



December 20, 2013

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

Subject: FAR Case 2013-001

Dear Ms. Flowers:

The Project On Government Oversight (POGO) provides the following public comment to FAR Case 2013-001, “Ending Trafficking in Persons,” 78 Fed. Reg. 59317 (September 26, 2013). Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO’s investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. POGO has a keen interest in government contracting matters, especially those relating to the promulgation of federal acquisition regulations.

POGO supports the Federal Acquisition Regulatory Council’s (Council) proposed rule to end trafficking in persons (TIP). It incorporates many of the strongest provisions from Executive Order (EO) 13627, “Strengthening Protections Against Trafficking In Persons In Federal Contracts,” and Title XVII of the National Defense Authorization Act, Public Law 112–239, the “End Trafficking In Government Contracting” Act (ETGCA). However, there are a few provisions in the proposed rule that require clarification or modification to truly uphold a zero-tolerance policy against human trafficking in the contractor labor supply chain. As the largest single purchaser of goods and services in the world, the U.S. government bears a responsibility to ensure that taxpayer dollars do not contribute to any form of this criminal behavior.

POGO provides comment on the following sections of the Federal Register notice and proposed rule:

Discussion and Analysis

This section should include a discussion of alternatives and best practices that strengthen accountability for prime and subcontractors that commit TIP infractions at any point in the recruitment and employment process. The FAR Council should urge contractors to directly hire employees, limit subcontracting, avoid unlicensed recruiters, and create a paper trail ensuring compliance with TIP provisions.

Part 9—Contractor Qualifications

POGO supports the addition of FAR Subpart 9.104-6(e), requiring contracting officers to include substantiated TIP allegations in the Federal Awardee Performance and Integrity Information System (FAPIS). POGO has long advocated for additional contractor responsibility instances to be added to FAPIS to ensure the government does not do business with risky contractors.¹

Part 12—Acquisition of Commercial Items

Currently, there is no requirement for a contractor TIP compliance plan or certification if the supplies to be furnished outside the United States involve solely commercially available off-the-shelf (COTS) items. The FAR Council should eliminate the exemption for COTS items. Most work performed in Iraq and Afghanistan, including logistics support, base construction and operations, and security services, could be categorized as COTS pursuant to the broad definition in FAR Part 2.101. If the COTS exemption remains, the TIP provisions will be rendered useless. This exemption applies to provisions throughout the proposed rule and must be removed.

The proposed clause at FAR Subpart 12.301(d)(4) should require that certification of contractor compliance plans be included in the government's Online Representations and Certifications Application (ORCA) Database, which has been integrated in the System for Award Management (SAM). These systems provide convenient access to contractor data and information, which benefits the contractors and contracting officers. TIP data must be included in those systems so that TIP is part of contractor responsibility determinations made prior to contract award.

Part 22—Application of Labor Laws to Government Acquisitions

The Council's proposal to prohibit "charging employees recruitment fees" is a great step forward in eliminating TIP. The Council should consider expanding the scope of those fees to include travel, training, hiring, administrative, handling, or any other types of fees assessed against the worker. Loan sharks, recruiters, and contractors at all tiers will find new ways to financially enslave and exploit workers if any and all fees are not prohibited.

Subpart 22.1703(e) requires that contractors and subcontractors "cooperate fully" with government officials during a TIP audit, investigation, or other action to ascertain compliance with the Trafficking Victims Protection Act. The provision further states that:

Contractors shall protect and interview all employees suspected of being victims of or witnesses to prohibited activities, prior to returning to their country of origin, and shall not prevent or hinder the ability of these employees from cooperating fully with government authorities.

The FAR Council should clarify that this provision applies to contractors as well as subcontractors. Additionally, the FAR Council should ensure that the provision includes a

¹ POGO Letter to the Office of Federal Procurement Policy, "POGO Suggests Way to Improve Federal Contractor Accountability Database," September 17, 2012. <http://www.pogo.org/our-work/letters/2012/20120917-pogo-suggests-way-to-improve-federal-contractor-accountability.html>

requirement to keep potential TIP victims and witnesses in the area and make them accessible to government investigators. As written, it is possible for victims to be flown to their home country without the victim knowing his or her rights to talk to government authorities. This requirement also will help prevent contractors from shuffling around third country nationals (TCNs) in order to hinder government trafficking investigations.

In light of the proposed requirement in Subpart 22.1703(e), the FAR Council should integrate TIP reporting requirements into the current mandatory disclosure rule governed by FAR Subparts 3.1003(a) and (b) and 52.203-13. The FAR Council should expressly state that the fraudulent hiring of labor constitutes “a violation of Federal criminal law involving fraud, conflict of interest, bribery, gratuity, or trafficking in persons violations found in Title 18 of the United States Code.” Integrating those provisions will require reporting to the Inspector General (IG) of the respective agency, as required by the EO and the ETGCA, as well as the contracting officer, thereby ensuring that the proper authorities are on notice and TIP allegations will not be ignored.

Including trafficking under the mandatory disclosure rule will also provide government “access to employees with information” pursuant to FAR Subpart 52.203(a). Such a change will ensure that the proper authorities are notified and will better protect victims who are often removed from government installations or sent back to their home country prior to the opening of a government investigation.

Part 52—Solicitation Provisions and Contract Clauses

52.222-50 Combating Trafficking in Persons

Many of the above corrections will require changes in the draft sections mentioned above as well as at the contracting clause at 52.222-50. For example, the COTS exemption and changes to the victim and witness accessibility rules need to be updated in FAR Parts 12 and 22, and carry over to Part 52.

In addition, the proposed rule should clarify the standards by which contracting officers impose remedies and report allegations to the agency IG and suspension and debarment official, as well as a contractor’s responsibility to inform the contracting officer and the agency IG. The proposed rule uses the terms “adequate evidence,” “credible violations,” and “credible information,” which, without clearer definitions and guidance, might cause confusion among those with a duty to notify—a problem that plagued the early implementation of the mandatory disclosure rule.² In that instance, the FAR Council settled on the “credible evidence” standard of notification as defined in FAR Subpart 3.1003(a)(2). Credible evidence should be the standard that applies for the TIP rule. Such a change will allow for easy amendment of the mandatory disclosure rule, which should include TIP notifications at FAR Subpart 3.1003.

²Andy Liu and Gunjan Talati, *The FAR Mandatory Disclosure Rules—You Do Not Have the Right to Remain Silent*, 2009, pp. 6-8. <http://www.crowell.com/documents/The-FAR-Mandator-Disclosure-Rules.pdf> (Downloaded December 20, 2013)

The proposed rule should also contain a provision at 52.222-50(e) which advises that filing a false certification or other TIP record could constitute a false claim under 31 USC §3729, and thereby trigger the False Claims Act. With the newly added criminal violation (18 U.S.C. § 1351), linking the TIP provision mandatory disclosure and the False Claims act would prompt compliance and ensure timely TIP disclosures and cooperation from all within the labor supply chain.

Subpart 52.222-50(h)(3)(iii) should also be amended to require that “licensed recruiters” be used by contractors, and to stipulate that no agents or subagents of those recruiters may be utilized. The proposed rule only requires that “trained” recruiters be used, which does not go far enough to prevent TIP. Trafficking starts with the recruiters, and the proposed rule should be strengthened to get to the heart of the problem.

Enforcement

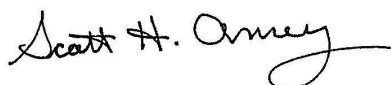
For the TIP rule to be effective, government agencies must have the ability to look at contractors and subcontractors at the pre- and post-award stages. Requiring TIP compliance plans and annual certifications will facilitate improvements, and requiring that all TIP victims and witnesses be interviewed by government investigators will ensure that allegations are not swept under the rug by contractors. More can be done, however, including government-wide requirements to audit contractor TIP compliance and randomly conducted, unannounced interviews with workers to ensure that TIP violations are not occurring. These interviews must involve detailed questioning to guarantee that all aspects of the rule are being followed. Inquiries about the recruiting process, financial arrangements, promises made to workers, and TIP training and compliance must be asked and answered.

The FAR Council should also implement a requirement to create and distribute documentation up the labor supply chain. Documents should include all recruiting papers, signed recruiting and employment contracts, posters and training materials, victim and witness statements, and other related materials. This will help prime contractors better understand their labor supply chain and ensure that corrections can be made prior to a TIP violation.

Implementing the above changes will improve notice provisions, contractor anti-trafficking programs, contractor and victim cooperation with federal investigations, and enforcement, and will ensure that the government’s zero-tolerance policy is successful in the U.S. and abroad.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink that reads "Scott H. Amey". The signature is written in a cursive style with a long, sweeping underline.

Scott H. Amey
General Counsel