specific contract, then it is not clear who the contractor should notify. The lack of clarity in tying the requirement to an individual contract could result in a contractor having to notify every CO with whom it has a contractual relationship, even if the violation of the anti-trafficking clause only affected one contract. Otherwise, the contractor may risk that the Government deems its actions non-compliant with the clause. The lack of clarity could also potentially result in inefficient and wasteful efforts by multiple Inspectors General, and by contractors.

Therefore, the Section recommends that the Rule make clear that “credible evidence” in the Business Ethics Rule and “credible information” in the Proposed Rule are equivalent. Alternatively, if the FAR Council intends for the standards to be different, we ask that the Council define and explain the “credible information” standard. Moreover, we recommend that the Proposed Rule, like the Business Ethics Rule, be tied to the “award, performance or closeout of this contract or any subcontract thereunder.”

2. Requirements for Full Cooperation Raise Important Concerns About Self-Incrimination and the Right to Defend

The Section’s previous comments on this FAR Case, dated March 12, 2013, referenced earlier comments submitted during the FAR Council’s consideration of the Business Ethics Rule. Those comments conveyed the Section’s concerns that disclosure regimes should be structured so as not to infringe upon fundamental individual rights against self-incrimination. Additionally, the Section commented that companies’ ability to conduct internal investigations to ensure their compliance with the law should not be prejudiced. Therefore, the Section urged the FAR Council to reaffirm when publishing this Proposed Rule that the requirement to provide “full cooperation” does not bar companies from conducting their own investigations, defending themselves and their employees, or indemnifying their employees’ defense. The Section also asked that the FAR Council clarify that companies will not be required to waive the attorney-client privilege and will not be forced to impair an employee’s right against self-incrimination in order to be found to have fully cooperated.

The Proposed Rule, however, does not mention these important issues. The Federal Register Notice for the Business Ethics Rule addressed directly the issues of
“Waiver of Privileges/Protections/Rights” including the Attorney-Client privilege as well as “Indemnification of Employees” and “Ability To Conduct a Thorough and Effective Internal Investigation.” 73 Fed. Reg. 67076-77. Further, the definition of “full cooperation” in the Business Ethics Rule summarizes each of these same topics and explicitly states that full cooperation “[d]oes not foreclose any contractor rights arising in law, the FAR or the terms of the contract.” FAR 52.203-13(a).

The Section believes that the final rule should address these important issues. Uncertainty about these fundamental protections may have a chilling effect on the willingness of contractors to accept such liability, and, therefore, to make disclosures. The Section recommends that in finalizing the rule, the FAR Council should define “full cooperation” similarly to the definition of that term in the Business Ethics Rule or, alternatively, incorporate that definition by reference. The Section urges the FAR Council to include guidance on “full cooperation” similar to that in the Business Ethics Rule in the final rule.

G. Agencies Should Work to Develop Training Requirements in Conjunction with the New Rule (Comment Area 4)

In response to the FAR Council’s request for comments on requirements for contractors to train employees on anti-trafficking persons policies and procedures, the Section reiterates its previous call for cooperation between the Government and contractors to develop clear and consistent guidance on the new rule.

E.O. 13627, Section 1, and the ETGCA, Section 1703(a)(1)(d), both emphasize the need for the Government to provide guidance to contractors about the requirements for establishing a compliance program to combat trafficking in persons. The E.O., for example, is intended, in part, to “provide[e] additional clarity to Government contractors and subcontractors on the steps necessary to fully comply with” the government’s efforts to eradicate trafficking in persons. Similarly, the ETGCA, in a section entitled “Guidance,” requires the Government to establish “minimum requirements” for contractor compliance plans and procedures that contractors are required to implement pursuant to Section 1703.

The E.O. lists the information to be included in certain contractors’ anti-trafficking compliance programs in E.O. 13672, Section 2(2). The ETGCA, enacted after the issuance of the E.O., directs the Executive Branch to “establish minimum requirements for contractor plans and procedures to be implemented pursuant to this section.” Once the minimum requirements are established, the need for accompanying guidance will be critical as contractors will be required to certify that their compliance plan meets the regulatory “minimum requirements.”

Although the Section recommends that the final rule remain flexible with respect to tailoring training to the contractor’s compliance plan and program, the Section recommends that the FAR Council permit agencies to make available to
contractors the training provided to the federal acquisition workforce pursuant to Section 3 of the E.O. 13627 as a possible guide to training that contractors may wish to consider. Like the Government, contractors will have to undertake training of their employees, as well as corporate managers, to ensure compliance with the final rule. The Government’s training may provide a useful, cost effective resource for contractors.

III. Conclusion

The Section strongly supports the efforts by the FAR Council, the President and Congress to combat trafficking in persons in the supply chain of federal contracts. The Section compliments the FAR Council’s invitation to all stakeholders to address the Proposed Rule implementing the E.O. and ETGCA. The final rule will provide much needed guidance for contractors and acquisition professionals to develop and evaluate human trafficking compliance programs. The details of implementation of these efforts will be important to ensuring the consistency and effectiveness of these new rules. Therefore, the Section encourages the FAR Council to continue to seek an active dialogue and to work in a cooperative manner with all stakeholders to develop a final rule.

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

Sincerely,

Stuart B. Nibley
Chair-Elect, Section of Public Contract Law

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