

Acquisition Councils Broadly Define Human Trafficking Prohibited Recruitment Fees: A Good Time for a Compliance Program Check-up

February 2019

The Trafficking in Persons (TIP) regulations recently celebrated their fourth birthday. When the Civilian and Defense Acquisition Councils (Councils) published them as final rules in January 2015, the TIP regulations attracted widespread attention and launched myriad compliance program upgrades for Government contractors. (See our *previous article on the topic*). While most sophisticated Government contractors now have put in place TIP procedures, a recent change to the definition of prohibited “recruitment fees” requires them to revisit those practices to assure continued compliance.

Allegations of human trafficking violations can blot a contractor’s reputation. The media are much more likely to report on any allegation including the words “human trafficking” than they are to cover, for example, disputes about cost or pricing data. Additionally, with their requirements for due diligence and certifications, the TIP regulations create a risk under the False Claims Act, as well as contractual and administrative remedies for violations, which include debarment. With the December 20, 2018 publication of a final rule “clarifying” (or perhaps broadening) the scope of the prohibition against charging recruitment fees to employees, contractors should not only make appropriate changes, they should also take stock of how well their overall TIP compliance programs are running.

Prohibited Recruitment Fees

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The prohibition against charging recruitment fees to employees is designed to protect vulnerable persons in high-risk environments from being forced to incur significant debt to the employer at the start of the relationship. The reasoning for the prohibition is that such debt may skew the balance of power against the employee, thereby setting the stage for abuse and coercion based on debt bondage. Even before the 2015 TIP regulations went final, the Government Accountability (GAO) recognized that the rule was ambiguous and recommended developing “a more precise definition of recruitment fees.” The December 2018 changes amends the definition of recruitment fee in FAR 22.1702 to respond to the GAO recommendation with a broad new definition:

Recruitment fees means *fees of any type*, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, *regardless of the time, manner, or location* of imposition or collection of the fee.

For the first time, the rule will include specific types of prohibited recruitment fees. Recruitment fees can be improper regardless of whether the payment is in cash, property, deducted from wages, through wage concessions, or as a “kickback, bribe, in-kind payment, free labor, tip or tribute.” Recruitment fees can be improper regardless of who does the collecting, including “an employer or a third party.”

The apparent common element for all prohibited fees is that they cannot be charged if they are “associated with the recruiting process.” When this amorphous principle combines with the unlimited time, manner and place element of the recruitment fee definition, the takeaway for contractors is to carefully examine any demands for money or things of value from your employees.

Certifications and Disclosure

Although the new definitions provide more clarity about what types of fees are prohibited, they do not change the expansive certifications and disclosure obligations in the regulations. The regulations require certifications, both before contract award and annually during performance, that the contractor has implemented a compliance plan and procedures to prevent activities prohibited by the TIP regulations and to monitor, detect, and terminate contracts with any subcontractors or agents engaging in such activities. Additionally, the contractor must certify, after engaging in due diligence, that either (i) to the best of its knowledge and belief, neither it nor any of its agents or subcontractors (or their agents) has engaged in such activities; or (ii) that it has found and appropriately remedied and referred such activities. Subcontractors must provide similar certifications.

If a contractor discovers prohibited trafficking activities, the regulations require disclosure to the contracting officer and Inspector General of information sufficient to identify the nature and extent of an offense and the individuals responsible for the conduct. Contractors must also cooperate with any government investigations and protect any employees suspected of being victims or witnesses.

As with any certification requirement, the trafficking regulations create a risk of False Claims Act liability if the certification turns out to be false—even if there was no specific intent to defraud the government. However, because these certifications extend beyond the company to include the conduct of its subcontractors and agents, they are especially high risk. And with the disclosure obligations for any discoveries of violations, there is an increased likelihood of a government investigation if violations do occur.

Compliance Program Check-up

The approach evidenced in this change strongly suggests that the TIP rules are an important enforcement priority, and that any serious violations may drive severe penalties. For TIP violations, that risk is higher because the prime contractor has to certify compliance for actors over whom they may have less ability to control. Add to this the fact that the greatest compliance risks often arise for projects heavily staffed by third-country nationals and executed overseas, thousands of miles from senior management oversight. It's an enormous compliance risk but this rulemaking notice provides contractors a timely reminder to see how their TIP programs are doing. Here are some questions to ask:

- **Compliance begins at home.** How well do key managers and support personnel (e.g., HR, legal, payroll) know the program? Do appropriate personnel receive refresher training; are new personnel properly trained? Is TIP compliance a well-known and ongoing senior management priority?
- **Change is inevitable.** Has compliance risk changed: does the company perform more work in higher-risk contracts/projects/geographical areas? Is the company more dependent on outside staffing support from foreign entities?
- **All systems go.** Are systems for detecting compliance risks and violations working well? Is the due diligence process documented? Have allegations related to TIP regulations been promptly and properly investigated and, if necessary, reported? Has the company adequately applied any lessons learned over time? Are the company's annual certifications up to date? Are all required hotline posters displayed?
- **Policing others.** How well do we know the entities that recruit for the company? Has the company flowed down required provisions to all levels? Has the company received certifications from all of its subcontractors and agents? Has the company reviewed the compliance programs and policies of its external recruiters?

These questions are a starting point for assessing internal TIP compliance controls. For more information or assistance implementing TIP policies, please contact one of the authors listed on this article.