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Government contractors must adapt after executive order

By Anthony Pacheco and Sara Brenner

President Barack Obama has issued an executive order to combat forced-labor violations in global supply chains by requiring greater accountability and transparency from the private sector. The executive order is designed to strengthen compliance with the Trafficking Victims Protection Act of 2000 (TVPA) among companies that contract and subcontract with the federal government. If your company contracts or subcontracts with the government, the order may require you to significantly re-vamp your policies and procedures or face the substantial perils of non-compliance.

President Obama's executive order, "Strengthening Protections Against Trafficking in Persons in Federal Contracts," prohibits certain conduct and requires federal contractors and subcontractors to implement procedures consistent with the government's longstanding "zero-tolerance" policy on human trafficking. The order reflects a tacit acknowledgement of the realities of globalization that leave the federal government unable to police human trafficking through domestic law enforcement alone. Companies increasingly outsource production to suppliers in distant countries, some with weak human rights protections, and those suppliers in turn subcontract to other unknown entities. Consequently, there is a growing belief that policing human rights violations of subcontractors down the supply chain must fall in some part on the parties who can most efficiently and effectively monitor their activities, namely, those companies that outsource the production.

Under the executive order, federal contractors, contractor employees, subcontractors and subcontractor employees are prohibited from: using misleading or fraudulent recruitment practices during the recruitment of employees; charging employees recruitment fees; destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents, such as passports or drivers' licenses; and, excepting certain specific situations, from failing to pay return transportation costs upon the end of employment for an employee who is not a national of the country in which the work is taking place and who was brought to that country for the purpose of working on a U.S. government contract or subcontract.

The order also requires both contractors and subcontractors to agree to allow contracting agencies and enforcement agencies to conduct audits and investigations at their businesses to ensure compliance with TVPA. Contracting officers must also notify the government if they become aware of violations of TVPA that could justify termination of the contract by the federal government under TVPA.

Compliance may be onerous for companies selling or contracting for goods or services outside the U.S. if the goods or services are valued at over \$500,000. Under those circumstances, each contractor and subcontractor must maintain a compliance plan during the performance of the contract that includes, at a minimum:

- * an awareness program so that employees understand the policy of ensuring that they do not engage in trafficking or forced labor and the actions that will be taken against employees for violation of that policy;

- * a process for employees to report, without fear of retaliation, activity that would justify termination of the contract under TVPA;

- * a recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees to the employee, and ensures that wages meet applicable host country legal requirements or explains any variance;

- * a housing plan, if the contractor or subcontractor intends to provide or arrange housing, that ensures that the housing meets host country standards or explains any variance; and

- * procedures to prevent subcontractors at any tier from engaging in trafficking, and to monitor, detect, and terminate any subcontractors or subcontractor employees that have engaged in such activities.

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Most importantly, for a company doing more than \$500,000 worth of business with the U.S. outside of the country, *it is not enough* to implement anti-trafficking policies and educate company employees. The company must also implement policies to monitor and police the entities *with which it subcontracts*, and certify to the federal government that it does so. If a subcontractor is found to violate TPVA and the contracting company has not taken the necessary steps to remediate and report it, that contractor may lose its contract with the federal government. Notably, however, these requirements do not apply to contracts or subcontracts for "commercially available off-the-shelf items."

The executive order builds upon California's Transparency in Supply Chains Act. That law, effective Jan. 1, 2012, requires large companies (\$100 million in annual gross sales) doing business in California to provide information on their websites as to the steps they take, or do not take, to combat human

trafficking and slave labor in their supply chains.

While the state Legislature's hope was that the public-shaming power of the Transparency in Supply Chains Act would mobilize companies to voluntarily combat forced labor abuses in their supply chains, the law itself is somewhat limited relative to enforcement (injunctive relief only) and easy to comply with, requiring only a link to the required information on the company's home page. If the company is content to announce on its website that it does nothing to combat human trafficking and slave labor throughout its supply chain, it will have complied with the Transparency in Supply Chains Act (apart from possible public relations concerns).

The same level of inaction for a federal contractor or subcontractor, however, may potentially result in the end of its business with the federal government under President Obama's executive order. Full compliance is essential: Companies will not want to risk losing their federal contracts. Moreover, TVPA violations found at a company or at one of its suppliers can lead to a firestorm of negative publicity, civil penalties, and even criminal exposure.

The executive order requires an amendment of a regulation to incorporate the above requirements by March 24, 2013, giving companies with federal contracts approximately six months to take the necessary steps to comply. While it is unclear whether Mitt Romney, if elected, would rescind the executive order, it would seem unlikely. There was virtually no public criticism of the order, and understandably so. No company wants to come out publicly and say it is too burdensome to take measures to keep abuses like human slavery out of its supply chains. Ultimately, it is imperative that federal contractors begin the process of evaluating their supply chain procedures to ensure that they do not violate the new federal government requirements. Forewarned is forearmed.

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