



Alliance to End Slavery and
Trafficking
1700 Pennsylvania Avenue, NW
Suite 520
Washington, DC 20006
www.endslaveryandtrafficking.org

**Written Comments to Department of Defense (DoD), General Services
Administration (GSA), and National Aeronautics and Space Administration
(NASA) Referencing “Public Comments on Protections Against TIP”**

The Alliance to End Slavery and Trafficking (ATEST), a national coalition of anti-human trafficking groups, and the undersigned organizations are pleased to submit comments in response to the February 12, 2013 Notice of a public meeting and request for comments pursuant to 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)*.

ATEST acts with a shared agenda to end forced labor and human trafficking around the world. Member organizations individually reflect a range of perspectives within the anti-human trafficking community both on labor and sexual exploitation, in the United States and around the world. It is this diversity in perspective and expertise that makes the alliance unique and allows members to put forth and advocate for comprehensive solutions that address the needs of the individuals affected by this crime.

It is in this capacity that ATEST, as well as the undersigned organizations, raise a variety of issues to provide comments on the implementation of E.O. 13627 and ETGCA. The United States has long had a zero-tolerance policy regarding government employees and contractor personnel engaging in any form of trafficking in persons. FAR Subpart 22.17 requires contractors and subcontractors to notify government employees of trafficking violations and puts parties on notice that the government may impose remedies, including termination, for failure to comply with the requirements. Recent studies by the Commission on Wartime Contracting showed a need for additional tools to address human trafficking issues. By way of background on this issue, we have included the American Civil Liberties Union (ACLU) and Allard K. Lowenstein International Human Rights Clinic, Yale Law School, report, *Victims of Complacency: The Ongoing Trafficking and Abuse of Third Country Nationals by U.S. Government Contractors* (see Appendix I).

We believe it is critical that the Federal Acquisition Regulatory (FAR) Council considers the needs of all human trafficking victims. By incorporating standards that address sex and labor trafficking of adults and children into all policies and procedures, the FAR Council is at a key juncture to comprehensively contribute to anti-human trafficking efforts. The E.O. and the ETGCA establish a stronger framework for government agencies to prevent human trafficking by clarifying the definition of trafficking in the federal supply chain, requiring contractors to create and implement compliance plans that guarantee they and their employees are neither engaging, nor

complicit in, human trafficking in their supply chain, and establishing training requirements for the federal acquisition community. As a result, the FAR Council has the opportunity to set an international standard that could affect government procurement around the world, as well as setting a standard for business entities on a global scale. Following the U.S. lead, for example, the Government of Australia has also promulgated an order on preventing trafficking in its procurement.¹

No Recruitment Fees

E.O. 13627 expressly prohibits federal contractors and their employees, in addition to subcontractors and their employees, from charging workers recruitment fees. The ETGCA included provisions that permitted “reasonable” recruitment fees, while deferring to the Executive Branch to define the parameters of “reasonableness.” However, the President has already concluded through the mechanism of the E.O. that any recruitment fee(s) is per se unreasonable. We echo this consideration and recommend that the FAR Council establish this most restrictive standard by prohibiting contractors, subcontractors, and their employees from charging any recruitment fees to workers.

The definition of reasonableness is amorphous and is unduly burdensome on private industry to enforce. The most efficient, cost-effective method to eliminate this burden is by applying an enforceable standard, namely that a recruitment fee is per se unreasonable. In addition, oversight of the administration of any recruitment fee is difficult to investigate because fees are often paid in cash, and thus undocumented, because workers who pay the recruitment fees are expressly told by their recruiters or employers to lie about the fee amount or otherwise face unemployment, and because recruiters charge multiple recruitment fees at several points in the process. All of these factors reinforce the vulnerability of the recruited worker and are directly linked to debt bondage situations and human trafficking.

Thus, the cost of assessing, investigating, and enforcing a “reasonable” recruitment fee is high and near impossible to police. Recruitment fees, including application fees, recruitment costs, labor certifications, employer attorneys’ fees, monetary payments, wage concessions, kickbacks, bribes, tributes, in-kind payments, and free labor, are per se unreasonable.

Additionally, the ILO Convention 181 (Private Employment Agencies Convention, 1997) supports a “no fees” position by stating, “[p]rivate employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.” Similar to any standard developed by the International Labour Organization (ILO), this is an international standard that was agreed upon by the international employer/business community, as well as governments and unions, through the ILO’s tripartite process.

¹ *Prime Minister pledges to boycott organisations linked to people trafficking*, THE AUSTRALIAN, Mar. 8, 2013, <http://www.theaustralian.com.au/news/prime-minister-pledges-to-boycott-organisations-linked-to-people-trafficking/story-e6frg6n6-1226592924805>.

The International Confederation of Private Employment Agencies (CIETT)² is committed to the accountability outlined herein and specifically supports not charging fees.

Grievance Procedure

E.O. 13627 directs that federal contractors and subcontractors maintain an appropriate compliance program during the performance of the contract or subcontract that establishes a process for workers to report, without fear of retaliation, any trafficking-related legal violations, such as engaging in trafficking in persons, the procurement of commercial sex acts, or the use of forced labor. We recommend that the FAR Council require the implementation of standard grievance procedures that allow workers to have a meaningful mechanism to complain without fear of retaliation by the employer. As such, an independent verification, with significant worker representation, should be conducted to audit any compliance program and confirm that it fulfills the minimum grievance procedure standard.

We recommend that the FAR Council require contractors and subcontractors to provide workers with the international telephone number, email address, and website information for the National Human Trafficking Resource Center, funded by the U.S. Government and operated by Polaris Project, to confidentially report labor exploitation and labor trafficking as a routine part of their orientation, training, and supervision.

A standard compliance program permits workers to report their grievances and experiences confidentially. It also mandates that the head of Agency take action against a contractor or subcontractor that is subject to a substantiated allegation of a grievance, consistent with the ETGCA, which provides for the discretionary suspension of payments or debarment of the contractor under such circumstances. In addition, the standard compliance program incorporates the principle of “no retaliation” against the worker to reduce the worker’s fear of unemployment or indebtedness to the employer.

E.O. 13627 requires contractors to certify on an annual basis, attesting to the maintenance of the existing compliance program. Compliance programs that integrate these internal reporting principles are cost-effective because they are consistent with existing corporate compliance plans under current FAR Council regulations and under 18 U.S.C. sec. 1351 that provide reporting requirements for engaging in fraud in foreign recruitment. To be meaningful, however, workers should receive training and education to understand the internal grievance process and be made aware of any external reporting mechanisms. A federal contractor’s failure to report allegations of abuses should result in the immediate suspension of, and the contractor’s eligibility for, federal contracts.

² CIETT, *CIETT Members’ Commitment Towards a Well Functioning International Labour Market*, Nov. 27, 2006, http://www.ciett.org/fileadmin/templates/ciett/docs/CIETT_Code_Conduct.pdf.

Independent Verification

Any compliance program and standards of recruitment implemented in response to FAR Council regulations on E.O. 13627 should incorporate a third-party verification requirement. As such, the independent verification process utilizes a disinterested party to assess the compliance and due diligence efforts that federal contractors put in place.

For example, an independent, disinterested party is in a more objective situation to assess whether the recruiting standards incorporate ethical principles, enforce no recruitment fees, and establish meaningful grievance procedures. An audit by an outside party, the cost of which is built into the private company's bid, verifies that the federal contractor is complying with FAR Council regulations, thereby effectively enforcing reporting and compliance requirements.

There are a number of existing standards that integrate employers' and workers' interests and balance the cost of regulatory implementation against the need to end human trafficking in supply chains. We urge the FAR Council to review the ethical framework for cross-border labor recruitment, a joint standard established by the Manpower Group, a for-profit recruitment firm from the private sector, and Verité, a non-governmental organization (see Appendix II). In addition, we recommend that FAR Council turn to Verité's Fair Hiring Toolkit (see Appendix III) and Fair Hiring Framework for Responsible Business (see Appendix IV) as illustrative frameworks to implement these standards. Any third-party verification system must have significant worker participation and representation.

Model Plans

E.O. 13627 requires that federal contractors and subcontractors develop a wage compliance plan that ensures recruiters do not charge recruitment fees, requires the use of recruitment companies with trained employees, and guarantees that wages meet applicable legal requirements. We recommend that to effectively implement these standards, the FAR Council should establish a regime in which contractors whose compliance programs match the highest standards, as defined by FAR Council evaluation requirements, receive preferential treatment in the federal procurement process.

To execute this regime, the FAR Council should establish a model compliance program. Evaluation factors when assessing which contractor should receive a federal contract would give preference to the bidders whose standards meet this model. As such, this regime incentivizes private contractors to "race to the top" and rewards the thoroughness of a compliance program.

As noted previously, existing standards have been developed to integrate employers' and workers' interests and balance the cost of regulatory implementation against the need to end human trafficking in supply chains. We refer the FAR Council to a number of frameworks that provide guidance in this process:

1. The ethical framework for cross-border labor recruitment, a joint standard established by the Manpower Group, a private sector recruiting firm, and Verité, a non-governmental organization, after a stakeholder consultation process. This framework is provided in Appendix II, indicated above.
2. The Fair Food Initiative, pioneered by the Coalition for Immokalee Workers, which engages workers directly in monitoring and auditing. Information on this Initiative is provided in Appendix V.
3. The ATEST report *Beyond SB 657* that provides guiding principles for companies required to comply with California's landmark anti-trafficking law and for any company working to eliminate forced labor from their supply chains. This report is attached as Appendix VI.

Trainings and Education

E.O. 13627 requires compliance programs to include awareness programs and training not only for contractors' employees, but also for the federal acquisition workforce. In addition, contractors' compliance plans are required to use licensed recruitment companies with trained employees. Evaluation factors that incentivize the establishment of a thorough compliance plan should include model trainings on trafficking in persons (TIP) that are distributed to all workers, contractors and subcontractors, and their employees.

FAR Council regulations should require that certified TIP-specific training be given to the federal acquisition agencies, contractors, and their employees and workers. Because the individual contracting officers (COs) are scattered around the world, there is a need for consistency within TIP training and to mandate COs to report "up the chain." TIP-specific training must address human trafficking comprehensively, including labor and sex trafficking of both adults and children. Trainings to contractors' workers must be available in their local languages. Cost-effective mechanisms to implement TIP training are available, such as existing online modules and distributing the Department of State's "Know Your Rights" pamphlet. Moreover, we encourage the FAR Council to recommend that anti-trafficking experts from non-governmental organizations and others in civil society assist in the development of the training curriculum.

Wage Plans

E.O. 13627 requires that contractors and subcontractors develop a wage compliance program to guarantee that the workers' wages meet applicable legal requirements. Wage compliance is a critical component to the implementation of E.O. 13627 because the potential for labor exploitation and trafficking continues beyond the initial recruitment. We recommend that wage plans incentivize transparency to verify that actual wages paid correspond to the initial promised wages to the worker.

During the recruitment process, suppose the recruiter appropriately does not charge a recruitment fee, but then the employer fails to pay its workers, thereby

exploiting the workers' labor and potentially leading to a labor trafficking situation. Over the course of employment, wages paid to the workers should reflect the wages that the employer promised to the worker. One approach to addressing this issue is to develop wage transparency mechanisms that can guarantee that workers are paid the income they are promised, while simultaneously promoting a free market. For instance, a worker's income statement can include the breakdown of the number of hours worked, hourly wage, total income, and any deductions. The workers have an opportunity to verify that their actual income matches the employer's promised income and the employer's reported income, and that no unauthorized deductions, such as a recruitment fee, are being made. Any wage compliance program may require certification of the actual wages, consistent with 18 U.S.C. sec. 1351, as well as the terms and conditions of employment to confirm that promised and actual wages equal. As a result, wage transparency limits the federal contractor's ability to report inflated earnings paid to the worker, and certifications of workers' income protects against labor exploitation.

Additionally, contractors and subcontractors should be required to include the provision of written contracts in their compliance plans. If workers have a clear understanding of the terms of their engagement before they depart for the host country to perform the work, they are far less likely to be vulnerable to coercion and other abuses once they reach the host country. The FAR Council should require that the contractor and subcontractor's compliance plans include requirements that all such contracts must be written in the official language of the country from which the worker is recruited and given to them at least seven days prior to the worker's departure from that country. At a minimum, the contract must include the compensation to be paid, job location, and benefits, including, where appropriate, Defense Base Act insurance coverage and procedures for claiming such insurance.

At a minimum, the contractor must comply with laws of host country. As a result, the FAR Council should require a standard clause in federal contracts that the contractor and subcontractor must comply with laws of the host nation from which the person is recruited, the laws of the United States, and, where there is a conflict, whichever provides the strongest protections for the worker. In addition, a key enforcement tactic should allow workers to collect back pay in their home countries to close any loopholes. This strategy gradually increases the minimum standard of fair labor because the contractor is required to respect standards of all applicable countries.

Wage plans should also include the identity of any recruitment company being used and proof that the company and/or recruiter is licensed under laws of the country of recruitment. Requiring the disclosure of the identity of recruitment companies or recruiters used will increase transparency and, in the long run, will help COs and the heads of Agencies to identify problem recruitment companies or recruiters. Requiring that such companies or recruiters be licensed will serve as another check on recruitment companies or recruiters, ensuring that they comply with the laws of the country of recruitment.

Defining Subcontractors

Federal contractors and subcontractors looking to avoid the implementation of the E.O. 13627 and ETGCA may construct a contract that limits the liability of subcontractors. We suggest, however, that FAR Council regulations to implement E.O. 13627 should reach contractors, subcontractors, and independent contractors alike without regard to the terms of art used in federal contracts. To prevent any ambiguity, the FAR Council should refine its definition of subcontractor to include any individual providing any such service along the supply chain in the course of executing a federal contract.³ Functionally, this system is simple to enforce because if a person is part of the supply chain, that person is held accountable to FAR Council implementation regulations. In line with E.O. 13627, the provisions of regulations for its implementation should apply both to subcontractors and independent contractors in the supply chain.

18 U.S.C. sec. 1351

ETGCA creates a new Title 18 anti-fraud provision. Specifically, it amends 18 U.S.C. sec. 1351, Fraud in Foreign Labor Contracting, to expand the prohibited scope of criminally fraudulent contractual conduct to include a materially false or fraudulent pretense, representation, or promise regarding employment of an individual recruited, solicited, or hired for work on a federal contract or at a federal facility overseas. It also prohibits individuals from *causing another* (e.g., a labor broker) from engaging in these practices. The provision is designed to criminalize the fraudulent employment misrepresentations at the heart of trafficking of third country nationals.

This new criminal offense, 18 U.S.C. sec. 1351(b), is intended to trigger the mandatory disclosure and enforcement regime established in the FAR Council regulations to implement the Close the Contractor Fraud Loophole Act. It is critical that the FAR Council's regulations implementing ETGCA clearly note that 18 U.S.C. sec. 1351(b) triggers these existing requirements.

Thank you for your time and attention to these comments.

Sincerely,

Coalition to Abolish Slavery and Trafficking (CAST)

Coalition of Immokalee Workers (CIW)

³ Reporting Executive Compensation and First-Tier Subcontract Awards, 75 Fed. Reg. 39414, 39419 (July 8, 2010), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2010-07-08/pdf/2010-16691.pdf> ("First-tier subcontract means a subcontract awarded directly by a Contractor to furnish supplies or services (including construction) for performance of a prime contract, but excludes supplier agreements with vendors, such as long-term arrangements for materials or supplies that would normally be applied to a Contractor's general and administrative expenses or indirect cost.").

ECPAT-USA

Free the Slaves

International Justice Mission

Not For Sale

Polaris Project

Safe Horizon

Solidarity Center

Verité

Vital Voices Global Partnership

World Vision

Additional Organizations:

American Civil Liberties Union (ACLU)

ATEST is a diverse alliance of U.S.-based human rights organizations, acting with a shared agenda to end all forms of modern-day slavery and human trafficking domestically and globally. ATEST member organizations include: Coalition to Abolish Slavery and Trafficking (CAST), Coalition of Immokalee Workers (CIW), ECPAT-USA, Free the Slaves, International Justice Mission, Not For Sale, Polaris Project, Safe Horizon, Solidarity Center, Verité, Vital Voices Global Partnership, and World Vision.
