

New Human Trafficking Mandate Raises Contractor Risk

By **Marcia Madsen and Cameron Edlefsen** (November 30, 2022, 5:56 PM EST)

New legislation mandates the referral of human trafficking allegations involving government contractors and recipients of federal grants or other awards to agency suspension and debarment officials to address perceived weaknesses in oversight by the U.S. Department of Defense.

The End Human Trafficking In Government Contracts Act was signed into law Oct. 17.[1] It amends Title 22 of the U.S. Code, Section 7104b, on monitoring and investigation of trafficking in persons.[2]

The amended law requires the head of an agency to refer to the agency's suspension and debarment official:

- Substantiated allegations[3] of human trafficking against a recipient of a federal contract, grantor cooperative agreement — or any subcontractor, subgrantee or agent of the recipient;[4] and
- Notifications of an indictment, criminal information or criminal complaint involving human trafficking.[5]

Previously, the law required only that the head of an agency consider referring a substantiated allegation to the agency's suspension and debarment officials, which was one of several discretionary remedial actions available to an agency head.[6]

The act also requires the director of the Office of Management and Budget to submit a report to Congress by Jan. 15, 2023, regarding the act's implementation.[7]

Background

According to the U.S. Senate Homeland Security and Governmental Affairs Committee report accompanying the act, the impetus for this legislation was an Aug. 4, 2021, U.S. Government Accountability Office report, GAO-21-546.

This report found that the DOD's oversight of contractors and handling of trafficking investigations was deficient in various respects, which contributed to the continued trafficking of foreign workers under federal contracts.[8]



Marcia Madsen



Cameron Edlefsen

The Senate report makes clear that Congress will continue to strengthen U.S. law and policy to end trafficking involving federal employees and contractors.[9]

Against this backdrop, Sen. James Lankford, R-Okla., proposed the legislation to provide more oversight of remedial action taken by agencies. In a Sept. 30 press release, Lankford stated that the goal is to "prevent any contractor found to be participating in human trafficking from doing business ever again with U.S. taxpayer dollars." [10]

Trafficking in Persons and Trafficking-Related Activities

The applicable statutes and regulations broadly define human trafficking to include both sex trafficking and forced labor.[11] U.S. policy also prohibits contractors — or their employees and agents — from engaging in trafficking-related activities that support trafficking.

Such activities include denying access to an employee's identification or immigration documents; charging recruitment fees; misrepresenting conditions and scope of employment, such as pay, benefits or work location; failing to reimburse an employee's return travel after expiration of an employment term; and housing employees in poor conditions.[12]

Although trafficking activity may seem obvious to most contractors, trafficking-related activities may be less so to new or unwary contractors or subcontractors that lack experience with employees and agents in foreign countries.

It is incumbent on contractors to know and comply with the applicable laws and regulations by training employees and agents located in foreign countries who may have different cultural norms and may not be attuned to what trafficking in persons entails as set forth by U.S. policy.

Takeaways

The act's mandatory referral of substantiated allegations of human trafficking to agency suspension and debarment officials is expected to increase awareness of these allegations and result in the exclusion of more contractors from federal contracting opportunities.

However, the act does not impose mandatory debarment for such substantiated allegations.

Instead, debarment of an entity is a discretionary business decision made by an agency suspension and debarment official to ensure the government only does business with presently responsible entities.

The suspension and debarment official makes an exclusion decision only after considering a number of factors, including (1) the gravity of the conduct; (2) whether the entity fully cooperated with the government during any investigation; and (3) whether entity had effective standards and internal controls, instituted remedial measures, or had other mitigating or aggravating factors.[13]

Agency suspension and debarment officials retain discretion to exclude entities from doing business with the government under the procedures of Federal Acquisition Regulation Part 9.4 for recipients of federal procurement contracts, or Title 2 of the Code of Federal Regulations, Section 180, for recipients of other federal awards.

Suspension and debarment officials are also likely to consider the specific mitigating and aggravating factors set forth in FAR 52.222-50(f), which provides guidance to contracting officers on determining appropriate remedies for contractors engaging in trafficking-related activities.

These factors primarily concern whether the contractor had a trafficking-in-persons compliance plan in place at the time the trafficking conduct occurred and was in compliance with it, and whether the contractor has implemented any remedial measures to prevent the future trafficking conduct.[14]

While suspension and debarment officials have discretion over exclusion, the message is clear that trafficking activities will not be tolerated.

As Congress continues to strengthen the consequences of human trafficking, contractors and recipients of grants or cooperative agreements must review, understand and take steps to comply with the applicable U.S. statutes and regulations or risk debarment from conducting business with the federal government.

Marcia Madsen is a partner, chair of the government contracts practice and co-chair of the national security practice at Mayer Brown LLP.

Cameron Edlefsen is counsel at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] End Human Trafficking In Government Contracts Act of 2022, Pub. L. No. 117-111, 136 Stat. 2248 (2022), available at <https://www.congress.gov/117/plaws/publ211/PLAW-117publ211.pdf>.

[2] 22 U.S.C. Section 7104b.

[3] Generally, substantiated allegations are those involving a determination by an agency inspector general that a preponderance of credible evidence demonstrates the contractor or grant recipient engaged in any of the trafficking-related activities described in 22 U.S.C. Section 7104(g).

[4] 22 U.S.C. Section 7104b(c)(1) (2022).

[5] *Id.*

[6] 22 U.S.C. Section 7104b(c) and Federal Acquisition Regulation ("FAR") Clause 52.222-50 (Combating Trafficking in Persons) enumerate the remedial actions available to the government, which include "remov[ing] a Contractor employee or employees from performance of the contract," "requiring a Contractor to terminate a subcontract," and withholding payment until a contractor takes "appropriate remedial action." FAR 52.222-50(e).

[7] End Human Trafficking In Government Contracts Act of 2022, Pub. L. No. 117-111, 136 Stat. 2248 (2022), available at <https://www.congress.gov/117/plaws/publ211/PLAW-117publ211.pdf>.

[8] U.S. Gov't Accountability Office, GAO-21-546, Human Trafficking: DoD Should Address Weaknesses in

Oversight of Contractors and Reporting of Investigations Related to Contracts (2021), available at <https://www.gao.gov/assets/gao-21-546.pdf>.

[9] See S. Rep. No. 117-116, at 2 (2022), available at <https://www.congress.gov/117/crpt/srpt116/CRPT-117srpt116.pdf>.

[10] Press Release, Sen. James Lankford, PASSED: Lankford Applauds Unanimous House Action on His Bill to Put a Stop to Human Trafficking (Sept. 30, 2022), available at <https://www.lankford.senate.gov/news/press-releases/passed-lankford-applauds-unanimous-house-action-on-his-bill-to-put-a-stop-to-human-trafficking>.

[11] See 22 U.S.C. Section 7102(11); FAR 52.222-50(a).

[12] See 22 U.S.C. Section 7104(g)(4); see also FAR 52.222-50(b).

[13] See FAR 9.406-1(a); 2 CFR Section 180.860.

[14] See FAR 52.222-50(f).