VIA REGULATORY PORTAL AND U.S. MAIL

Mr. William Clark
General Services Administration
Regulatory Secretariat (VIR)
Attn: Ms. Deborah Lague
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405


Dear Sir or Madam:

On behalf of the Section of Public Contract Law of the American Bar Association (“the Section”), I am submitting comments in the above-referenced matter. 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.

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.¹

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.”
I. INTRODUCTION

The Section wishes to express its continued support for efforts by the federal government to eradicate trafficking in persons and modern day slavery. The President and Congress have again shown their leadership in this area by calling for additional regulations to eradicate human trafficking in all federal government contracts and grants. To implement these measures, the Federal Acquisition Regulation (FAR) Council has issued Notice-MVC-2013-01 (the “Notice”), announcing a public meeting and request for comments on the implementation of Executive Order (E.O.) 13627, Strengthening Protections Against Trafficking In Persons In Federal Contracts, and Title XVII of the National Defense Authorization Act, Pub. L. No. 112–239, the End Trafficking In Government Contracting Act (ETGCA). 78 Fed. Reg. 9918 (Feb. 12, 2013).

As the Notice 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 United States government contract or subcontract. Since 2006, the FAR has also required contractors to immediately inform their contracting officer 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. The FAR, however, otherwise provided little specific guidance for contractors seeking to comply with these requirements. In the past five months, both the President and Congress have sought to remedy that gap by requiring new regulations to both strengthen protections against trafficking in persons in federal contracts and add certain compliance requirements to the existing regulatory landscape.

A. E.O. 13627, Strengthening Protections Against Trafficking In Persons In Federal Contracts

On September 25, 2012, President Obama issued an Executive Order, “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. E.O. 13627 aims to provide those that contract with the U.S. government 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

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3 FAR Subpart 22.17; FAR 52.222-50.

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 employees access to their passports, driver’s licenses, and other identification documents; and using misleading recruitment practices such as materially misrepresenting the amount of wages, living conditions, and the work location.

Among other directives, E.O. 13627 directs the FAR Council to adopt regulations for federal contractors and subcontractors requiring them to agree in their contracts to allow for anti-trafficking compliance audits and investigations. Supplementing contractors’ duty under existing statutes and regulations to report suspected human trafficking to contracting officials, the Order requires contracting officers who “become aware of” any trafficking-related activity to notify the agency’s inspector general and, if necessary, the official responsible for suspension or debarment actions and/or law enforcement. E.O. 13627 also directs the FAR Council to develop regulations, for all U.S. government contracts with work performed overseas exceeding $500,000, that will require each contractor and subcontractor to maintain a compliance plan that includes, among other things, a program to make employees aware of the contractor’s or subcontractor’s anti-trafficking policy and the consequences for violating the policy, mechanisms for reporting violations, a recruitment plan that deters trafficking-related activities, and methods to prevent subcontractors from engaging in trafficking in persons and trafficking-related activities. The new regulations must also require that such contractors and subcontractors certify that neither they nor their subcontractors have, to the best of their knowledge, engaged in trafficking-related activities and that, if abuses have been found, they or their subcontractors have taken appropriate actions in response to the abuses.

E.O. 13627 also directs the Office of Federal Procurement Policy (OFPP) to, as stated in the FAR Council’s Notice, “develop guidance to assist agencies in training the Federal acquisition workforce regarding the anti-trafficking obligations of contractors and subcontractors.”

B. End Trafficking in Government Contracting Act (ETGCA)

On the heels of E.O. 13627, President Obama signed the National Defense Authorization Act for Fiscal Year 2013 (NDAA) containing the ETGCA. As the Notice recognizes, the ETGCA contains similar, but not identical, provisions addressing trafficking in persons in federal contracts. In addition to prohibiting severe forms of trafficking, the use of forced labor, and the procurement of a commercial sex act during the contract period, the NDAA prohibits contractors, subcontractors, grantees, and subgrantees from engaging in “acts that directly support or advance trafficking in persons.” Much like E.O. 13627, these acts include confiscating or otherwise denying employees access to their identity documents; failing to provide or pay for return transportation for employees from outside the United States to the countries from which they were recruited (unless exempted by the federal contract or the employee is a victim

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of human trafficking who is seeking services in the country of employment); soliciting potential employees or offering employment through materially false representations about the employment terms and conditions; charging unreasonable recruitment or placement fees, or recruitment fees that are illegal in the country from which the employees are recruited; and, when housing is arranged or provided, failing to meet the housing and safety standards of the host country.

The ETGCA also requires agencies to obtain certifications regarding compliance with anti-human-trafficking procedures from all overseas contractors for work performed outside the United States valued at more than $500,000. These compliance procedures include maintaining a compliance plan designed to prevent, monitor, detect, and remedy human trafficking and human trafficking-related activities. The ETGCA will also require that contractors certify that they and all subcontractors, or any agent of any subcontractors, have not engaged in severe forms of human trafficking, the use of forced labor, or the procurement of commercial sex acts during contract performance.

Furthermore, like the E.O. 13627, the ETGCA implements reporting mechanisms in cases of allegations of trafficking in persons by a contractor or subcontractor, or agent of either, that require contracting officials to refer reports of “credible information” that a contractor or subcontractor has engaged in prohibited trafficking activities to their agency inspector general. Notably, in addition to requiring full cooperation with government human trafficking investigations, the ETGCA also requires “the head of an executive agency” in charge of the contract or grant to “require that the recipient . . . immediately inform the Inspector General of the executive agency of any information it receives from any source that alleges credible information that the recipient; any subcontractor or subgrantee of the recipient; or any agent of the recipient or of such a subcontractor or subgrantee, has engaged in” severe forms of trafficking in persons, the procurement of a commercial sex act during the period when performing the contract, the use of forced labor in performance of the contract, or any of the trafficking-related activities in Section 1702 of the ETGCA.

The ETGCA also outlines remedial actions that the head of the agency must consider in cases of substantiated allegations of human trafficking, up to and including suspension and debarment of the contractor or subcontractor. Finally, in addition to the administrative actions outlined in E.O. 13627, the ETGCA also requires the head of the agency to ensure that substantiated allegations of human trafficking are included in the Federal Awardee Performance and Integrity Information System (FAPIIS).6

As explained below, the Section recommends that the FAR Council give consideration to the following topics:

6 We also note that on February 12, 2013, the U.S. Senate approved the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2013 as an amendment to the Violence Against Women Reauthorization Act of 2013. The Act would authorize funding for trafficking-related resources and amend the RICO Act to add fraud in foreign labor contracting as a predicate offense for RICO violations.
1) Consider pre-existing anti-human trafficking sets of practices including the US Department of Labor’s “Reducing Child Labor and Forced Labor” toolkit;

2) Harmonize other FAR disclosure rules with E.O. and ETGCA disclosure rules to discourage derogation of the attorney-client privilege or contractor employees’ rights against self-incrimination;

3) Recommend that agencies develop training in concert with the new regulations to ensure consistency between acquisition workforce training and contractor training; and

4) Correct an issue with the current wording of the E.O. 13627 victim and witness assistance protection provisions that currently penalize victims and witnesses in trafficking-related enforcement actions who would typically receive reimbursement for the cost of travelling back to their country of origin.

The Section has attempted to set out some suggestions and concerns in this letter. Nevertheless, we urge the FAR Council to engage in a dialogue with the Section and other stakeholders as the Council develops relevant regulations to address the requirements of E.O. 13627 and the ETGCA.

II. COMMENTS

A. Consider Pre-existing Sets of Practices Applicable to Human Trafficking Compliance Programs

We urge the FAR Council to examine other areas where standard sets of practices for human trafficking compliance programs have already been developed as it develops new human trafficking compliance plan requirements in response to the E.O. and ETGCA. For example, the U.S. Department of Labor (DOL) has developed a “toolkit” in response to the mandate in the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2005 that the DOL’s Bureau of International Labor Affairs “work with persons who are involved in the production of goods on [ILAB’s List of Goods Produced by Child Labor or Forced Labor] to create a standard set of practices that will reduce the likelihood that such persons will produce goods using [forced and child labor].” The result is an on-line set of tools that addresses various compliance needs of companies facing human trafficking issues.

For example, the toolkit recommends that companies have “a strong code [that] should address areas covered by the International Labor Organization’s (ILO) core labor standards.”7 Those areas are freedom of association and collective bargaining, discrimination in employment, child labor, and forced labor. Beyond these areas, the ILAB also recommends that a code address topics such as compensation, hours of work,

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and “[o]ccupational safety and health, including issues such as industrial hygiene, emergency preparedness, safety equipment, sanitation, and access to food and water.”

The toolkit also describes other elements of an anti-trafficking compliance plan, including engaging stakeholders, conducting risk assessments, training employees, monitoring compliance, remediating violations of the code of conduct, conducting independent audits and reviews of the compliance program’s effectiveness, and reporting publicly on the compliance system. Based on a survey of industries, ILAB also compiled examples of best practices in anti-trafficking compliance in eight core areas:

- Engaging stakeholders and partners
- Assessing risks and impacts
- Developing codes of conduct
- Communicating and training the entire supply chain
- Monitoring compliance
- Remediating violations
- Conducting independent review
- Reporting performance

The survey included responses from many companies, some of whom permitted ILAB to include their codes of conduct and other compliance materials in the toolkit.8

We recommend that the FAR Council consider referring to these pre-existing standard sets of practices in the implementing Federal Register Notice or the regulations themselves for E.O. 13627 and the ETGCA. The Section also asks the FAR Council to consider whether the implementing regulations could consider compliance with the DOL standard set of practices as a factor in assessing compliance with the new FAR Rule implementing the E.O. and ETGCA. Considering existing standard sets of practices will ensure consistent compliance policies across U.S. companies and help avoid the risk of unnecessary duplication of efforts by government contractors that may already have used the ILAB toolkit to develop anti-human trafficking compliance policies for their commercial operations.9

B. Harmonize Reporting and Cooperation with Existing FAR Provisions

1. Notification and Cooperation Requirements Are Expressed Slightly Differently Under the ETGCA, the E.O., and FAR 52.222-50

9 Id.
E.O. 13627 and the ETGCA both address reporting and cooperation. As explained below, the reporting provisions of ETGCA Section 1705, however, might be (but need not be) read to require a new and different mandatory disclosure regime with a different evidentiary threshold for reporting and investigation. If so implemented, there is a potential that compliance burdens on contractors could increase and possibly create confusion among contractors regarding their rights and duties to investigate reported misconduct. Further, the Section believes that the FAR Council should consider whether the reporting and cooperation provisions of the E.O. and ETGCA can be satisfied utilizing the already-established FAR 52.203-13, Contractor Code of Business Ethics and Conduct (hereinafter the “FAR Business Ethics Rule”) reporting scheme.

FAR 52.222.50, which is the current clause implementing the Government’s anti-trafficking policy, provides the following notification requirement:

The Contractor shall inform the Contracting Officer immediately of [a]ny information it receives from any source (including host country law enforcement) that alleges a Contractor employee, subcontractor or subcontractor employee has engaged in conduct that violates this policy; and [a]ny actions taken against Contractor employees, subcontractors, or subcontractor employees pursuant to this clause.

The Executive Order contains a provision seeking to “strengthen the efficacy of the Government’s zero-tolerance policy . . . by:

requiring contractors and their subcontractors by contract clause, to agree to cooperate fully in providing reasonable access to allow contracting agencies and other responsible enforcement agencies to conduct audits, investigations, or other actions to ascertain compliance with the TVPA, this order, or any other applicable law or regulations; establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor; and requiring contracting officers to notify, in accordance with agency procedures, the agency’s Inspector General, the agency official responsible for initiating suspension or debarment actions, and law enforcement, if appropriate, if they become aware of any activities that would justify termination under section 106(g) of the TVPA, 22 U.S.C. 7104(g), or are inconsistent with the requirements of this order 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 further requiring that the agency official responsible for initiating suspension and debarment actions consider whether suspension or debarment is necessary in order to protect the Government’s interest.

The ETGCA’s treatment of reporting and cooperation is more succinct. It requires that the head of an executive agency shall require that the contractor:
immediately inform the Inspector General of the executive agency of any information it receives from any source that alleges credible information that the recipient; any subcontractor or subgrantee of the recipient; or any agent of the recipient or of such a subcontractor or subgrantee, has engaged in conduct described in section 106(g) of the [TVPA], as amended by section 1702 of this Act; and fully cooperate with any Federal agencies responsible for audits, investigations, or corrective actions relating to trafficking in persons.

The ETGCA’s requirement to immediately inform the Inspector General of “any information it receives from any source that alleges credible information” is different wording than is used in other FAR reporting schemes. This could, but need not be interpreted, as a different standard than the FAR Business Ethics Rule standard of “the Contractor has credible evidence” of a violation.


The FAR’s Business Ethics Rule became effective in November 2008, more than four years ago. The Rule requires that contractors make their own assessment of whether there has been a violation of law that must be disclosed. This places responsibility on a contractor to make the decision whether a federal criminal violation or some lesser civil or administrative violation has occurred, and whether it is related in some manner to a federal contract or subcontract. Each element of that analysis is subject to discretionary judgments including: an assessment of available facts, weighing countervailing legal theories, determining whether elements of criminal or civil violations are present and what facts are sufficient to establish intent or reckless disregard, as opposed to negligence.

Contractors have reordered their business processes and the more than 750 disclosures made to DoD, plus additional disclosures to GSA and other federal agencies, suggest that companies are attempting to satisfy the intent of that Rule. Thus, the compliance infrastructure and the risks associated with a maturing mandatory disclosure regime are now factored into contractor pricing and risk calculations.

The Section has concerns about disclosures because the ETGCA could be read to impose a new mandatory reporting scheme for covered contractors that is duplicative of, but potentially inconsistent with, their already-existing FAR Business Ethics Rule

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obligations. It is not clear, for example, whether the requirement to immediately report “any information . . . from any source” permits contractors to conduct a reasonable investigation and whether “credible information” is different than “credible evidence.”

Under the current FAR 52.222-50 and ETGCA reporting requirements, a contractor must “immediately inform the Inspector General” of “any information it receives from any source that alleges credible information” that the contractor or its subcontractor or agents of either have engaged in conduct prohibited by the TVPA; and the contractor must “fully cooperate with any federal agencies responsible for audits, investigations, or corrective actions relating to trafficking in persons.” FY13 NDAA § 1705. Furthermore, the ETGCA’s reporting requirement is triggered when a contractor “receives [information] from any source that alleges credible information that the recipient [or another enumerated party] has engaged in conduct described in section 106(g) of the [TVPA], as amended . . . .” This language, while similar to the current FAR 52.222-50, expresses a contractor’s obligation in language that differs from the language in the FAR Business Ethics Rule at FAR 52.203-13 (discussing “credible evidence” of a violation of federal criminal law).

Substantively, the FAR Business Ethics Rule covers criminal violations of the TVPA, as amended, involving fraud. Thus, there is no need to implement a new mandatory disclosure regime to report such TVPA violations committed “in connection with the award, performance, or closeout” of a covered contract or subcontract. The human trafficking crimes that are not subject to the reporting obligations in FAR 52.203-13 are those that were previously in Title 18, Chapter 77 that do not involve fraud, or are not committed in connection with a covered contract. For example, severe forms of human trafficking in 18 U.S.C. § 1589 that involve forced labor by means of threats of physical harm are not necessarily offenses involving fraud.  

The Section believes that it is reasonable to give weight to the requirement that the allegation involve “credible information.” We also believe that in order to know whether information is credible, it is reasonable for the contractor to conduct its own threshold inquiry and to provide timely notice where it determines that there is “credible evidence” of a violation, the same trigger for reporting as exists under the FAR Business Ethics Rule. Permitting the contractor a reasonable time to investigate and determine if credible evidence exists will also ensure that the Contracting Officer and

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12 The ETGCA contains separate particular mechanics for the Government’s obligation upon receiving a report, as set forth in Section 1704. This process can also be incorporated in a new FAR rule, by reference to the reporting requirements of FAR 52.203-13.

13 Nevertheless, we would note that some commentators have suggested that the most common human trafficking violations involving third country nationals performing U.S. contracts in Iraq and Afghanistan have been reportable as violations of the Civil False Claims Act or the Anti-Kickback Act, Title 41 U.S.C. 4107, which has its own mandatory reporting and cooperation requirements. See Fraud Magazine, In the Name of ‘Progress’: Illegal Human Labor Trafficking Within Government Contracts, Sindhu P. Kavinnamannil and Sam W. McCahon, (May/June 2011).
Inspector General are only required to investigate and forward allegations that have at least been tested for credibility.

The Section acknowledges that reporting to the Inspector General under the ETGCA is to be “immediate[,]” but we nevertheless believe that truly immediate reporting may not serve Congress’s intent to strengthen the zero tolerance policy. Therefore, the Section asks that the FAR Council consider comparable standards for reporting under FAR 52.203-13 and whether allowing contractors to perform a reasonable investigation of allegations serves the interests in the ETGCA’s disclosure standards.14

Accordingly, the Section recommends that the FAR Council consider amending FAR 52.203-13 to add Title 18, Chapter 77, human trafficking offenses, to the list of reportable offenses in FAR 52.203-13, or include in the implementing regulations language that requires reporting all credible evidence of trafficking-related offenses in terms that are identical to or make reference to the standards in the FAR Business Ethics Rule. Regardless of how it is accomplished, the FAR Council should consider harmonizing the language of the ETGCA with the requirements of the FAR Business Ethics Rule. Implementing the ETGCA in this manner may produce the least burden on contractors while beneficially leveraging the mechanisms already established under the FAR Business Ethics Rule.

3. Reporting, Cooperation, and Fundamental Rights

As explained in the Section’s January 18, 2008 and July 15, 2008 comments concerning FAR Case 2007-006, Contractor Compliance Program and Integrity Reporting, new disclosure regimes should be structured so as not to infringe upon fundamental individual rights against self-incrimination. Disclosure regimes should further be structured so as not to unduly impair companies’ ability to conduct internal investigations to ensure their compliance with the law.

As the Section emphasized in 2008, when cooperating with government investigations, companies and company employees must be permitted the opportunity to continue their own investigations and preparation of defenses to criminal allegations. Companies have a fiduciary duty to do so in order to protect shareholder/owner interests. At the same time, and for the same reasons, companies need to be able to pursue their own investigations to determine if there are defenses to mitigate or explain the events that resulted in a disclosure of possible criminal activity.

The Section has also previously emphasized that the attorney-client privilege is a fundamental right that is critical to companies’ ability to address compliance issues

effectively and make disclosures. The Section’s prior comments also made clear that there should be no waiver of the attorney-client privilege, neither required nor imputed, when a company makes a disclosure similar to those required by the ETGCA. Similarly, the Section previously has expressed concern that an assertion of attorney-client privilege by a company, or the invocation of the right against self-incrimination by an employee or officer of the company, in subsequent proceedings should not be construed under any disclosure regime as a failure to cooperate in an investigation.

Therefore, the Section urges the FAR Council to reaffirm in the notice of proposed implementing regulations that the requirement to provide “full cooperation” with investigations of trafficking in persons does not bar companies from conducting their own investigations, defending themselves and their employees, or indemnifying their employees’ defense. Furthermore, the Section urges the FAR Council to make clear in the notice 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 meet the obligation to provide “full cooperation” with government investigations.

C. Agencies Should Work to Develop Training Requirements in Conjunction with the New Rule

The E.O., 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 “provid[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 of the ETGCA.

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 to be issued will be critical as contractors will be required to certify that their compliance plan meets the regulatory “minimum requirements.”

Prior regulatory initiatives arising in the overseas and contingency contracting sector have required the Executive Branch to provide appropriate training and information. In some instances, however, contractors have been left initially to implement their own training. The implementation of the rules requiring human trafficking compliance programs for overseas contractors would greatly benefit from timely and complete guidance and training from the Government to facilitate effective
implementation. Timely issuance of the guidance will facilitate the common objective of combating trafficking in persons and will do so in the most efficient manner.

In addition, the E.O. requires that the Government in parallel “implement training requirements to ensure that the federal acquisition workforce is trained on the policies and responsibilities for combating trafficking, including on: (i) applicable laws, regulations, and policies; and (ii) internal controls and oversight procedures implemented by the agency, including enforcement procedures available to the agency to investigate, manage, and mitigate contractor and subcontractor trafficking violations.”

The Section recommends that the FAR Council work with its members with the objective of developing and issuing guidance and training information required by statute for both agency personnel and contractors prior to or concurrent with the final rule. This will ensure consistency and accuracy in the development of contractor compliance plans and programs.

The Section further 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 Executive Order. Like the Government, contractors will have to undertake training of their acquisition employees, as well as corporate managers, regarding applicable laws and regulations to ensure compliance with the regulation. A common set of training modules will establish the baseline of knowledge required for competency in this area and ensure that agency and contractor personnel are trained to the same standard.

D. Victims of Human Trafficking And Witnesses In Trafficking-Related Enforcement Actions Should Be Entitled to Return Transportation Costs

Both the E.O. and the ETGCA contain language that addresses employers’ responsibilities for paying return transportation costs to an employee upon the end of employment. The Section applauds the inclusion of such language in a final rule to prevent employees from being stranded in distant lands at the end of an employment. Nonetheless, the Section is concerned that an 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.

As an exception to the rule that contractors must pay employees’ return transportation costs, the E.O. states that return transportation costs are not required to be paid when the employee is a victim of human trafficking or a witness in a trafficking-related enforcement action:

[T]he requirements of [the return transportation provisions] shall not apply to . . . an employee who is a victim of trafficking and is seeking
victim services or legal redress in the country of employment, or an employee who is a witness in a trafficking-related enforcement action.


Therefore, according to this language, non-victims and those who are not witnesses in human trafficking or trafficking-related enforcement actions will be afforded the protection of guaranteed return transportation, while victims of human trafficking and witnesses in such enforcement actions will have no guarantee to return transportation costs. The language as crafted in the E.O. may have the unintended effect of disincentivizing victims and potential witnesses to report instances of human trafficking, and may effectively result in these groups losing the otherwise assured funding for travel to return home because they have reported misconduct by their employers. In particular, employees who witness prohibited trafficking-related activities, but are not themselves victims of such prohibited activities, may experience a particular disincentive from reporting, for fear of being called upon as a witness and losing the benefit of having their return transportation costs provided.

To avoid this unintended consequence, the Section recommends that the FAR Council consider whether it can address this situation with a final rule to ensure that victims and witnesses to human trafficking are not penalized with a loss of the funding for return travel that would otherwise be required. Specifically, the Section recommends that the exception in the E.O. for victims of human trafficking and witnesses in a trafficking-related enforcement be excluded from the final rule, so that the payment for return transportation costs provisions applies to all employees, irrespective of whether the employee is a victim, non-victim, or witness. To facilitate the payment of these costs upon the end of an employment, the Section recommends defining “return transportation costs” to mean “actual transportation costs or, for victims of human trafficking or witnesses in a trafficking-related enforcement action, estimated transportation costs.” Finally, the Section proposes the inclusion of language in the final rule that makes clear that employers are prohibited from removing victims of human trafficking or witnesses from the country of employment against their will.

III. Conclusion

The Section strongly supports the efforts by 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 new requirements in E.O. 13627 and the ETGCA publicly prior to publishing a proposed rule. The Section believes the E.O. and ETGCA provide much needed guidance for contractors and acquisition professionals to develop and evaluate human trafficking

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15 The ETGCA addresses victim and witness travel costs, but does not have the disincentivizing language that the E.O. contains, stating, “Failing to pay return transportation costs to an employee upon the end of employment [may serve as a grounds for termination or other remedial action] unless . . . the employee is a victim of human trafficking seeking victim services or legal redress in the country of employment or a witness in a human trafficking enforcement action.” ETGCA § 1702.
compliance programs. The details of implementation of these efforts will be important to ensuring consistent and effective implementation 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,

Mark D. Colley
Chair, Section of Public Contract Law

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