

It's Not Just About Prostitution

FAR Compliance and Human Trafficking



So long as they're not confiscated... Photo: Stock

THE U.S. government, NATO and the United Nations all have adopted “zero tolerance” policies on human trafficking. The full impact of the U.S. policy hit home in January, when the outgoing Bush Administration issued a final regulation on “combating trafficking in persons.” Many in the government contractor community reacted with dismay.

The objection? Federal Acquisition Regulation (FAR) Subpart 22.17 mandates that all government contractors police — or at least punish — their employees’ and subcontractors’ behavior outside of the workplace. The regulation requires contractors to discipline any employee found to have: 1.) engaged in a “severe form of trafficking”; 2.) procured a commercial sex act; or 3.) used forced labor in the performance of the contract.

Contractors learning of allegations — from any source — must report the violation to the contracting officer. Failure to comply can trigger a host of

consequences, including termination for default, suspension of contract payments, loss of award fee and debarment. The clause flows down to all subcontractors.

Perhaps unsurprisingly, the contractor community’s attention has focused on the unprecedented implications of the commercial sex provision. But the fixation on sex trafficking masks the more salient risk: forced labor.

Trafficking for Forced Labor

The Trafficking Victims Protection Act of 2000 defines a “severe form of trafficking in persons” as:

1. *recruitment, harboring, transporting, provisioning, or obtaining a person for the purpose of a commercial sex act, where the act is: a) induced through force, fraud, or coercion; or b) where the person performing the act has not attained 18 years of age; or*
2. *recruitment, harboring, transporting, provision, or obtaining a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.*

Liability for forced labor under the FAR rule is double-barreled: it covers an employee who enslaves a domestic worker in his or her home during the period of performance of the contract, as well as an employee who uses forced labor in the performance of the contract itself.

Sound like something that contractors need not worry about? Think again. Many of the civil trafficking cases brought in federal courts stem from forced labor allegations asserted by domestic workers. And the *only* federal human trafficking case relating to U.S. government contractors, filed in August 2008, demands civil damages for alleged forced labor on U.S. military bases in Iraq.

Indeed, while the contractor community and much of the legal press has fixated on the potential for employee weekend jaunts to Nevada’s legalized brothels, the U.S. military contracting command has focused almost exclusively on forced labor. So, too, have U.S. prosecutors, who, according to *The Wall Street Journal*, ► 18

17 ◀ exercised some of their vast extraterritorial jurisdiction in this area to investigate allegations of human trafficking lodged against a Kuwaiti company operating in Baghdad.

The incidence of trafficking in Iraq became widely known only after an investigative reporter, Cam Simpson, published a prize-winning series in *The Chicago Tribune* investigated in 2005 documenting the alleged trafficking of twelve Nepali men to Iraq for work on U.S. military bases. The men, who had paid exorbitant fees to labor brokers, apparently believed that they would be employed in Jordan in luxury hotels. Insurgents executed all

has reported almost exclusively on trafficking into the sex sector. And the U.S. government has long conflated trafficking in persons with prostitution. The regulations now applicable to all government contractors carry on this tradition.

U.S. contractors, disturbed by the breadth of the draft regulation, fired off lengthy comments to the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council. The Councils answered the critics on August 17, 2007, and again on January 15, 2009:

- To those who suggested that the

behavior that carries penalties.” In short, “the government seeks to ensure that contractor employees who traffic in persons or procure commercial sex acts do not work on government contracts,” the councils declared.

The Rest of the Story

The FAR clause merely implements the requirements of the Trafficking Victims Protection Reauthorization Acts of 2003 and 2005. These statutes dictate the FAR provision’s content.

Congress passed these sweeping laws in response to allegations of egregious

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twelve on the road to Baghdad, prompting riots in Nepal and a Department of Defense investigation in Iraq.

Gen. Casey, then Commanding General of Multi-National Forces-Iraq, issued an anti-trafficking fragmentary order (FRAGO) in 2006. The order requires all contractors to return passports to employees and provide employees with signed employment contracts, forbids the use of unlicensed recruiting firms, sets minimum standards for living conditions, and institutes random checks to “aggressively address areas of non-compliance.” The FRAGO mentioned neither forced prostitution nor the sex industry.

Conflating Prostitution

Contractors can be forgiven for their myopic focus on prostitution. With a few notable exceptions, the U.S. press

regulation apply only to employee behavior at work, the Councils responded that such an approach “would inadequately implement the statute since employee violations are more likely to occur after working hours.”

- To critics who noted that the employee provisions raised collective bargaining issues, the Councils responded that contractors should update their employment contracts to reflect the anti-trafficking statutory and regulatory requirements.

- To those who sought to remind the government that prostitution is legal in some foreign countries and even in several U.S. jurisdictions, the councils replied that while they appreciated “the challenges contractors face in monitoring employee actions during non-work hours,” contractors and their employees had to realize “that procuring commercial sex acts is an unacceptable

behavior by some contractors’ employees. Since 2002, Congress has heard testimony from whistleblowers and human trafficking experts who made allegations of U.S. contractor complicity — if not direct engagement — in trafficking for forced prostitution. In April 2002, Ben Johnston, a former U.S. contractor employee for the Stabilization Force (SFOR) in Bosnia and Herzegovina, testified before Congress that his colleagues had purchased women and girls as chattel from a local brothel owner near Tuzla. After lodging a complaint with the U.S. Army, Johnston was fired by his employer. U.S. Army investigators subsequently verified most of Johnston’s allegations and referred the case to local Bosnian prosecutors. The employees quickly left Bosnia and Herzegovina, precluding a local prosecution.

Sarah Mendelson, a senior fellow at the Center for Strategic and ► 20

19 ◀ workers “believe it is better to work in Iraq with their lives in danger rather than face the danger of not having breakfast, lunch or dinner in the Philippines.”

And why do Asian workers earn so much less than U.S. citizens for the very same jobs? A U.S. Army Corps spokesperson Richard Dowling, told me: “These workers consider themselves fortunate to have jobs, even if it means them traveling somewhere else. The [salary] decision is not based on the value of his life but on the cost of training and equipping the workforce. Nor would it be right for the U.S. Army to enforce U.S.-based salaries where no one else could match it. Life sometimes isn't fair.”

In April 2006, Gen. George Casey, the top U.S. commander in Iraq, issued an order titled “Prevention of Trafficking in Persons in MNF-I” (Multinational Forces-Iraq), which noted that the military confirmed a number of human rights abuses on U.S. military bases. They included deceptive hiring practices, excessive fees charged by overseas job brokers who lure workers into Iraq, substan-

dard living conditions once laborers arrive, violations of Iraqi immigration laws, and a lack of mandatory “awareness training” on U.S. bases concerning human trafficking, according to a copy of the memo summarized in *The Chicago Tribune*.

Casey ordered that contractors be required by May 1, 2006, to return passports confiscated from workers. Companies that failed to do this could be blacklisted from future work, and commanders could physically bar them from bases, according to his order. The contractors were also required to meet “measurable, enforceable standards for living conditions (e.g., sanitation, health, safety, etc.) and establish 50 square feet as the minimum acceptable square footage of personal living space per worker.”

Yet matters have only changed imperceptibly. In April 2008, every single worker that I met told me that they had paid an average of \$4,000 to a broker who arranged their jobs for them. Given that some made as little as \$100 and \$300 a month, the time taken for these workers to start setting

aside money for the future, could often be years.

In December 2008, 1,000 workers from five countries — Bangladesh, India, Nepal, Sri Lanka and Uganda — started a protest against their living conditions that caught the eye of a CNN reporter and was quickly flashed around the world. 600 of them had been confined in a single derelict warehouse, four to a bed, with no running water, in Baghdad airport. The angry mob was dispersed when the Iraqi police started firing into the air and seized several who were then handcuffed and beaten.

When will conditions for TCNs improve? The military says that the working conditions are the responsibility of the contractors, but in reality the Pentagon needs to share responsibility for turning a blind eye to abuses, whether in the recruitment process or on the bases. As ultimate paymaster, the Pentagon can choose to withhold payment from any contractor that does not treat its workers properly. It is high time that they exercise that responsibility. ■

FAR Compliance on Trafficking in Persons

18 ◀ International Studies who conducted research in Bosnia and Herzegovina, reported to Congress in 2005 that one U.S. government contractor had made special arrangements with local Bosnian police: when the contractor's employees were picked up during brothel raids, the police would call the country manager to pick up his men. After firing them, the manager would facilitate their rapid return to the United States to avoid local criminal charges.

In another case reported by Mendel-

son, a U.S. contractor employee in Bosnia arranged for his civilian contractor colleagues to have sex with trafficked women, hiring another company employee to serve as a bodyguard.

In testimony before a Senate committee in April 2008, Barry Halley, a U.S. contractor employee previously based in Iraq, alleged that a U.S. military contractor manager misappropriated an armored car to transport prostitutes from Kuwait to Iraq. Halley further alleged that the manager

delivered the women to hotels operated by the contractor.

These and other horror stories outraged members of Congress. But the enforcement of the “zero tolerance” anti-prostitution provisions to date has been just that — zero. Despite anecdotal accounts of trafficking for forced prostitution in Iraq and Afghanistan, U.S. enforcement muscle has focused not on sex trafficking, but on labor violations. Enforcement of both is likely to ramp up. ■