

Submission to Federal Acquisition Regulatory Council (FAR Council) in response to Notice-MVC-2013-01 requesting Public Comments on Protections Against TIP

**Sweatfree Purchasing Consortium
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We are grateful for this opportunity to submit comments in response to the Federal Acquisition Regulatory Council (FAR Council) request for comment on the implementation of Executive Order (E.O.) 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)*, dated February 12, 2013.

As the largest single purchaser of goods and services in the world, the Federal Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking or to broader labor rights abuse. Cities, states, counties, and schools across the United States, Canada, and Europe have adopted ‘sweatfree’ purchasing policies to ensure that government contractors do not patronize abusive workplaces. ‘Sweatfree’ policies in effect in numerous state and local governments today prohibit the use of forced and trafficked labor in the production of contracted goods.

Recognizing the need to pool resources, share information, coordinate compliance activities, and avoid duplication of efforts in order to ensure their contracts are compliant with these sweatfree policies, states, cities, and counties established the Sweatfree Purchasing Consortium (Consortium). Currently with 16 members, including three states and 13 cities, the Consortium has developed an online procurement supply chain database and a model vendor code of conduct and sweatfree procurement policy, and maintains a resource library and other forums to share successful rules, procedures, and implementation tools to ensure apparel and other products are manufactured in decent working conditions. The Consortium has also proposed a Responsible Manufacturer Program, a partnership between the Consortium and manufacturers to ensure labor rights compliance in factories that make uniforms and other apparel public agencies buy, and to prequalify vendors. We encourage the federal government to join this process to share information about supply chains and contractor compliance, and coordinate monitoring and other enforcement activities with state and local government agencies as appropriate.

The International Labor Rights Forum (ILRF) is a founding partner of the Sweatfree Purchasing Consortium. Founded in 1986, the International Labor Rights Forum (ILRF) promotes the rights of all workers to a safe working environment where they are treated with dignity and respect, and where they can organize freely to defend and promote their rights and interests. ILRF has a long track-record of testing US trade and labor policy, proposing innovative solutions to combat labor rights abuses, including trafficking and forced labor, and raising awareness among U.S. consumers of their connections to workers around the world.

The Sweatfree Purchasing Consortium and ILRF submit these comments in response to Federal Register notice's call for public comment on the most effective and least burdensome approaches to implementation of E.O. 13627 and ETGCA, answer the FAR Council's questions about appropriate focus of guidance, best practices, and appropriate oversight, and stimulate federal government agencies to coordinate efforts with state and local governments to ensure successful policy implementation. The Consortium's approaches to promoting vendor compliance with sweatfree procurement policies have already been carefully vetted with state and city government officials, including procurement officials, legal experts, and vendor companies. These approaches take careful account of existing company codes of conduct and private voluntary monitoring initiatives. Our program targets the gaps in enforcement that are not being addressed by private voluntary systems. It inherently addresses forced labor and trafficking as part and parcel of its overall sweatfree procurement guidelines.

1. Contractor Certifications and Compliance Plans

The requirements in E.O. 13627 exceed those required by E.O. 13126, issued in 1999, which prohibits the procurement of goods produced with forced or indentured child labor. Federal agencies require contractors to sign an attestation that they have made a "good faith" effort to ensure they are not supplying goods made using forced or indentured child labor. However, there is no clear definition of what actions constitute "good faith" efforts. Thus, to date, not a single case of contractor violation of E.O. 13126 has been brought forward.

By contrast, under ETGCA, as under E.O. 13627, contractors are required to certify, prior to receiving an award and annually thereafter, that they have implemented a plan to prevent trafficking in persons and forced labor and that they have procedures to prevent prohibited activities. While E.O. 13627 provides helpful guidance for the content of compliance plans, we recommend that the FAR Council incorporate guidelines for contractors to demonstrate that they are purchasing the products to be sold to federal agencies under terms, including prices and delivery dates, that support and enable the manufacturing of the product in compliance with the prohibition on trafficking in persons and forced labor. It is increasingly understood that supply chain labor violations, including trafficking and forced labor, cannot be adequately addressed without addressing the purchasing practices of large buyers. For example, in the global apparel industry, pricing, order volume, turnaround time requirements, and frequent changes in specifications affect a factory's ability to pay decent wages and benefits, maintain restrictions on working hours, avoid forced overtime and other forced labor conditions. These purchasing practices should be addressed in compliance plans to ensure there is not an unreasonable burden on factories to remediate violations for which the factories' customers are also responsible.

Furthermore, along with the compliance plan we recommend that the FAR Council incorporate guidelines for contractors to identify the names and locations of the factories to be used in supplying the government. While government agencies need this information to exercise due diligence in evaluating compliance plans, experience with state and local government agencies show that contractors typically need very precise language to ensure they disclose exactly the supply chain entities required by government agencies.

2. Vendor Prequalification

The FAR Council should consider the establishment of a vendor prequalification program that rewards vendors that have made all adjustments to their supply chains necessary to ensure that international production facilities fully respect the prohibitions on trafficking in persons and forced labor. Such adjustments may include the establishment and implementation of managerial systems, rules, procedures, and audits, as well as the payment of adequate prices to subcontractors to ensure the vendor has the ability to guarantee compliance, as detailed in compliance plan requirements.

Vendor prequalification should allow vendors that do not themselves act as manufacturers (brand owners) to prequalify for bids or proposals by working with manufacturers that participate in the program, thereby shifting the burden of compliance work from vendors to manufacturers. Whereas vendors may be small distributors at the end of global supply chains, many steps removed from, and without direct influence over, the factories where the products they sell are made, manufacturers are usually in a better position to develop and maintain the supply chain management tools necessary to maintain labor rights compliance in factories that make their products.

By adopting a vendor prequalification program government buyers will benefit through enhanced efficiency in review of solicitations. Instead of time consuming work to collect and evaluate information to determine bidder and contractor compliance, procurement officials will have the option to recognize vendor participation in the program in solicitations for bids and proposals, or in the award and contract performance stage, as appropriate for each government agency.

Manufacturers also benefit. As increasing numbers of government entities require compliance with trafficking, forced labor, and broader labor right standards, increasing numbers of vendors ask their suppliers (manufacturers) for compliance information relating to specific factories. By participating in a prequalification program manufacturers can avoid responding separately to each request for information, saving time and money.

3. A System for Compliance: Monitoring, Verification, and Investigations

E.O.13627 require government contractors and subcontractors to provide access to contracting agencies and “other responsible enforcement agencies” to conduct “audits, investigations, or other actions” to ascertain compliance with all applicable laws restricting trafficking in persons and forced labor. ETGCA requires federal agency Inspector Generals to investigate allegations of non-compliance. Many state and local government agencies have established similar access requirements for agencies to monitor compliance and investigate complaints of non-compliance and some cities have practical experience in monitoring supplier factories and investigating complaints. We offer the following comments based on these experiences.

First, we urge the FAR Council to create clear definitions that distinguish between “monitoring” and “verification.”

Monitors evaluate the process of implementation of the required standards. Monitoring should be the responsibility of the contractor. Federal agencies should require contractors to secure independent, professional, and transparent inspections into labor conditions at both its direct supplier and all subcontractors both before and after the awarding of the contract. In the case the contractor is not the brand owner, the contractor should be required to present evidence that the brand owner has secured these inspections. To ensure accuracy of the inspections, organizations and individuals conducting monitoring must be able to demonstrate that they have no conflict of interest due to past or current relationship with the company or the company's contractors, nor shall they obtain any revenue from, any vendor, manufacturer, contractor, or subcontractor.

Verification, on the other hand, would ideally be performed by a collaborative body pooling federal agency resources. *Verifiers* evaluate the integrity of the contractor compliance plan, including the monitoring. A collaborative effort on verification would provide far greater efficiency to all agencies than a go-it-alone or outsourced approach to verification. A standardized approach across government agencies would mitigate confusion among contractors and suppliers. Currently in the private marketplace for standards, a vast array of certification initiatives are accredited to a wide variety of standards that encompass forced labor, trafficking and other social standards. Government agencies will benefit from having a central point of authority to differentiate between these market claims.

As a final level of integrity, federal agencies should provide for a complaint-driven investigation and remediation process that would allow any person or organization to submit a complaint that a contractor or subcontractor has been or is failing to comply with the terms of the contract or policy. The Inspector General may investigate the complaint or designate an independent third party to investigate. Similar to the verification process, the process of receiving, evaluating, and investigating complaints could be done more efficiently and effectively through a multi-agency collaborative effort that allows for sharing of information and pooling of knowledge and resources than agency by agency. Ideally this collaboration extends to state and local government agencies as the procurement supply chains of these agencies overlap with those of federal agencies.

As noted above, the credibility of monitoring and investigation is directly related to the independence of the entity conducting the monitoring and investigation. The FAR Council can benefit from the experience in the global apparel industry where monitoring organizations with strong industry ties and the social auditing methodology that many brands use to verify compliance have come under scrutiny in the wake of the recent tragic garment factory fires in Pakistan and Bangladesh that claimed the lives of hundreds of workers because the factories were not compliant with basic safety standards. The factories had been certified as compliant or audited as recently as weeks and months before the fires. Two U.S. government contractors were among the buyers of the Bangladeshi factory.

In this context we urge the FAR Council to set clear benchmarks for what can be considered "independent" entities to perform monitoring and investigation services. Ideally, federal government agencies would coordinate and share a list of agencies designated as satisfying the relevant criteria to determine their independence from industry.

We offer the following operational definition of independent monitoring, developed by the Sweatfree Purchasing Consortium, for the FAR Council's consideration: "An independent monitoring organization is an organization with expertise in monitoring factory working conditions that is not owned or controlled in whole or in part by, nor obtains any revenue from, any contractor or other entity that derives income from the sale of any product or service covered by a sweatfree purchasing policy." Two Consortium members have contracted for monitoring services with an independent factory monitor meeting this definition of "independent monitoring."

4. Remedies for Workers

Under ETGCA, "remedial actions" refer to a variety of contractor sanctions, none of which addresses remedies to the victims of trafficking or forced labor abuses. E.O. 13627 requires each contractor and subcontractor to certify, prior to receiving an award and annually thereafter, that they have taken "appropriate remedial and referral actions" if abuses have been found. We urge the FAR Council to provide more comprehensive guidance to contractors regarding what constitute appropriate remedial or referral efforts, to ensure that exploited workers, if identified, have access to appropriate remedies and services, and are not left in situations that expose them to further exploitation.

If an investigation reveals the presence of trafficked workers in a contractor's operations or supply chain, federal agencies should attempt to negotiate with that contractor in an effort to bring it into compliance before pursuing sanctions. This should include review of a remediation plan for the workers identified. We recommend that remediation plans include protocols for appropriate immediate actions, such as referral to law enforcement or appropriate authorities in cases where auditors discover specific violations of applicable child or forced labor laws. It should also include resources for victims such as rehabilitation, education and training, employment, appropriate housing, counseling, restitution for lost wages and other material assistance.

By negotiating with contractors, the agencies do not give up the right to any legal remedy for the violation. If the contractor or subcontractor does not negotiate or cannot comply with requirements to institute remedial actions, the agencies should then impose sanctions as provided by law and as a last resort.

5. Conclusion

We hope that these comments will stimulate federal government agencies to coordinate efforts with state and local government agencies and to combine efforts to monitor labor rights conditions in procurement where possible. We invite the FAR Council, the Administrator of Federal Procurement Policy, and the President's Interagency Task Force to Monitor and Combat Trafficking in Persons (PITF) to contact the Sweatfree Purchasing Consortium and its members and ILRF to discuss development of internal procedures and controls for awarding contracts in compliance with the procurement prohibition on trafficking in persons and forced labor, a process for evaluating and identifying industries with high risk of trafficking-related or forced

labor activities, and safeguards, guidance and compliance assistance to prevent human trafficking and forced labor in federal contracts.

For further reference, Consortium resources that may be useful to the FAR Council include:

- Vendor Code of Conduct and model Sweatfree Procurement Policy, at: <http://buysweatfree.org/model>
- Online procurement supply chain database, at: <http://buysweatfree.org/linkup>
- Resource library, including sample policies, compliance form, and administrative rules, at: http://buysweatfree.org/resource_library