

October 16, 2007

General Services Administration
Regulatory Secretariat (VIR)
1800 F Street, NW, Room 4035
Washington, DC 20405
Attn: Laurieanne Duarte

**RE: FAC 2005-19, FAR Case 2005-012: Federal Acquisition Regulation:
Combating Trafficking in Persons (Revised Interim Rule)**

Dear Ms. Duarte:

Please accept these comments on the revised interim FAR rule targeting trafficking in persons.¹

Congress passed the contractor-accountability provisions of the Trafficking in Victims Protection Reauthorization Act of 2005² in response to press accounts and credible research linking trafficking in persons for forced labor and forced prostitution to U.S. contractors, their subcontractors, and agents. Those allegations, extensively documented by The Chicago Tribune, The Washington Post, CSIS, and Human Rights Watch, gave rise to a broad-based consensus among lawmakers that contractors must be held accountable for involvement in human trafficking.

The underlying purpose of this interim FAR rule is to implement NSPD-22, and 22 U.S.C. 7104(g), the provision enacted to operationalize contractor accountability. But this version, the most recent in a string of interim rules, largely eviscerates the regulation. The interim rule does little to ensure that contractor employees who do engage in trafficking will not simply enjoy the same impunity that their status has always afforded them in the past.

As an anti-trafficking expert and scholar, my work focuses on links between Department of Defense (DOD) contractors and human trafficking in conflict and post-conflict zones. As a senior fellow at the Center for Strategic and International Studies and now the director of the CSIS Human Rights and Security Initiative, I have spearheaded efforts to investigate allegations of human trafficking for forced labor on U.S. military bases abroad. My report, Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans, published in February 2005, documents the Department of Defense's efforts to implement the "zero tolerance" policy. I have testified before the House Armed Services Committee and the Helsinki Commission concerning the links between human trafficking and peacekeeping.

¹ Federal Register Vol. 72, No. 159: FAC 2005-19; FAR Case 2005-012; Item V; Docket 2006-0020; Sequence 1 (August 17, 2007), referencing Federal Acquisition Regulation Supplement Subpart 22.17 – Combating Trafficking in Persons (August 17, 2007).

² Trafficking Victims Protection Reauthorization Act, H.R. 972 (December 21, 2005).

General Comments on the Revised Rule

The most recent version of the interim rule can only be described as a rollback of the initial FAR and DFARS interim rules. I previously provided comments on DFARS Subpart 222.17 on January 26, 2007, and on DFARS Clause 252.222-7006, then identified as DFARS Clause 252.225-70XX, on August 22, 2005. While my comments on these two interim rules were certainly critical, I had advocated that the rule be strengthened to end impunity for trafficking by contractors. Instead, the most recent revisions have weakened the rule substantially.

NSPD-22 requires that the U.S. government “hold accountable those engaged in [trafficking].” The record is clear: despite credible allegations of trafficking, the U.S. Government has not prosecuted a single contractor for trafficking. My own research has shown that the key factor driving this lack of accountability has been the utter ineffectiveness of investigations into trafficking allegations in the field. The recent revisions to this FAR rule only reinforce my concern that the regulation will fail as an effective tool to achieve accountability. To the contrary, this revised rule does little to facilitate prosecutions of contractors, subcontractors, or their employees who engage in human trafficking.

I do welcome the extension of the anti-trafficking rule to all U.S. government contracts. But not even that expansion in the regulation’s sweep can compensate for the elimination of meaningful provisions that might have deterred participation or facilitated prosecution of suspects. I respectfully submit these comments with the objective of enhancing the regulations, with an eye on ultimately eliminating trafficking and trafficking-related criminal activity by contractors.

Specific Recommendations

The recommendations fall into the following categories:

- 1) Reinsertion of requirements to:
 - a) Establish policies and procedures to combat human trafficking;
 - b) Develop an awareness program for employees; and
 - c) Obtain written notification of understanding of said policies and procedures from employees
- 2) Clarification of definitions, specifically “forced labor”
- 3) Creation of measures to prevent the hiring of those accused of human trafficking offenses by other contractors for deployment abroad
- 4) Facilitation of investigations and prosecutions of human trafficking allegations
- 5) Strengthening the distinction between solicitation and procurement of commercial sex acts and trafficking abuses.

1) Reinsertion of requirements

The elimination of the mandate that U.S. contractors establish anti-trafficking procedures and policies eviscerates the rule. Basic notification to employees of U.S. policy on this matter effectively eliminates any proactive burden on the part of contractors.

NSPD-22 demands the creation of more exacting standards: “The Administration policy includes the use of law enforcement tools, prevention efforts, and victim protection and assistance.” This language requires more than the mere awareness efforts mandated by the interim rule.

As such, we recommend the insertion of more explicit requirements, similar to those found in the original December 15, 2004 DFARS interim rule: “Require contractors to develop policy and procedures that prohibit any activities on the part of contractor employees that support or promote severe forms of trafficking in persons, procurement of commercial sex acts, or the use of forced labor.”³ Earlier versions of the FAR and DFARS clauses included such language; I simply urge its reinsertion.

2) Explicit definition of terms

The current FAR version references several terms, but does not fully define them, leaving both contractors and contractor employees at a loss to interpret the policy and contract clause. Specifically, FAR Subpart 22.1703 makes reference to “forced labor,” but never fully defines the term. Language derived from 18 U.S.C. § 1589,⁴ the criminal statute on forced labor, should be added to the definitions section:

This would then read:

22.1702 Definitions.

Forced labor means knowingly providing or obtaining the labor or services of a person:

- (1) by threats of serious harm to, or physical restraint against, that person or another person;
- (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
- (3) by means of the abuse or threatened abuse of law or the legal process.

3) Facilitation of investigations and prosecutions

It is my understanding that the current DFARS interim rule is to be phased out, and replaced with this FAR clause. If that is indeed the case, much will be lost. The DFARS rule mandates

³ Federal Register Vol. 69, No. 240: Defense Federal Acquisition Regulation Supplement; Combating Trafficking in Persons (DFARS Case 2003-D107) (December 15, 2004).

⁴ 18 U.S.C. 1589: Forced Labor.

reporting trafficking allegations to the Combatant Commander,⁵ an important step in ending impunity and launching effective investigations. The loss of the reporting requirements of the DFARS rule will allow many allegations of trafficking abuses to fall through the cracks. The current rule does call for immediate notification of the Contracting Officer, but it is unclear whether that individual will wield sufficient power to prevent what is now the norm: immediate repatriation back to the United States, and a complete lack of accountability.

In order to combat the status quo, I would suggest the inclusion of a hotline, similar to the one described elsewhere in the DFARS.⁶ Such an anti-trafficking hotline would serve as a collection point for allegations of trafficking, thereby bolstering accountability. Linking this hotline directly to the Department of Justice would further allow contractor employees to report trafficking allegations without fear of reprisal. For such an effort to succeed, the international toll-free number would have to be posted (with instructions translated in the appropriate languages) throughout workers' living quarters or in public areas. Contractors and their subcontractors should be required to advertise the hotline, and to post information on the job-site.

4) Prevention of rehiring employees accused of human trafficking offenses

The language in the interim FAR rule only addresses the termination of a current contract; it does not reach hiring of individual employees. While 10 U.S.C. § 2408⁷ addresses rehiring individuals convicted of felonies related to defense contracts, it leaves a gaping hole, currently unaddressed. The scope of 10 U.S.C. § 2408, which applies *only* to those “convicted of fraud or any other felony arising out of a contract with the Department of Defense,” is insufficient in the light of the U.S. Government’s record of zero prosecutions. Contractor employees suspected of trafficking-related offenses can simply return to the United States and sign on to another contract.

The language regarding violations is vague, covering those who “engage” in trafficking. Subpart 22.1704 (a)(1). The rule does not describe what would be considered as “adequate evidence” to suspect a violation; nor does the rule provide guidance on how those found to have “engaged” in trafficking will be prevented from signing on with another contractor to return to the field. While this raises obvious due process issues, the complete lack of prosecutions requires the use of some stop-gap measure until the U.S. government begins to tackle the investigation and prosecution issue seriously. Contractors and their subs should ask applicants and their references whether the individual has ever been disciplined, permitted to resign, or terminated for cause relating to trafficking.

5) Distinguish between the procurement of commercial sex acts and trafficking abuses

⁵ DFARS 22.1704-70: “If the contracting officer receives information indicating that the contractor or its subcontractors have failed to comply . . . the contracting officer shall, through the contracting officer's local commander or other designated representative, immediately notify the Combatant Commander responsible for the geographical area in which the incident has occurred.”

⁶ DFARS Subpart 203.7001(3): “A mechanism, such as a hotline, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.” Available at http://farsite.hill.af.mil/reghtml/regs/far2afmcfars/fardfars/dfars/dfars203.htm#P178_6013.(accessed on August 30, 2007).

⁷ 10 U.S.C. § 2408 (Fed. Reg. at 62562).

Trafficking in persons and the procurement of a commercial sex act fall into two distinct legal categories: trafficking in persons is a felony under U.S. federal law (18 U.S.C. § 1590); procurement of a commercial sex act is not covered by federal law and is treated in most states as a misdemeanor, unless it involves a child. By failing to distinguish between federal felonies and those acts not punishable under federal law, the FAR provision becomes difficult to implement, thereby hindering the actual purpose of the regulation: the eradication of trafficking. This lack of differentiation heightens confusion between commercial sex acts and trafficking.

Thank you for the opportunity to comment on this interim rule.

Sincerely yours,

A handwritten signature in black ink, appearing to read "S. E. Mendelson", with a long horizontal flourish extending to the right.

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