We're under the pressure
Yes we're counting on you
That what you say
Is what you do

It's in the papers
It's on your TV news
The application
It's just a point of view

-- The Politics of Dancing, Re-Flex, 1983

In February, 2008, the FAR contract clause 52.222-50 (“Combating Trafficking in Persons”) was promulgated. Among other things, the clause announced that the United States Government “has adopted a zero tolerance policy regarding trafficking in persons”. To that end, Federal contractors and their employees were prohibited from engaging in “severe forms of trafficking in persons” and procuring “commercial sex acts” during the contract’s period of performance. (Those phrases were defined in the clause.)

Although we are 100% against trafficking in persons, we did not think much of the rule. One important concern we had was the definition of “commercial sex act” which was defined as “any sex act on account of which anything of value is given or to be received by any person.” We suspected that the definition was vague enough to make taking a person to dinner and a movie a precursor to a commercial sex act, which could be problematic. In addition, we thought the imposition of American morality outside of CONUS was a bit arrogant. Other countries might have less concern with “commercial sex acts” between consenting adults than Americans seem to have. Think Amsterdam, for example. Moreover, there are certain places in Nevada where “commercial sex acts” are permitted by law. Thus, prostitution that would be legally permissible under the local laws would be prohibited by this contract clause. That didn’t make much sense to us.

One issue (among many potential issues) is that the contract clause presumes that when a US citizen is employed by a contractor working on a Federal contract, that citizen has waived his/her right to engage in legally protected sex acts. We don’t think so. (But in fairness, we are not attorneys so what do we know?) The bottom line for us is, had the rule stopped at

preventing human trafficking, we would have applauded it. But when it delved into morality and what is or what is not legally permitted sex acts between consenting adults, we thought it went off the rails.

In 2012, President Obama issued **Executive Order 13627** to "strengthen protections" against human trafficking in Federal contracts. It directed studies that would lead to FAR revisions regarding the subject. While those studies were taking place, a year ago (as this article is being written), we **told readers** that the 2013 National Defense Authorization Act (NDAA) was going to lead to revisions in the anti-human trafficking rules. We wrote –

Among other things, requires contractors to annually certify that they have a compliance plan and have 'implemented procedures to prevent [human trafficking] and to monitor, detect, and terminate any subcontractor, subgrantee, or employee of the recipient engaging in [such activities].' Covered contractors will 'provide a copy of the plan to the contracting or grant officer upon request, and as appropriate, shall post the useful and relevant contents of the plan or related materials on its website and at the workplace.'

Indeed, a proposed rule soon followed. And now we have a **final rule** that implements the NDAA legislative direction. We're not going to quote the whole rule and the promulgating comments because, frankly, if you print it out it's a book. For those who need to get deeply into the topic, start with reading the revised FAR Part 22.1703 and 22.1704. Then review the revised 52.222-50 contract clause. Importantly, the new rule applies to many contracts and many contractors. If your company performs work outside the United States, it is likely the new rule applies to you.

As per the rulemaking comments (link above), the new rule requires the following—

(a) Prohibit contractors, contractor employees, subcontractors, subcontractor employees, and their agents from—

(1) Engaging in severe forms of trafficking in persons during the period of performance of the contract;

(2) Procuring commercial sex acts during the period of performance of the contract;

(3) Using forced labor in the performance of the contract;

(4) Destroying, concealing, confiscating, or otherwise denying access by an employee to the employee's identity or immigration documents, such as passports or drivers' licenses, regardless of issuing authority;

(5)(i) Using misleading or fraudulent practices during the recruitment of employees or offering of employment, such as failing to disclose, in a format and language accessible to the worker, basic information or making material misrepresentations during the recruitment of employees regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, the living conditions, housing and associated costs (if employer or agent provided or arranged), any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work;

(ii) Using recruiters that do not comply with local labor laws of the country in which the recruiting takes place;

(6) Charging employees recruitment fees;

(7)(i)(A) Failing to provide return transportation or pay for the cost of return transportation 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 into that country for the purpose of working on a U.S. Government contract or subcontract, for portions of contracts and subcontracts performed outside the United States; or

(B) Failing to provide return transportation or pay for the cost of return transportation upon the end of employment, for an employee who is not a United States national and who was brought into the United States for the purpose of working on a U.S. Government contract or

subcontract, if the payment of such costs is required under existing temporary worker programs or pursuant to a written agreement with the employee for portions of contracts and subcontracts performed inside the United States; …

(8) Providing or arranging housing that fails to meet the host country housing and safety standards; or

(9) If required by law or contract, failing to provide an employment contract, recruitment agreement, or other required work document in writing. …

That's not all. The new rule also requires a certification (found at 52.222-56) that an apparent successful bidder has a compliance plan for the foregoing requirements. Moreover, the bidder must certify that it has implemented the plan through procedures designed to prevent any prohibited activities. The bidder must also have procedures to monitor, detect, and terminate any subcontract or agent agreement engaging in prohibited activities.

The certification is required if the contract or subcontract is for supplies (other than COTS items) that are being acquired outside the United States, or if the contract or subcontract is for services to be performed outside the United States, when the estimated contract/subcontract value exceeds $500,000. The certification must be executed and submitted annually during contract/subcontract performance. Prime contractors must obtain the certification prior to award of a qualifying subcontract, and annually thereafter.

There's more, of course. Isn't there always? But you get the gist. Importantly, prime contractors and subcontractors who fall under the certification requirements are going to have to generate a compliance plan with supporting procedures, and then they are going to have to execute that plan, performing "due diligence" to check for prohibited activities and then to report any findings to the Contracting Officer.

We are all about contract compliance. And now the fight against human trafficking has led to new contract compliance requirements. If you have a contract subject to the new requirements, you had better get moving.

How to get started? Well, the government contracts attorneys at Crowell & Moring have some good ideas. Here's **a link** to some compliance plan basics, including some of the minimum required plan elements. Here's a link to **another** C&M article on the contract administration aspects of the new rule. The C&M articles include this analysis of the risks involved in the new rule—

This certification requirement, like its compliance plan counterpart, poses another risk for contractors. Given the many risks associated with some types of certifications, including possible exposure under the civil false claims and false statement acts, this certification requirement creates a risk for contractors because it requires contractors to certify to the compliance of their subcontractors but it provides little guidance as to what level of 'due diligence' is sufficient or required before making such a certification. In the response to comments on the proposed rules, the FAR Council declined to define or clarify the term 'due diligence' and instead responded that 'the level of 'due diligence' required depends on the particular circumstances. This is a business decision requiring, judgment by the contractor.'

The final rule leaves contractors facing a range of compliance challenges and open questions as contractors try to institute "appropriate" compliance plans to reduce the risk of the potentially serious consequences associated with violating the new rule.

For those prime contractors and subcontractors with significant OCONUS activities, this is going to be a challenging rule, we believe. Part of the challenge lies in the ambiguity of terms and requirements; another part lies in the fight (embodies in the rule) against certain activities to which mainstream American morality objects.

Writing in Policy Paradox: The Art of Political Decision Making (2012), Deborah Stone discussed the balance between precision and vagueness. She wrote—

Precise rules stifle creative responses to new situations. … Precise rules are good for only short periods; they lose their efficacy as time passes and conditions change. The failings of precision are the virtues of vagueness. Vague rules with broad categories and lots of room for discretion can be flexible and allow sensitivity to differences. They enable creative responses to new situations. Vagueness can boost a rule's effectiveness by allowing individuals with knowledge of particular facts and local conditions to decide on the means for achieving general goals. … Vague rules allow decision makers to use tacit knowledge, the things people know but can't put into words.

The problem with the new rule on fighting human trafficking is that it's vague where it should be precise and prescriptive where it should allow discretion. Nonetheless, it's a final rule now. Until a court interprets some of the ambiguities, contractors will have to muddle through. But make no mistake: these requirements will have to be implemented by contractors and subcontractors that are subject to them.