VIA ELECTRONIC MAIL AND FACSIMILE

General Services Administration
Regulatory Secretariat (VIR)
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On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), I am submitting comments on the above-referenced FAR case.1 The Section of Public Contract Law consists of attorneys and associated professionals in private practice, industry, and Government service. The Section’s governing council and substantive committees have 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 International Law Section of the American Bar Association also participated in the drafting of this comment.

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

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1 This letter is available in pdf format at http://www.abanet.org/contract/federal/regnscomm/home.html#comments under the topic “Emerging Areas.”
I. INTRODUCTION

The Section abhors trafficking in persons and views trafficking as a human rights violation that deserves the anti-trafficking enforcement effort that it is receiving. The United States has demonstrated international leadership in combating human trafficking through the enactment of the Trafficking Victims Protection Act of 2000 (Public Law No. 106-386) (‘‘TVPA’’) and its subsequent amendments. As amended, the TVPA requires that government contracts, grants, and cooperative agreements include a provision to authorize the termination of the contract, grant, or agreement if the contractor or a subcontractor engages in trafficking.

To implement this requirement, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (‘‘Councils’’) published an interim rule in the Federal Register at 71 Fed. Reg. 20301 (Apr. 19, 2006) (‘‘Interim Rule’’) with a request for public comment. The Interim Rule implemented 22 U.S.C. § 7104(g) by adding FAR Subpart 22.17 (with an associated clause at FAR § 52.222-50 which addresses combating trafficking in persons). The Interim Rule applied to all contracts for services, other than commercial service contracts under FAR Part 12. The Interim Rule prohibited contractors and contractor employees from engaging in or supporting severe forms of trafficking in persons, procurement of commercial sex acts, or use of forced labor during the performance of the contract.

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2 Mary Ellen Coster Williams, a Council member of the Section of Public Contract Law, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

3 The Section notes that the terms ‘‘trafficking in persons’’ and ‘‘human trafficking’’ are used interchangeably in the literature on this topic.


Based on public comments received and further discussions by the Councils, the Councils then determined to issue a revised interim rule in the Federal Register at 72 Fed. Reg. 46335 (Aug. 17, 2007) (“Revised Interim Rule”) with a further request for public comment by October 16, 2007. This letter responds to that request.

As a preliminary matter, the Section notes that the Revised Interim Rule modifies certain procedural requirements included in the Interim Rule. These modifications include deletion of the requirement to obtain written agreement from employees, deletion of the requirement in FAR Part 22 to monitor employees, replacement of the awareness program with an employee notification requirement, and deletion of the requirement to identify all related U.S. and host country laws and regulations. The Section commends the Councils for these modifications, which are in accord with the mandate of the TVPA and responsive to public comments made to the Interim Rule.

As explained in further detail below, the Section notes that the Revised Interim Rule includes several terms and provisions for which further documentation is needed so that the statutory mandate is implemented without launching unintended consequences deleterious to the interest of the Government.

In particular, the Section recommends that the Councils give further consideration to the following topics:

1) Application of the Revised Interim Rule to commercial item [sub-] contracts

2) Definitions of “employee” and “sex act”

3) Potential for wrongful discharge filings and collective bargaining issues

4) Prohibition of legal commercial sex acts

5) Procedures for processing claims of violations

While the Section has attempted to address these topics fully, the intricacies of the employer-employee relationship, particularly when considered in the specialized venue of government contracting, indicates that an active dialogue and conference between the contractor community and the Councils is needed. The submission of written comments alone constricts the Councils' consideration of the various implications of proposals, which emerge from contemporaneous exchanges with experienced government contracting representatives from industry and the government procurement offices. We urge the Councils to seek such an active dialogue in developing a final rule.
II. COMMENTS

A. Application of the Revised Interim Rule to Commercial Item [Sub]Contracts

The Councils have correctly noted that the statutory language at 22 U.S.C. § 7104(g) (2005) contains no express exception or limitation with regard to its application to federal contracts. Accordingly, although the Interim Rule applied only to contracts for services (other than commercial services), the Revised Interim Rule has been written to apply to all contracts, including contracts for supplies and contracts for commercial items as defined in FAR § 2.101.

The Section encourages the Councils to reconsider expanding the scope of the Revised Interim Rule to all contracts for the following reasons:

1. The FAR need not mirror the statute’s vagueness.

   The Section disagrees that the Councils are compelled to expand the reach of the rule as a result of the absence of limiting language in the TVP Act. It is precisely at the regulatory level where fundamental legal challenges to a statute first arise; an appropriate implementing regulation should attempt to further the Congressional intent by filling in gaps.

2. The proposed language invites unintended consequences.

   Even if the TVPA can reasonably be interpreted as implicating the full range of government contracts (including commercial-off-the-shelf (“COTS”) purchases), the Section nevertheless encourages the Councils to implement a narrower interpretation to compensate for what the Section considers statutory overbreadth. In moving from the Interim Rule to the Revised Interim Rule, the Councils are inviting a host of implementation issues and unintended consequences.

   For example, consider a commercial company, whose sales to the Government comprise only a small percentage (e.g., 2-5 percent) of its total sales, and whose products are COTS items that are manufactured and placed into inventory before any purchase of them is made, and without any knowledge of

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7 The Revised Interim Rule has been written to apply to all contracts with the exception of “noncommercial purchases below the micro-purchase threshold.” 72 Fed. Reg. 46336 (August 17, 2007).
what type of customer will purchase them (commercial or government). Is it reasonable to subject the company to the strictures of the TVPA? Under these circumstances, which employees of the company are “directly engaged” in the performance of a government contract or subcontract? How precisely would the applicable government contract or subcontract be determined? What is the period of performance of the government contract or subcontract during which the prohibitions against “procuring commercial acts” or engaging in “severe forms of trafficking in persons” would apply?

The same issues arise for suppliers (subcontractors) to a commercial company that holds a few government contracts. For example, if only about 2-5 percent of the products the supplier sells to the commercial company become components of end products sold by the commercial company to the Government, and the commercial company issues numerous purchase orders to the supplier for the components, how will the supplier determine (1) which purchase orders were for components of end products sold to the Government, and (2) which of its employees are directly engaged in the performance of a government subcontract and subject to the prohibitions in FAR 52.220-50?

3. The proposed language will create an effect that is inconsistent with the Government’s acquisition goals.

The Section can envision many other problematic scenarios that could arise under the expanded scope in the Revised Interim Rule. Particularly, commercial companies with only tangential or periodic exposure to government contracts might abandon the field rather than assume the business risk of these uncertainties and those that remain may demand higher prices from reduced competition or to cover an increased risk of termination. These potential outcomes arguably contradict the Government’s stated acquisition goals and suggest that the Councils should proceed with caution and craft a solution that takes into account market realities.

As previously noted, the Section is confident that the Councils can develop a better final rule that is more consistent with acquisition goals by working in an expanded and cooperative manner with the contractor community.
B. Definitions of “Sex Act” and “Employee”

1. “Sex Act”

The term “commercial sex act” in FAR 22.1702 is broadly defined to mean “any sex act on account of which anything of value is given to or received by any person.” The term includes both illegal and legal acts and includes acts that are performed during work or outside of work. The term “sex act,” however, is undefined, which makes it difficult to know precisely what is prohibited. For example, the term “sex act” could be broadly interpreted to include providing tips to exotic dancers, paying for a lap dance, paying for a bachelor’s or bachelorette’s party, or even purchasing pornographic materials, or it could be narrowly interpreted to include none of those. There is no clear boundary as to what is and is not a “sex act.” The Section therefore recommends that the Councils define the term “sex act.”

In defining this term, the Section notes that the Councils could adopt one of several existing definitions of “sex act.” For example, the Model Elements of Comprehensive State Legislation to Combat Trafficking in Persons defines that term broadly to mean “any touching of the sexual or other intimate parts of another person for the purpose of gratifying sexual desire of any person. It includes touching of the actor as well as touching by the actor, whether directly or through clothing.”

By contrast, federal child exploitation statutes apply a narrower definition of “sexual act”:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to

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8 The Model is compiled from numerous sources, including the TVPA, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (Public Law No. 108-21), the Department of State’s 2003 Model Anti-Trafficking Law, the Department of Justice’s 2004 Model State Anti-Trafficking Criminal Statute, and current and proposed state statutes related to combating human trafficking.
abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;


2. “Employee”

The term “employee” is defined in FAR 52.222-50 to mean “an employee of the Contractor directly engaged in the performance of work under the contract who has more than a minimal impact or involvement in contract performance.” The Section believes that the terms “directly engaged” and “minimal impact or involvement” are unclear and should be defined to avoid contractor and contracting officer confusion.

For example, without a definition of “directly engaged” it is unclear whether employees who perform overhead or support type functions related to the contract are included as “employees” for TVPA purposes. Are employees who perform work relating to the contract in the legal, security, contract administration, or sourcing departments potentially included in the definition of “employee”? If so, what factors should the commercial company use to make this determination? Are any employees who work in the company’s home office and who perform work related to the contract potentially included in the definition of “employee”? Or does the definition of “employee” only include those employees who work in the division that holds the contract and who are performing work clearly related to the contract?

In defining these terms, the Section suggests that the Councils reference the Drug-Free Workplace Act, which includes a similar definition of “employee” but also includes a definition of “directly engaged.” Moreover, the Department of Labor has a series of Q&As on the Drug-Free Workplace requirements on its website, including the following pertinent Q&A on the definition of “employee”:

Q: Are all employees of a grantee covered if only a few of the grantee’s several divisions are involved with the grant?

A: Persons on the grantee’s payroll who work on any activity under the grant are covered. This includes both “direct charge” (i.e., those whose services are directly and explicitly paid for from grant funds) and “indirect charge” (i.e., those persons who perform support or overhead functions related to the grant and for which the Federal agency pays its share of expenses under the grant program) employees. If a grantee has four operating divisions and a headquarters unit, and one division receives a Federal grant, then the employees of the one division receiving the grant who are directly engaged in the performance of work under the grant are covered, as are headquarters employees who support the division’s operations. However, these rules in no way preclude a grantee from electing to cover employees of other divisions.

Another definition of “employee” appropriate in the context of the Revised Interim Rule appears in FAR 23.503, which implements the Drug-Free Workplace Act: “employee” means an employee of a contractor directly engaged in the performance of work under a Government contract. “Directly engaged” is defined to include all direct cost employees and any other contract employee who has other than a minimal impact or involvement in contract performance.

If the Councils still believe the Revised Interim Rule must be applied to COTS items, the Section recommends that the definition of “employee” be revised to read as follows to address COTS items:

"22.1702 Definitions

Employee means an employee...in contract performance. An employee who is engaged in producing commercial items as defined in FAR 2.101 that (1) are sold in substantial quantities in the commercial marketplace and are offered to the Government, without modification, in the same form in which they are sold in the commercial marketplace, and (2) at the time of production of the commercial items, such items have not been identified to a Government contract, is not directly engaged in the performance of work under the contract."
The above definition of “employee” includes the definition of a COTS item in 41 U.S.C. 431 and would exclude many employees of commercial companies who are involved in the manufacture and sale of COTS items to the Government. This would address the previously described situation where a commercial company’s sales to the Government comprise only a small percentage (e.g., 2-5 percent) of its total sales, and whose products are COTS items that are manufactured and placed into inventory before any purchase of them is made, and without any knowledge of what type of customer will purchase them (commercial or Government).

C. Potential For Wrongful Discharge Filings and Collective Bargaining Issues

There is a potential for wrongful discharge litigation by employees against companies over conduct proscribed by the Revised Interim Rule. Litigation costs, including attorneys fees, may be allocable and allowable on cost reimbursement contracts where the contractor prevails. Thus, the Revised Interim Rule potentially raises the Government’s acquisition costs.

There is also a potential for inconsistent court decisions. In the situation where a contracting officer terminates a contract for default because of a contractor employee’s behavior (e.g., a liaison with a prostitute), a contractor would appeal to a board of contract appeals or the U.S. Court of Federal Claims (COFC). By contrast, the individual employee might file a wrongful discharge action in state or federal court or before a state or federal labor board. It is possible that a Board or the COFC would uphold the default termination because of employee misconduct even though a court or labor board determines that the contractor wrongfully discharged the employee. It would be unfair for contractors to be whipsawed by such inconsistent decisions.

In addition, the requirements of FAR 52.222-50 may have unintended consequences with respect to contractors’ collective bargaining agreements. For example, because the requirements of FAR 52.222-50 apply to both legal and illegal acts, acts performed during work or outside of work, and because a union employee who is directly engaged in the performance of work on a government contract may be disciplined or terminated for violating the prohibitions in FAR 52.222-50, the requirements of FAR 52.222-50 may compel major changes in labor-management agreements. The Revised Interim Rule could force all federal contractors to immediately renegotiate existing labor-management agreements to prohibit commercial sex acts outside of work whenever union employees are working under a government contract or subcontract.
D. Prohibition of Legal Commercial Sex Acts

The Section recommends that the Councils carefully consider the enforcement issues that may arise in addressing commercial sex acts that are legal in particular jurisdictions, but that may potentially result in contract revocation under the Revised Interim Rule. While the Administration wishes to generally adopt a “zero-tolerance policy” towards “commercial sex acts,” the Section believes that this aspect of the Revised Interim Rule is overbroad for the following reasons:

1. The proposed language encompasses activity beyond illegal human trafficking.

The Revised Interim Rule does not rely upon a federal statute that criminalizes commercial sex acts; there is no such federal law. As currently written, commercial companies face severe penalties if any one employee – even in non-working hours – engages in any variety of commercial sex acts that are not legally proscribed, either domestically or under foreign laws. The Revised Interim Rule would therefore penalize contractors for activities beyond illegal human trafficking.

2. The rule embraces an unlimited theory of respondeat superior.

Although the Revised Interim Rule limits its chronological reach of “the period of contract performance,” it does not place any reasonable bounds on the extent to which commercial companies are expected to control and monitor the behavior of their employees. Indeed, the Revised Interim Rule adopts a limitless notion of respondeat superior. The Revised Interim Rule would hold contractors responsible for the activities of their employees (and subcontractors’ employees) around the clock, during work and non-work hours. The Councils’ response to earlier public comment to the Interim Rule defended the rule’s breadth in this area by asserting that private contractors are often perceived as representing the Government and that employee violations are more likely to occur after working hours. This response appears unpersuasive in light of the sweeping monitoring, expense, and intrusion upon employee privacy required to comply with the Revised Interim Rule.

The Revised Interim Rule is also unclear as to a contractor’s responsibility to investigate and report rumors or suspicion of trafficking. For example, if a company learns that one of its employees may be involved in the procurement of commercial sex acts outside of work (e.g., if the company reads an article in a newspaper about a sauna being raided for alleged prostitution where the article mentions that one of the patrons works at the company but the article does not include the patron’s name), is there a requirement for the company to investigate the incident to determine the name of the company employee who was involved and whether he or she was working on a government contract or subcontract at the time of the incident? Do employees have an obligation under FAR 52.222-50 to report to the company alleged violations by a co-worker of the prohibitions under FAR 52.222-50?

E. Procedures for Processing Claims of Violations

The Section believes that the Revised Interim Rule should be refined to include specific procedures governing the investigation and punishment of contractors for rule violations. The Section encourages the Councils to provide a more developed framework, more detailed guidance, or even a decision-tree, for contracting officers attempting to apply the rule. The lack of such structure in the current rule raises several concerns:

1. The Section is concerned that companies receive a measure of due process before adverse contract action is taken.

There are due process concerns regarding how contracting officers will establish that a company or an employee has engaged in prohibited acts. The Revised Interim Rule does not require a conviction of a contract employee for engaging in commercial sex acts. Indeed, it is not clear at all what amount of evidence the contracting officer must collect before taking adverse action against a company. Would an anonymous phone call to an agency official suffice? The Revised Interim Rule also does not contemplate an opportunity for the company to challenge the contracting officer’s determination in advance of an adverse contract action. It does not require agencies to make findings, and it does not assign the burden of proof, yet it burdens contracting officers with enforcement. The lack of clear procedures could result in an agency decision to terminate a contract before the contractor has been able to verify and address an alleged violation of the rule. The financial consequences to the contractor, and the damage to its reputation from unfounded accusations of trafficking, could be grave. The Councils should consider adding measures to ensure that contractors receive a measure of due process before adverse contract action is taken under the rule.
2. The Section believes that the rule creates uncertainty for government agencies and agency officials.

The Revised Interim Rule creates uncertainty for the agency administering the contract. Consider the case of an agency that decides not to exercise its power to terminate a contract. If the responsible agency personnel knew that a contractor was engaging in human trafficking, but retained the contract, would the government employees be liable? Is the agency ever required to terminate a contractor? The Revised Interim Rule does not address this issue. In short, the Revised Interim Rule’s vagueness makes it ripe for arbitrary enforcement.

The Revised Interim Rule also lacks a designated statute of limitations. Agency staff could choose to ignore reports of a contractor’s liaison with a prostitute on one occasion, but their successors could decide to punish the contractor. Moreover, an unscrupulous contracting officer could use evidence of a trafficking violation as a pretext to demand that the contractor make unwarranted concessions or agree to perform extra-contractual work to avoid termination. The contractor should have the ability to counter that situation should it arise.

Finally, an unscrupulous offeror could potentially sabotage an on-going solicitation by alleging, either overtly or covertly, that a competitor for contract award either has engaged or is engaging in trafficking. The Revised Interim Rule provides no guidance for a contracting officer to investigate and resolve such an allegation, and the contracting officer would certainly risk a protest if an award were ultimately made to either offeror.

3. The Section believes that the rule should limit the remedies available to contracting officers.

The Section believes that the Councils should consider restricting the remedies available to the contracting officer. In particular, the Councils should consider applying the most severe actions, including termination, suspension, and debarment, to contractors that willfully fail to report violations by employees or “severe” misconduct. A reasonable concern of contractors trying to abide by the rule – given the practical impossibility of guaranteeing total compliance – is that a random employee will engage in a prohibited act and discuss the incident with co-workers, but never disclose it to management, thereby subjecting the employer to severe penalties. Requiring a willfulness element before imposing harsh penalties
should help address that concern. Contracting officers should be directed not to \textit{debar} a contractor while an investigation of severe misconduct is on-going.\footnote{A suspension pending the outcome of the investigation may be an appropriate remedy where very serious violations have been alleged but are the subject of an on-going investigation.}

\section{CONCLUSION}

The Section strongly supports the TVPA and its plan to combat trafficking in persons, to ensure just and effective punishment of traffickers, and to protect their victims. The Revised Interim Rule has effectively addressed many concerns, but implementation issues remain, such as the extension of the rule to all contracts (including those for commercial items), the permissible reach of the rule into activity deemed legal, and the absence of procedural protections for contractors accused of human trafficking.

The Section encourages the Councils to seek an active dialogue with the contractor community (and not to rely upon the submission of written comments) and to work in a cooperative manner with the contractor community 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,

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