

Purchasing Power:

How the U.S. Government Can Use Federal Procurement to Uphold Human Rights

ISABELLE GLIMCHER



 **NYU | STERN**

Center for Business
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Author:

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How Public Procurement Works Today

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Workers in countries around the world **endure** serious human and labor rights violations as they work to make goods for the United States federal government.¹

In Bangladesh, employees at Manta Apparels, which made uniforms for the General Services Administration (GSA), reported regular beatings and chained fire exits. Children made up a third of the workforce at another Bangladeshi factory manufacturing U.S. Marine Corps shirts to be sold in U.S. military stores.² Workers there reported violence by managers if production quotas were missed and the lack of a functioning alarm system despite past fires.³ In Thailand, employees making clothing sold by the Smithsonian Institution, an arm of the U.S. government, reported illegal wage confiscation, physical harassment, and constant surveillance with cameras mounted even in bathrooms.⁴ In Cambodia, clothes sold by the U.S. Army and Air Force were being made by workers as young as 15, and some reported being told to hide from inspectors.⁵ One worker told *The New York Times*, “Sometimes people soil themselves at their sewing machines,” because bathroom use is restricted.⁶ These are examples of a much larger problem: U.S. federal procurement relies on global supply chains that are often rife with serious human and labor rights violations.

Relying on Global Supply Chains

Federal procurement takes place in an increasingly globalized economy. Despite some recent efforts to increase domestic production for a variety of reasons—including the creation of job opportunities for U.S. workers, concerns about dependence on foreign suppliers for items related to national security, and a desire for greater speed and efficiency in the delivery of goods⁷—our economy has become dramatically more international over the last century.⁸ Globalization has produced a shift away from vertically integrated companies towards those that rely heavily on supply chains dispersed around the world.⁹ These global supply chains have helped lift millions of people out of extreme poverty and made goods more affordable to consumers everywhere.¹⁰ However, this system has also shifted a large proportion of global production to poorer countries where production costs are much lower, in large part because wages are so low and governments fail to enforce minimum standards. Producing-country governments often lack the resources and incentives to monitor and enforce human

and labor rights compliance by multinationals operating in their jurisdictions.¹¹ Downward pricing pressure, driven in large part by the [buying practices](#) of multinational corporations,¹² has also encouraged suppliers to cut wages and safety provisions while extending hours and productivity expectations.¹³ These factors have combined to produce a volatile environment in which rights violations are commonplace and monitoring is minimal or neglected entirely, with workers paying the price.



The U.S. is implicated in the mistreatment of workers around the world, including some who are suffering from physical abuse and modern forms of slavery. These practices are contrary to core American values but are being funded by U.S. taxpayers.



Much of federal procurement depends on global supply chains and thus contributes to this unstable and often problematic system. Government procurement contracts are exceedingly price sensitive¹⁴ and too often reward contractors who can offer the lowest bid, regardless of how they operate or treat their workers. The [Federal Acquisition Regulations](#) (FAR), the body of law that governs federal procurement, prioritizes “best value” as a determinative factor in awarding bids to contractors.¹⁵ According to the FAR, “[i]n different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful

contract performance is minimal, cost or price may play a dominant role in source selection.”¹⁶ Many contracts are therefore awarded to the lowest price offeror regardless of a contractor’s commitment to human and labor rights protections for workers. At present, the U.S. government does not dedicate the resources required to independently monitor these supply chains and to address governance gaps in producing countries.

Without sufficient governance, abuses abound. According to a [detailed report](#) from the International Corporate Accountability Roundtable, human rights violations occur across myriad sectors in the U.S. government supply chains, including electronics, mineral extraction, logistical and security support abroad, apparel, agriculture, seafood, and meat.¹⁷ The report cites excessive working hours, harsh working conditions, health and safety risks, child labor, forced labor, debt bondage, and the fueling of broader social conflict.¹⁸ Another [report](#) by Verité, commissioned by the U.S. State Department, highlights the risk of human trafficking in federal and corporate supply chains, focusing on 11 sectors: agriculture, construction, electronics, extractives, fishing, forestry, healthcare, hospitality, housekeeping, textile and apparel manufacturing, and transportation and warehousing.¹⁹

Why We Should Be Concerned

These rights violations by U.S. government suppliers create a variety of problems. Most fundamentally, the U.S. is implicated in the mistreatment of workers around the world, including some who are suffering from physical abuse and modern forms of slavery. These practices are contrary to core American values but are being funded by U.S. taxpayers. In addition, international law to which the U.S. is party prohibits states from being “directly complicit” in the violation of individual human rights.²⁰

The United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) elaborate that governments have a duty to protect individuals from human rights violations, including those committed by businesses or in which businesses are complicit.²¹

The existence of widespread human and labor rights violations in federal procurement supply chains also undermines U.S. economic interests in several ways. First, rewarding contractors who can offer lower prices because they or their subcontractors violate the rights of their workers unfairly disadvantages contractors, including American companies, which must offer higher prices to maintain adequate rights standards. As the Department of Labor (DOL) elaborated in its 2018 List of Goods Produced by Child Labor or Forced Labor, “enforcing trade commitments, strengthening labor standards, and combatting international child labor, forced labor, and human trafficking,” can help “promote a fair global playing field for workers in the United States and around the world.”²² Indeed, ensuring fair competition animates much of procurement law in the U.S.,²³ but relying on lowest-price contracting creates perverse incentives to utilize contractors with access to low-cost labor in countries without rule of law. Second, workers who enjoy better working conditions are typically more reliable, more productive, and less likely to defraud or otherwise take action against their employers.²⁴ While this may not translate into clear cost savings to the U.S. government in the short term, the increased costs of goods produced under acceptable working conditions clearly does not tell the whole story. Finally, and more broadly, funding supply chains in which rights are violated frustrates U.S. efforts to alleviate poverty and support development in the countries hosting those supply chains, and U.S. foreign policy efforts more broadly.

What Others Are Doing

Seeking to address these problems, other governments have begun to take modest steps to reform their procurement practices, focusing largely on reporting standards related to global labor practices. Both the United Kingdom and Australia have passed Modern Slavery Acts.²⁵ The U.K.'s law requires businesses over a certain size to produce a report detailing efforts they have

taken, if any, to ensure their supply chains are free of human trafficking.²⁶ A more recent report, commissioned pursuant to the Act, outlines steps government agencies should take to ensure their procurement supply chains are free of rights violations.²⁷ Australia's law goes further, making it the first country to impose requirements on government entities to report the human and labor rights risks in their supply chains and

steps they have taken to address those risks. However, neither of these laws includes any compliance mechanisms.²⁸ In both the U.K. and Australia, these laws focus on transparency and reporting without mandating any enforcement capacity or leveraging institutional purchasing power. In contrast, Sweden goes beyond reporting requirements, using contract remedies to enforce rights standards. (See sidebar)

The Swedish Approach

In Sweden, 21 county councils developed a shared code of conduct to facilitate the implementation of social criteria in public procurement.²⁹ The code of conduct enshrines human and labor rights requirements based on the International Labor Organization's (ILO) core principles,³⁰ the U.N. Convention on the Rights of the Child,³¹ and the Universal Declaration of Human Rights.³² These requirements are included as binding contractual provisions in procurement contracts for goods from eight sectors chosen for their high procurement volumes and high risk of human rights violations.³³

Each contractor supplying goods from one of these high-risk sectors is asked to fill out a self-assessment questionnaire, outlining the policies and processes they use to ensure they are following the code of conduct.³⁴ Suppliers are then asked to verify whether and how these processes work in practice in their factories and those of their subcontractors. Finally, the county councils can send third-party auditors to review work sites and factories. If violations are identified, suppliers are asked to outline their remediation plans and the councils retain the right to suggest specific remedies. Repeated violations or non-cooperation is a breach of contract and the county councils are empowered to impose contract remedies, up to and including termination.³⁵

Through this system, Sweden has driven impressive changes—for example, in Pakistan's surgical instrument supply chain. A 2007 report by Swedwatch, an independent research organization focused on companies' human rights and environmental compliance,³⁶ found widespread and severe rights violations in the supply chain. In response to these findings, Sweden's three largest county councils started a joint initiative to include social criteria in procurement contracts for the sector. In a subsequent investigation in 2015, "Swedwatch found positive developments in the factories supplying Sweden... [and their] sub-suppliers had also improved."³⁷ In contrast, "[t]he evaluation of workshops outside Swedish supply chains, where no special requirements were mandated, revealed little change since 2007."³⁸ Swedwatch highlights an important takeaway from this example: "Real change on the ground is a result of long-term commitment and monitoring from the contracting authority's side. Without the commitment, positive change over human rights and work conditions is not likely to materialize, and setting social criteria risks becoming merely an administrative burden with little actual impact."³⁹

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Alongside governments, various non-governmental organizations (NGOs) have attempted to support businesses in their efforts to guarantee better rights protections across global supply chains. The Fair Labor Association (FLA), for example, is a multi-stakeholder initiative that includes apparel and agricultural companies, civil society organizations, and universities.⁴⁰ The FLA has adopted common labor standards and metrics that are applied across the global supply chains of its 60 participating companies. The organization requires members to submit to independent FLA audits and assessments, and in exchange, affiliated companies can publicly demonstrate their commitment to human and labor rights in a way consumers and investors can trust. Another independent monitoring group, the Worker Rights Consortium (WRC), “investigate[s] working conditions in factories around the globe,” and has pioneered “worker-centered investigations” at factories in 12 countries.⁴¹

Other organizations, like Electronics Watch⁴² and the Sweatfree Purchasing Consortium,⁴³ work directly with governments to leverage their buying power to incentivize rights compliance. U.S. cities, including Austin, Berkeley, Ithaca, Los Angeles, Madison, Milwaukee, Olympia, Portland (OR), San Francisco, Santa Fe, and Seattle, have made commitments to eliminate procurement from sweatshops through their work with the Sweatfree Purchasing Consortium and the WRC.⁴⁴ These efforts are valuable and important, presenting a learning opportunity for the federal government to understand the challenges these cities have faced in implementing responsible procurement.

While many foreign governments, NGOs, and U.S. states have made progress towards ensuring better protections for workers around the world, the federal government has only begun to explore what it has the power to do.

Recent Efforts by the U.S. Government

Recently, the U.S. federal government has taken some promising steps to address these issues. Section 307 of the Smoot-Hawley Tariff Act of 1930 (Tariff Act), prohibits the importation of any goods made wholly or in part by convict or forced labor abroad.⁴⁵ The Tariff Act empowers the Treasury Department to issue Withhold Release Orders (WROs) under which goods are detained at U.S. ports unless the producer can demonstrate the goods were not manufactured with forced labor. Until 2016, the Tariff Act’s so-called consumptive demand exemption allowed importation of goods made with forced labor if “U.S. demand exceeded domestic production”⁴⁶ – a loophole that grew as domestic production decreased. But in 2016, the Trade Facilitation and Trade Enforcement Act removed the consumptive demand exemption, thereby enhancing Custom and Border Patrol’s (CBP) ability to prevent the importation of goods it has reason to believe were created wholly or in part by forced labor.⁴⁷ Since 2016, CBP has been more actively using the WRO as an enforcement tool, with 15 WROs imposed on specific goods from companies in Malawi, China, Brazil, Malaysia, Turkmenistan, and Zimbabwe.⁴⁸

The Trump administration has also centralized anti-trafficking efforts. On August 2, 2017, President Trump signed the Countering America’s Adversaries Through Sanctions Act (CAATSA), which stipulates that goods produced by North Korean nationals are the product of forced labor and are prohibited from being imported into the U.S. unless clear and convincing evidence proves otherwise.⁴⁹ On January 31, 2020, Trump also signed an Executive Order (EO) on Combating Human Trafficking and Online Child Exploitation in the United States.⁵⁰

Anti-Trafficking Provisions in the FAR

In the last two decades, some efforts have been made to address human and labor rights issues in federal procurement as well, specifically related to forced labor and human trafficking.⁵¹ Under the [current version](#) of the FAR, all contractors and their subcontractors, employees, and agents are prohibited from engaging in human trafficking, forced labor, commercial sex, and some of the practices commonly associated, including interfering with an employee's identity or immigration documents, "using misleading or fraudulent practices during the recruitment of employees," and charging employees recruitment fees.⁵² Contractors are required to notify the relevant agency's Contracting Officer, who awarded and oversees the contract, and Inspector General, who is charged with investigating complaints, of any credible allegations of violations,⁵³ and take steps to remedy them.⁵⁴ The FAR also requires contractors to draft compliance plans for "any portion of the contract that—(i) Is for supplies, other than commercially available off-the-shelf items, acquired outside the United States...; and (ii) Has an estimated value that exceeds \$500,000."⁵⁵ Such contractors are also required to certify that they have implemented the compliance plan and "procedures to prevent any prohibited activities and to monitor, detect, and terminate the contract with a subcontractor or agent engaging in prohibited activities," and that after conducting due diligence, to the best of their knowledge, prohibited activities have not occurred or have been addressed appropriately.⁵⁶

While these provisions are laudable, they are not sufficient, particularly in terms of their implementation. First, the system is predicated on self-reporting by contractors, who often lack the expertise, knowledge, or willingness to assess their supply chains in comprehensive ways. Many contractors

are not even aware of every link in their own supply chains. Furthermore, by predicated punishment on awareness rather than failure to monitor or remedy, some experts argue federal regulations may actually discourage investigation.⁵⁷ Rejecting this, the Office of Management and Budget (OMB) maintains "an effective monitoring program and/or reporting mechanism," and "risk mitigation tools in place at the time an incident arose," are mitigating circumstances in cases of trafficking violations, and insists that contractors could face penalties for reporting failures.⁵⁸ In reality, the likelihood that a government agency will independently uncover unreported violations is typically low. This leaves contractors with insufficient incentive to investigate thoroughly. Even those contractors who are required to have a compliance plan under the FAR are not required to provide them to government personnel unless a copy of the plan is explicitly requested. Relatedly, the system places responsibility with agency Inspectors General to conduct audits and other monitoring activities. Given the scale of surveillance required to ensure labor rights are being appropriately protected across sprawling global supply chains, federal agencies are poorly positioned to complete this evaluation, usually lacking the resources and expertise needed to do so.

Another major weakness of the current system is its limited scope. The FAR focuses exclusively on human trafficking, while other labor rights violations—including discrimination, harassment, wage theft, illegal overtime, health and safety violations, and limits on freedom of association—go unaddressed in contracts being fulfilled outside the U.S.⁵⁹ As drafted, the current provisions in the FAR also exclude contracts for commercially available off-the-shelf (COTS) items from the compliance plan and certification requirements. The scale of COTS procurement makes this loophole especially problematic. COTS is defined to include any item that is

available to the general public and is sold to the government without modification.⁶⁰ While there is no centralized data on annual COTS expenditure, the category includes vast amounts of procurement from high-risk sectors with troubling human and labor rights violation records, including technology, apparel, agriculture, seafood, and meat. This exclusion leaves agency personnel with a more limited basis on which to approach contractors for human rights compliance information. It also guarantees that any improvements that do occur due to agency oversight will not be shared more widely across factories and facilities producing commercial items. Finally, the \$500,000 value threshold further limits the scope of the relevant provisions. This loophole may incentivize prime contractors to subcontract in smaller increments, thereby complicating their supply chains and making it more difficult for them, or agency personnel, to track compliance comprehensively.

As designed, the current system also imposes penalties without parallel rewards and incentives. While contractors can face penalties for failing to report violations, the FAR provisions do not provide any mechanism to support contractors who are making serious efforts to improve their supply chains except as mitigating factors if trafficking violations are found.⁶¹ Given the challenges involved in policing supply chains, greater incentives are needed.

A Call to Action

The federal government needs to go much further, using its power and resources to incentivize and support rights compliance and penalize serious violations. The federal government spends hundreds of billions of dollars annually on contracts for goods and services, purchasing everything from office supplies to armaments.⁶² The

scale of this spending means that federal procurement regulations can be used to push suppliers to better protect human and labor rights across their supply chains.⁶³ Federal procurement requirements can provide financial incentives to contractors to police their supply chains more carefully and thereby drive improvements in rights protection in countries around the world. An independent assessment by Swedwatch found that “where social criteria have been implemented in the procurement process, human rights and labour conditions have improved over time.”⁶⁴ Indeed, given the sheer scale of U.S. government procurement, and the U.S.’s attendant buying power across myriad sectors, the power of procurement as a means to effect supply chain reform is extremely broad. As Professors Olga Martin-Ortega and Claire Methven O’Brien write in their new book on the subject, it is “difficult to conceive of a tool available to all states with higher potential economic leverage to implement their human rights commitments.”⁶⁵

Seeing this potential, this report proposes several ambitious steps that the U.S. federal government can take to reform its procurement processes to drive improved human and labor rights compliance globally. Recognizing the massive scale of this initiative, the report’s recommendations apply only to the procurement of goods from four high-risk sectors: electronics, minerals, apparel, and food—including agriculture, seafood, and meat. In each of these four sectors, the volume of federal procurement is substantial, and the risk of human and labor rights violations is significant.⁶⁶


While this project aims high, its aspirations are achievable. It is premised on the argument that the U.S. government needs to be a responsible buyer, ensuring that its spending supports, rather than impedes, global human and labor rights.

Big Spenders: The U.S. Government Agencies Responsible for the Most Procurement Dollars

(Fiscal year 2019 obligations, in billions)

Total: \$586.2 Billion

Civilian Federal Agencies – \$205.1 Billion		
\$ 33.3	Department of Energy	
\$ 27.3	Department of Veterans Affairs	
\$ 26.5	Department of Health and Human Services	
\$ 17.6	Department of Homeland Security	
\$ 18.2	NASA	
\$ 16.8	General Services Administration	
\$ 9.5	Department of State	
\$ 8.4	Department of Justice	
\$ 6.8	Department of Transportation	
\$ 7.4	Department of Agriculture	
\$ 33.4	Other Federal Civilian Agencies	

Department of Defense – \$381.2 Billion		
\$ 120.1	Navy	
\$ 94.7	Army	
\$ 75.7	Air Force	
\$ 90.7	Other Defense Agencies	

Source: U.S. Government Accountability Office, “A Snapshot: Government-Wide Contracting, A 2019 Update”

Challenges to Reform

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The recommendations outlined on the following pages accord with priorities from both parties and legislation to realize them should be supported by politicians on both sides of the aisle.
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Three principal challenges are likely to arise in any attempt to leverage the procurement process to drive stronger rights protections by contractors: the need to establish a clear mandate for all federal agencies procuring from high-risk sectors to implement these reforms; the need for monitoring and enforcement mechanisms; and the need to mitigate against increased costs to taxpayers. These challenges are inevitably interconnected, and we consider each below.

Agencies Lack an Enforcement Mandate

Federal agencies lack a comprehensive mandate to prioritize, monitor, and require broad human and labor rights compliance by the contractors who supply them. Instead, procurement officers are instructed to prioritize obtaining the “best value” at the lowest cost to the taxpayer.⁶⁷ While “best value” leaves some room for discretion, many procurement decisions are based wholly or very substantially on cost. Awards often go to the lowest bid without sufficient consideration of a contractor’s rights compliance record.⁶⁸ As a result, contractors have little reason to believe rights compliance will affect their business with the U.S. government. Without a standardized system with which to assess rights compliance, and a mandate to do so, procurement officers also lack the information and expertise necessary to make informed decisions among competing bids.

While some of the recommendations outlined in this report can be accomplished without legislation, full imple-

mentation will require legislative action. Bipartisan legislation has proven elusive in recent years but combatting human trafficking has generated bipartisan support, and addressing other serious labor rights should as well. The Trump administration’s [2017 National Security Strategy](#) examines U.S. relationships with trading partners and insists “the United States will no longer turn a blind eye to violations [or] cheating,” but rather will “work with like-minded allies and partners to ensure our principles prevail and the rules are enforced so that our economies prosper.”⁶⁹ Likewise, the policy commits the government to “expand[ing] trade that is fairer so that U.S. workers and industries have more opportunities to compete for business.”⁷⁰ More recently, Trump signed an Executive Order on [Aligning Federal Contracting and Hiring Practices With the Interests of American Workers](#).⁷¹ While this EO focuses on the performance of federal contracts within the United States, its overarching goal of protecting opportunities for American workers aligns with some of the justifications for the recommendations outlined in the next section.

The 2020 Democratic Party Platform also commits the party to “pursu[ing] a trade policy that puts workers first,” to “negotiat[ing] strong and enforceable standards for labor [and] human rights,” and to “mak[ing] sure American workers have a fair shot in the global economy.”⁷² The Obama administration attempted to enforce stronger labor rights provisions on contractors through the EO Fair Pay and Safe Workplaces,⁷³ and helped create the provisions of the FAR which address human trafficking.⁷⁴ Indeed, combating forced and child labor has been a bipartisan priority for many years. As the DOL describes, “the international community has set a goal of eradicating all forms of child labor by 2025, and all forced labor by 2030. The United States has always played a leadership role in this fight.”⁷⁵ The recommendations outlined on the following pages accord with priorities from both parties and legislation to realize them should be supported by politicians on both sides of the aisle. Legislation alone, however, is not sufficient to promote compliance.

The Complexities of Monitoring

Ensuring consistent compliance will also require stronger monitoring and enforcement mechanisms. As a recent preliminary survey in Germany found, if monitoring responsibility is imposed on a voluntary basis, few companies will choose to undertake the effort.⁷⁶ Even if prime contractors are committed to policing their supply chains, many corporations lack the resources necessary to assess the actions of all subcontractors and suppliers. Instead, many rely on information provided by the suppliers themselves, which is often inaccurate, incomplete, or both.⁷⁷ Employees themselves often avoid reporting issues for fear of retribution from their employers, or because they do not want to take on the additional uncompensated labor of fulfilling complex reporting requirements.⁷⁸ When independent audits are

undertaken, they are often check-the-box exercises without sufficient participation by, or protections for, workers.⁷⁹ In many countries, weak national regulatory systems cannot fill this compliance gap.⁸⁰ Instead, the U.S. government will need to use its considerable leverage to impose standards on prime and subcontractors and underwrite meaningful monitoring and enforcement.⁸¹ This, however, would entail significant financial costs.

Increased Costs

Increased cost, not only for monitoring and enforcement mechanisms, but also for the goods themselves, constitutes one of the most significant roadblocks to implementing stronger rights standards for government contractors. Monitoring and enforcement by the U.S. government itself will be costly. While the recommendations in the next section attempt to minimize these costs, some significant investment will be required. The costs of goods themselves are also likely to increase as contractors recruit workers ethically, pay them a fair wage, maintain safe workplaces, limit the number of hours permitted in a day, week, or month, conduct due diligence on subcontractors, and fulfill reporting requirements.

Despite these very real challenges, increasing rights compliance among U.S. government contractors is achievable, and the recommendations on the following pages are designed to minimize these issues.



Ensuring consistent compliance will also require stronger monitoring and enforcement mechanisms.



Recommendations

These recommendations leverage the existing procurement process, and the federal government's impressive buying power, to drive rights compliance by contractors and improve rights protections for workers. Recognizing the scale of this undertaking, we propose incremental adoption over multiple years for each of the four high-risk sectors. These recommendations outline practical and tangible proposals of where to begin. A preliminary review of agency spending to identify high-risk sector procurement is an important diagnostic step and should be completed as soon as possible. From this finding, agencies can prioritize implementation of these recommendations in the high-risk sector from which they procure the highest volume, before extending it to the other high-risk sectors. Further detail about the incremental implementation of each recommendation is discussed below. From these starting points, lessons can be learned, and improvements can be implemented more widely.

Mindful of the unique constraints that apply to the procurement of goods related specifically to defense and national security,⁸² we propose excluding contracts for these goods from this program. This means that certain contracts, for example, for weapons technology systems and body armor, flight suits, and other specialized clothing that require a high-tech production facility would be excluded. However, other contracts, such as those for soft apparel made in cut-and-sew factories and other generic consumer goods or COTS used by federal agencies with national security- or defense-related responsibilities, would still be subject to these enhanced procurement requirements when agencies work with international contractors in the four high-risk sectors.

1. Create a binding code of conduct that is included in high-risk procurement contracts with all prime contractors and subcontractors.

The code of conduct should align with international human rights and labor law and should build on the prohibitions on forced labor and human trafficking already included in the FAR. The ILO's four Core Labor Standards,⁸³ and their elaboration in the eight core ILO conventions,⁸⁴ constitute authoritative sources for the content of the code of conduct's requirements. The Fair Labor Association's (FLA) code of conduct and metrics can also serve as a useful guide.⁸⁵ The Electronics Watch Code of Labour Standards provides another valuable model, applying standards drawn from ILO Conventions, ILO Recommendations, the Universal Declaration of Human Rights, and the UN Convention on Rights of the Child, to the procurement of goods.⁸⁶ Like the Electronics Watch Code, the code of conduct created to govern high-risk federal procurement should include both principles and examples of compliance and non-compliance.

Eventually, this code should be included in full for all procurement contracts for goods from all four high-risk sectors. However, incremental implementation is possible in two ways. First, the full code of conduct could be included as binding terms in contracts for procurement from only a subset of the high-risk sectors, and eventually expanded to all four. Alternatively, only certain elements of the code of conduct could be included as binding terms at first, before expanding to include the full code over time.

If the code is to be implemented in parts, we propose that begins by expanding existing prohibitions on forced labor and modern slavery—by requiring compliance plans and annual certification from all contractors, and mandating review by Contracting Officers before award decisions are made—and by establishing standards to ensure workplace safety. Subsequent additions should expand federal purchasing contracts to require adherence to other labor rights, such as prohibitions on workplace discrimination and harassment, and reasonable working hours. Requirements relating to the vital issues of fair wages and freedom of association are likely to require more time to incorporate into procurement contracts, in part because of conflicts with the national laws of other countries.

For high-risk procurement, the code of conduct should ultimately be included as a binding contract provision, with contract penalties imposable for violation. Any provision that is made binding in the procurement contract should include language mandating that all prime contractors will include similarly binding language in all contracts with subcontractors, agents, and employees—sometimes known as mandatory flow down.

2. Build human and labor rights risk assessment into the solicitation stage of all federal procurement and reward compliance in high-risk procurement award decisions.

When beginning a procurement process, all agencies should conduct a risk assessment to identify potential human and labor rights risks in the involved supply chain. This risk assessment can rely on tools already created by the U.S. government, including the DOL List of Goods Produced by Child Labor or Forced Labor and the DOL List of Products Produced by Forced or Indentured Child Labor.⁸⁷ The assessment can also rely on findings from authoritative external sources such as those of the Fair Labor Association,⁸⁸ the Fair Wear Foundation,⁸⁹ and Oxfam's Behind the Brands scorecard.⁹⁰ Finally, any procurement from the four sectors catalogued here—electronics, minerals, apparel, and food—can be immediately identified as high risk.

If high risk of human or labor rights violations is identified, a contractor's history of rights compliance and violation remediation should be explicitly factored into award decisions. Procurement officers should be mandated to review contractors' records, including past performance evaluations in the [Contractor Performance Assessment Reporting System \(CPARS\)](#)⁹¹ and the [Federal Awardee Performance and Integrity Information System \(FAPIIS\)](#)⁹², which already includes a Trafficking in Persons designation and should be expanded to include other human and labor rights violations by contractors.

Procurement officers should be incentivized to factor these records into award decisions. Initially, the specific balancing of factors in determining awards can be left to individual procurement offices, with procurement officers strongly encouraged to consider records of repeated violations and/or refusal to remedy as weighing heavily against awarding a contract. In the longer term, however, a mechanism similar to the federal program favoring women- and minority-owned companies can be implemented for businesses with strong rights compliance and violation remediation records. This will serve to incentivize all contractors to adhere to the code of conduct requirements and to take proactive steps to improve human and labor rights compliance across their supply chains.

3. Rely on external monitors to assess rights protection and remediation.

Ensuring compliance with the requirements of this program will require an assessment program that includes on-the-ground monitoring and evaluation. Examining contractor policies and processes is also important but not sufficient. Given the vast scope of government contracts, this monitoring program will need to be carefully targeted to a relatively small and strategically chosen number of facilities. Efforts should prioritize facilities where there are credible reports of egregious and systematic labor and human rights violations within the sectors identified as high-risk herein. Because U.S. government agencies do not have the resources or personnel to undertake this type of monitoring and assessment, the government should rely on external groups, accredited by a newly formed body within the Office of Management and Budget (OMB), to fulfill this need.

A. Create a new body within OMB to oversee monitor accreditation contingent on sufficient expertise.

A newly formed OMB office should be composed of individuals with requisite expertise in monitoring, human and labor rights issues, supply chain management, and government procurement. An important aspect of this office's remit would be to accredit and oversee compensation of external monitoring groups. It should assess and accredit external groups to monitor facilities around the world that are producing goods from high-risk sectors pursuant to U.S. government contracts. The monitoring groups that receive accreditation will be expected to demonstrate monitoring capacity and expertise, local ties, and independence. These groups could be accredited to monitor only in certain countries or sectors, depending on their background and proven competencies.

B. Mandate specific good practices.

Accredited monitoring groups should perform repeated audits of facilities producing goods pursuant to U.S. government contracts, and the internal policies of prime contractors and subcontractors. Audits should occur periodically and additional assessments should be conducted if a worker, a union, or another NGO reports violations.

While auditing is an imperfect tool,⁹³ best practices should be implemented to ensure meaningful results. The audit process should include unannounced visits to facilities, anonymous interviews with workers in a safe and comfortable setting offsite, and the collection of wage records, safety certificates, corporate policies, and all other information needed to assess whether human and labor rights standards are being respected in practice. Recent technological advances can also be used to provide workers with a means to provide feedback anonymously but are not sufficient on their own.⁹⁴ As much as possible, monitors should avoid check-the-box exercises and instead aim to identify underlying issues and engage workers to the greatest extent possible.⁹⁵ Once a monitoring group produces a report, the findings should be relayed back to workers and worker organizations to invite feedback on the accuracy of the findings.

Overall, these audits should be treated as a “tool for collaborative engagement,” not a policing mechanism.⁹⁶ When violations are identified, the monitoring group should work with contractors and workers to develop and execute a corrective action plan that provides a remedy to the workers affected and implements practices to prevent future violations. Monitors should also conduct periodic reassessments of these facilities to determine whether remedial plans have been put into place and carried out, and to identify any further violations.

C. Create a rebate system to pay for monitoring and implement in all high-risk procurement contracts.

To help ensure their independence, external monitoring groups should be compensated through a centralized federal funding pool overseen by OMB. Funding can be collected through the inclusion of a monitoring rebate in all high-risk procurement contracts. Madison, Wisconsin, has pioneered a similar rebate system for all apparel procurement as part of its participation in the Sweatfree Purchasing Consortium.⁹⁷ The rebate can be included as a percentage of the contract price, and given the scale of federal procurement contracts, sufficient funding is likely with a rebate under 1% of the total contract price.

D. Impose reporting requirements for monitoring groups.

Monitors should follow standard guidelines, recording details of visits to prime and subcontractor facilities, evidence of violation(s), recommendations for remediation, and measures the contractor has taken to prevent and remedy violations. Monitors should work with the contractor to develop corrective action plans to provide remedies to workers affected by violations and prevent future reoccurrence. As long as good faith remediation is undertaken, and improvements are not transient, reports involving relatively minor violations should be held in the monitoring group's internal database and only made available to the U.S. government on a confidential basis.

However, if monitors discover human trafficking as prohibited under the FAR, penalizing of whistleblowers or victims, efforts to hide violations, or failure to remedy, they should alert any government agency working with the contractor. If remedial and preventative efforts are undertaken and completed in good faith, and in a timely manner, the monitoring group should report this progress to the U.S. government. Alternatively, if contractors fail to take such steps, or if they penalize the victim or whistleblower, the monitor should issue a warning to them, record the warning in the monitor's internal database, and notify the contracting agency and the OMB oversight body of the warning.

4. Impose additional requirements on contractors engaged in high-risk contracts.

In addition to following the code of conduct, contractors must:

A. Conduct human rights due diligence on all subcontractors and agents to ensure likely compliance with the code of conduct.

Prime contractors should be expected to work only with subcontractors and agents who meet the same minimum human and labor rights requirements enshrined in the code of conduct. Prime contractors should exercise due diligence to identify subcontractors with strong records of rights compliance and should conduct periodic reassessments to ensure compliance.

The UN Guiding Principles identify due diligence as “a comprehensive, proactive, preventive or mitigating, repeated exercise to discover actual and potential human rights risks in business activities.”⁹⁸ It includes five elements: identifying and assessing actual and potential adverse impacts,⁹⁹ mobilizing findings to take appropriate prevention and mitigation actions,¹⁰⁰ tracking the efficacy of their responses,¹⁰¹ conveying their due diligence processes publicly,¹⁰² and remediating adverse impacts when identified.¹⁰³ These efforts should be tailored to the size and complexity of the enterprise or contract.¹⁰⁴

Adhering to this requirement will be especially challenging for contractors who work in sectors where human and labor rights violations are widespread. Therefore, this expectation should be gradually expanded to include a larger range of subcontractors. To begin, prime contractors should be expected to conduct such due diligence on all subcontractors from assembly through delivery. Over time, these requirements should be expanded across the supply chain until prime contractors are eventually expected to conduct good faith, iterative due diligence on all subcontractors beginning with the collection of raw materials.

B. Build a mechanism through which employees can report violations and guarantee protections for whistleblowers.

All contractors should be required to guarantee protections for victims of rights violations and whistleblowers who report labor rights violations either to the contractor or supervisors directly, or to external monitoring groups. Anonymity should be guaranteed for victims and whistleblowers, except if it is absolutely necessary to remedy violations. These protections accord with domestic and international law,¹⁰⁵ and are crucially important in order to encourage reporting and to protect victims and whistleblowers from retribution.

C. Take steps to ensure employee awareness of rights, reporting procedures, remedies, and penalties for violation.

All contractors should be expected to make the code of conduct, violation reporting procedures, and the remedies and penalties available in case of violation accessible to employees. Information should be posted publicly in all facilities, in local languages, and using images whenever possible.

D. Allow accredited monitors access to facilities and policies, and work with them to the greatest extent possible on all auditing and monitoring.

Monitors should be granted full access to all contractor and subcontractor facilities for the purpose of assessing whether the human and labor rights of workers are being protected. Contractors should also provide accredited monitors with their policies, practices, and records for rights compliance assessment purposes.

E. Report on subcontractors, violations, and penalties.

Prime contractors should be required to submit the names and locations of their subcontractors as part of their tender offers when bidding for a contract with a federal agency. Recognizing the challenges for prime contractors in obtaining this information, this requirement should be phased in incrementally. At first, it should extend only to the point of assembly, requiring prime contractors to report the names and locations of subcontractors from the point of assembly through delivery. Over time, this requirement can be extended further across the supply chain.

The plain language of the Federal Funding Accountability and Transparency Act (Transparency Act) of 2006 mandates such disclosure.¹⁰⁶ While it has been interpreted more narrowly by the FAR Council,¹⁰⁷ the Transparency Act can provide the legislative basis for full disclosure, as intended. During the decision-making process, all information must be kept confidential.¹⁰⁸ Once an award decision is made, however, subcontractor information should be published along with the award decision on usaspending.gov, unless a contractor requests non-disclosure on the basis of a security risk.¹⁰⁹ This information should also be made available to monitoring groups on the condition of confidentiality.

Contractors should also be required to report human and labor rights violations in their supply chains, as well as remedial efforts taken, to the agency with whom they have a contract and the newly created oversight body within OMB. If such reporting and remedial actions are carried out promptly and in good faith, these violations should not be the basis for any penalty or denial of future U.S. government contracts, unless a pattern of such violations continues unabated.

Finally, as part of their reporting to the Securities and Exchange Commission, contractors should be required to publicly disclose any penalties imposed by the U.S. government on the basis of human and labor rights violations. These violations should be reported as risk factors in contractors' annual 10-K and quarterly 10-Q filings.

F. Create and implement corrective action plans in cases of violations.

When labor and human rights violations are discovered, either through a contractor's internal monitoring or by external monitors, contractors should be expected to implement a corrective action plan which provides appropriate remedies to workers affected by violations and outlines policies and practices designed to prevent future violations from occurring. Contractors should be encouraged to seek assistance from monitors and/or the U.S. government in creating a corrective action plan. If contractors implement a corrective action plan in good faith, the existence of these violations should not be grounds for penalties or prejudice in the awarding of future government contracts.

As a last resort, prime contractors should be required to terminate contracts with subcontractors who are repeatedly unwilling to make good faith efforts to prevent human and labor rights violations, or who repeatedly hide violations, penalize victims or whistleblowers, or engage in other efforts to conceal violations from monitors, prime contractors, or the U.S. government. The goal of this program is to promote continuous improvement and compliance. Consistent with that, subcontractors should be given ample time to remedy violations before payments are withheld or the contract is terminated.

5. Use penalties as a last resort to enforce compliance.

This system as a whole is designed to incentivize and support prime and subcontractors in bringing their facilities and supply chains in line with minimum human and labor rights standards. Therefore, penalties should only be imposed in cases of persistent refusal by a contractor to take appropriate remedial actions in a timely manner, or efforts by a contractor to penalize whistleblowers or conceal violations.

These penalties should be applied using an escalating scale, taking into account mitigating factors outlined by OMB, including the implementation of risk-mitigation factors, the promptness of notice to the U.S. government, cooperation with investigations, the extent of a contractor's experience working with the federal government, and the complexity of the supply chain.¹¹⁰ If a contractor has failed to take good faith steps to remedy violations or prevent future violations, penalized whistleblowers or victims, or attempted to hide violations, subsequent to receiving a warning from the monitoring group, OMB should issue an additional warning, stating that the contractor's actions threaten current and future U.S. government contracts. OMB should provide a deadline by which time the contractor must take good faith steps to

remedy and implement policies to prevent future violations. A record of such warnings, and any additional penalties detailed below, should be recorded in CPARS and FAPIIS.

When a contractor fails to take steps to implement a corrective action plan even after receiving a warning from OMB, penalties should escalate, including withholding of payments, official sanction, contract suspension, contract withdrawal, temporary debarment, and in extreme cases, prosecution. Prime contractors should be afforded the opportunity to challenge the imposition of penalties in an administrative hearing. The final determination of whether to impose penalties, and what penalties to impose, should be left to OMB in consultation with any agencies actively engaging the contractor.

6. Build human and labor rights expertise among federal procurement officers.

A. Increase human and labor rights training for procurement officers.

According to Swedwatch's findings, implementation of social criteria in public procurement as a way to drive rights compliance by contractors "requires competent procurement officials with adequate knowledge of human rights risks in supply chains."¹¹¹ In line with this, additional training should be provided for all procurement officers on the human and labor rights risks in global supply chains, how to interpret and assess monitor findings and corrective action plans, and how to identify potential violations and inadequate responses. This training should be provided to agencies based on the scale of high-risk procurement they undertake with additional sector-specific training whenever possible.

B. Add a human and labor rights expert to the FAR Council.

The FAR Council "was established to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government."¹¹² It currently includes two Office of Federal Procurement Policy executives from OMB, the Acting Principal Director of Defense Pricing and Contracting from the Department of Defense, the Assistant Administrator for Procurement from NASA, and a Senior Procurement Executive from GSA.¹¹³ Given the wide-reaching powers invested in the FAR Council, making broad shifts in federal procurement policy towards greater human and labor rights compliance will likely require adding a human and labor rights expert to the Council. This individual could be the leader of the newly formed body within OMB and can contribute their expertise to directing federal procurement policy.

The federal government must do more to ensure it acts as a responsible buyer around the world.

The recommendations outlined in this section aim to leverage the significant expenditures of the federal government to drive rights compliance among contractors and subcontractors. Mindful of the challenges inherent in this effort, these recommendations are designed to support contractors' attempts to better police their supply chains. Indeed, the government can act as a powerful partner in these endeavors. As companies around the world undertake efforts to ensure responsible sourcing, the federal government can be a leader, driving improvements in factories, supply chains, industries, and whole markets. Through these efforts, workers around the world can enjoy more comprehensive rights protection, American companies can compete on a more level playing field, and Americans can feel confident that their government is doing everything it can to make the world safer and fairer for all.

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NYU Stern Center for Business and Human Rights
Leonard N. Stern School of Business
44 West 4th Street, Suite 800
New York, NY 10012
+1 212-998-0261
bhr@stern.nyu.edu
bhr.stern.nyu.edu

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