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Written Comments on Proposed Federal Acquisition Regulations for Implementing the Executive Order 13627, "Strengthening Protections Against Trafficking in Persons in Federal Contracts"

The Alliance to End Slavery and Trafficking (ATEST) is a U.S. based coalition that advocates for solutions to prevent and end all forms of human trafficking and modern slavery around the world. We are pleased to submit comments in response to the proposed rule to implement Executive Order (E.O.) 13627, *Strengthening Protections Against Trafficking In Persons In Federal Contracts* [FAR Case 2013–001; Docket 2013–0001; Sequence 1].

ATEST acts with a shared agenda to prevent and 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.

ATEST has been closely following the design, announcement, and implementation process for Executive Order 13627 and is committed to helping all parties involved fully realize the potential of this potentially historic policy. In that spirit, we are pleased to submit comments on the FAR's proposed amendments and look forward to staying actively engaged as this policy is fully employed throughout the federal government and contractor community.

ATEST was particularly pleased to see an unequivocal stance prohibiting fees in the labor recruitment process. The prohibition of fees throughout the labor supply chain for federal contracts is central to realizing the federal government's "zero tolerance" policy on trafficking, and we applaud the FAR Council for maintaining that position and not creating exceptions to it. The Council should be vigilant, however, to ensure that fees do not continue to be charged under the guise of fictional or unnecessary costs, such as for "training" or exorbitant transportation costs. Unfortunately, beyond this salutary provision regarding the imposition of fees, we believe the Council has not taken sufficient steps to approach, much less achieve, the zero tolerance policy for trafficking announced in the Executive Order. Our reasons for reaching this conclusion follow, and we provide a number of proposals that would significantly strengthen the draft regulations. We urge the Council to adopt these proposals in order to fulfill the President's vision articulated in the Executive Order.

In general, we think it is important to consider that there are (and will remain for quite some time) many barriers to the implementation of the Executive Order because human trafficking tends to take place in countries where one cannot – indeed, must not – assume the rule of law prevails. Furthermore, there are entrenched models of doing business in many countries and in many business activities (such as labor recruitment and sub-contracting) that are tied to human trafficking. Therefore, we believe it is important that compliance plans be based on independently verified policies and practices that clearly make a break with prevailing practices. We are particularly concerned that the contractor community will assume that they are not connected to trafficking because they have not actively sought to understand the pervasive nature of trafficking in many sectors and/or are likely to resist making changes to their existing business models. Experience demonstrates that many businesses do not make major changes in their operational protocols unless there is a clear and present risk of enforcement action. We think it is particularly important that contractors not be allowed to design and implement compliance plans that are structured around self-disclosure on their part. That is why we believe strongly that the FAR regulations for this Executive Order must not offer the appearance or reality of accepting compliance approaches that do not include robust independent and accessible grievance mechanisms, independent verification of practices, and sufficient resources and mechanisms to ensure meaningful enforcement.

ATEST is concerned that effective implementation of the letter and spirit of the Executive Order will be seriously compromised by some of the proposed approaches to enforcement, which we outline below:

We believe that the provision of both products and services should be included and fully afforded protection by the regulations, with neither exempted, even under the "commercial off the shelf (COTS)" provision. Therefore, we advocate strongly that the COTS exemption not include "services" (*see* FAR Part 12.1022). If a COTS exemption remains, we suggest that contractors be required to track the supply chain of the COTS items they use in the process of fulfilling a federal contract, so that such information can be compiled and analyzed by governmental and other actors to determine how best to leverage the contractors' purchasing power to fight trafficking. After an appropriate period of collecting and analyzing that information, there should be a reconsideration of ways in which regulations under this Executive Order can be fine-tuned to require contractors to take action to prevent trafficking associated with COTS goods.

With regard to **Part 9—Contractor Qualifications, 9.104-6, Federal Awardee Performance and Integrity Information System, Section (e)**, we are very concerned that the proposed system is unworkable, as it relies entirely on Inspector General (IG) findings from investigations. Inspector General investigations and reports are rare, and those most affected by trafficking certainly do not customarily have the access and resources to get their complaints investigated by an IG of a U.S. government agency. Only those complainants who are most persistent and well resourced will manage to have their complaints heard and investigated through the mechanisms being proposed. Victims of trafficking, especially those located overseas, are not likely to have the

knowledge or resources to push their case to that level. In thinking through the likely efficacy of the proposed approach, one need only ask how such an overseas victim of trafficking would bring his or her plight to the attention of anyone associated with the Inspector General. It seems clear that, as written, the proposed regulations require the victim to proceed through the employer to access potential redress. However, our broad experience in combating trafficking indicates that such a system will not work, as even an employer with no direct involvement in or knowledge of the trafficking all too often will have a vested interest (avoiding penalties, damage to its brand, or both) in not bringing such severe abuses to light.

Furthermore, if the only findings of a violation that will be validated and posted publically are the IG's findings, the system will be quickly overloaded if there are more than a token number of allegations of wrongdoing; IG offices will not have the resources or expertise to investigate more than a handful of cases. If there are not substantial allegations of wrongdoing (at least in the first several years of implementation), then the complaint systems the contractors are required to have in place are almost certainly not working. The reality of trafficking in today's world necessitates that the government officials charged with enforcing compliance plans recognize that a paucity of complaints is more problematic than an abundance of complaints. That is, a lack of complaints in early years would indicate that the systems of enforcement and grievance mechanisms indeed are failing, rather than demonstrate that the problem has been solved. We presume the Council has developed meaningful grievance procedures; therefore there should be little or no cost associated with modifying those procedures to comply with these regulations. Effective grievance mechanisms indeed require vigorous enforcement by contracting officers and other government officials. Implementation of the Executive Order necessarily incurs a cost to meaningfully implement its "zero tolerance" policy and meaningful grievance procedures.

Under **Section 22.1703 Policy, (a)**, we would like to recommend that the prohibitions on employer actions include a general prohibition on limiting employees' freedom of association. Efforts to limit the freedom of association may include explicit company bans on independent labor unions or more covert behavior, such as intimidation or retaliatory firing. Our experience indicates that workers with union support benefit from better access to basic employment rights and fair negotiations. As a result, unionized workers are less vulnerable to employer coercion and less vulnerable to the conditions that lead to forced labor and trafficking.

Concerning **Sections 22.1703(a)(5)** and **22.1703(a)(9)**, we recommend that references to information provided to prospective employees, during the recruitment process, and to employees, through the employment contract or similar agreement, be amplified to increase the information provided to workers and to decrease worker vulnerability. In our experience, cases of labor trafficking often involve employer failure to disclose, or deception concerning, this information. While we commend the provisions' attention to the issue of disclosures, we also recognize that most employers and recruiters will not disclose to workers more information than that information which, by express law, must be disclosed. Therefore, we strongly recommend that the

provisions require disclosure of the following information: identity of the employer and the identity of the person conducting the recruiting on behalf of the employer, including any subcontractor or agent involved in such recruiting; the period of employment; any withholdings or deductions from compensation, whether on behalf of a government, the employer, or a third party; any penalties for early termination of employment; and, if applicable, the type of visa under which the foreign worker is to be employed, the length of time the visa is valid, the terms and conditions under which this visa may be renewed with a clear statement that there is no guarantee that the visa will be renewed. Additionally, **Section 22.1703(a)(5)**'s reference to "significant costs to be charged to the employee" should require that the employer or recruiter provide to the employee an itemized list detailing these costs.

We would also like to express concern about **Section 22.1703 Policy, (a)(7)(ii)(B),** especially the portion that reads: "The requirements of paragraph (a)(7)(i) of this section do not apply to an employee who is…. (B) Exempted by the contracting agency from the requirement to provide return transportation or pay for the cost of return transportation; . . . ." We think this provision creates a significant loophole because there are no listed criteria that would circumscribe the agency's discretion to exempt contractors. Understandably, cordial relationships often develop between an agency and those contractors with whom it regularly interacts. This relationship is positive, as it allows the contracting process to function smoothly. On the other hand, contracting agencies do not have similar relationships with workers, often located in foreign countries, who may have been, or face the prospect of being, trafficked. As providing return transportation to such workers incurs costs to the contractor, the contractor's financial incentive is to refuse to pay for repatriation. In addition, the contractor, unlike the worker, will have the ability and relationships with the agency to present its perspective in the most persuasive way possible. Given the centrality of transportation costs to various forms of trafficking, especially those in debt bondage situations, any ability to exempt a contractor from providing transportation to workers should be circumscribed by precise and clearly articulated criteria. The proposed regulation does not reflect such criteria.

With regard to **Section 22.1703 Policy (7)(ii)(d)(1)**, we think more clarity is needed about whether certification is required only if the portion of the contract to be performed outside the United States, not necessarily the entire contract, exceeds $500,000. If it applies only to specific portions exceeding $500,000, then applicability is limited significantly, and contractors will be incentivized to break up contracts into multiple portions of less than $500,000 to evade the regulations. Also, this section requires a certification that the contractor has a plan and has implemented it, but the provision does not require that the contractor declare what this plan is. As a result, evaluation of the plan will be merely a retrospective exercise, presumably only when the plan has been discovered to be ineffective.

Later in this section, it states that "the certification must state that, after having conducted due diligence, either (i), **to the best of the contractor's knowledge and belief**, neither it nor its agents, nor any of its subcontractors or their agents, has engaged

in any such activities." We believe the bolded text will encourage a "don't ask, don't tell" approach to dealing with subcontractors. At a minimum, there needs to be a definition of "due diligence" attached to this particular certification, so that contractors are required to conduct a certain depth of inquiry and at least certain specified inquiries, before certifying that no trafficking or other prohibited conduct is occurring. We would be happy to make available to the Department the expertise of ATEST members to help shape the nature of those inquiries.

Subsection **(3)** of the same provision provides the following: "Require the contractor to obtain a certification from each subcontractor...that is has a compliance plan…outside the United States under the subcontract [if the subcontract] exceeds $500,000." We are very concerned that this provision specifies that subcontractors have to certify compliance only if their portion of the contract that is being performed outside the United States exceeds $500,000. As mentioned above, this section severely limits the reach of this regulation and will encourage contractors to divide subcontracts deliberately into amounts less than $500,000 to evade oversight. We strongly support requiring subcontractors to demonstrate their compliance and creating some accountability in the contractor itself, but setting this limitation at the same amount as in the Executive Order severely undermines it effectiveness. This provision is one of the most problematic of the proposed regulations, as the majority of risky subcontractors will likely be outside the purview of the regulation yet still actively implicating the federal government – via its contractors – in human trafficking.

Later, in subsection **(5)**, there is language requiring protection and interviewing of suspected victims prior to their return to their country of origin. We applaud the spirit of this section to seek to prevent forcible repatriation, and it is laudable that contractors are required to assist victims and not obstruct cooperation with authorities. Yet, we believe the current structure of this regulatory approach provides incentives for the contractor to dissuade employees from speaking up. There need to be clear consequences for retaliation against those who speak out and an articulation of the need for a compliance mechanism independent of the contractor and subcontractors (as discussed more fully below in conjunction with Section 22.1704). We suggest that the certification of a contractor or subcontractor should require identification of how an *independent* complaint mechanism will be operated and by whom.

Section 22.1704 Violation, remedies, and notification. (a) Violations reads "The Government may impose the [enumerated] remedies . . . ." We suggest that this should read "shall," not "may," to ensure that some remedy be applied to the violator. With violations associated with trafficking and severe abuse, there should not be discretion (as implied with the term "may") about whether a remedy is imposed or not. Zero tolerance for trafficking means, by definition, that excuses for the conduct, no matter how compelling, cannot be accepted. Otherwise, there may be a limited tolerance policy for trafficking, but there is not a zero tolerance policy. The President in the Executive Order announced that zero tolerance is the policy of the United States, and excusing behavior that has resulted in trafficking, including the failure to penalize it, cannot be reconciled with that position.

Later in this same section, it states: "In addition to other remedies available to the Government, the Contractor's failure to comply with the requirement...may result in . . . ." Again, we believe that "may" creates too much ambiguity, relies too heavily on the *ad hoc* discretion of officials, and signals a potential leniency for prohibited conduct that is inconsistent with the Executive Order. Instead, this provision should state "shall result in . . . ."

The regulations delineate requirements, such as creating "a process for employees to report, without fear of retaliation, activity inconsistent with the zero-tolerance policy." This principle is very important, yet there should be minimum requirements or guidance to develop a grievance process that reflects this approach. We have learned through our work in numerous countries around the world, including here in the United States, that only an independent and, most importantly, confidential complaint mechanism will be effective in surfacing abuses. If a complaint or grievance mechanism is not capable of protecting the confidentiality of a worker, retaliation (or the fear of retaliation) will persist, ranging from physical abuse to simply not re-hiring the worker. As a result, the system quickly would fall into disuse and lead to few, if any, complaints. Again, this threat is a sign of failure, not success. ATEST members have extensive expertise and experience in this area, and we again stand ready to work with the Council to articulate the necessary characteristics of such a system.

We are concerned about the ambiguity of timing to submit a compliance plan under the following subparagraph: "(ii) The Contractor shall provide the compliance plan to the Contracting Officer upon request." The plan should be required with submission of a bid and, crucially, used as a major criterion when selecting among contractors. To effectively implement the zero tolerance policy announced in the Executive Order, a contractor's anti-trafficking compliance plan should be available when the solicitation process is open, so that contracts are awarded to those who are both qualified and most likely to avoid prohibited conduct.

In the subsection **(5) Certification** regarding the presence of trafficking in a contractor's operations, there is a second appearance of problematic language – "to the best of the knowledge and belief" of the contractor – which invites a policy of "don't ask, don't tell." This line should be amended as discussed earlier in these comments. Similarly, standards must delineate at least the minimum steps necessary to qualify as "appropriate," under subparagraph **"(B) If abuses have been found, the Contractor or subcontractor has taken the appropriate remedial and referral actions."** Giving the contractor or subcontractor discretion to determine what remediation is sufficient will be ineffective in practice because the contractor or subcontractor was likely either part of, or will bear the cost of fixing, the problem.

ATEST recommends that prime contractors should hire workers (including third country nationals) directly and that preference should be given to bidders that can prove that they do so. In many countries, including our own, significant legal protections attach to the employer-employee relationship, and, conversely, a contractor can avoid much

responsibility if it is able to portray an intermediary as the technical employer. Therefore, requiring a contractor to treat all of the workers performing services for it under a contract as its employees will close a significant and common loophole used to avoid accountability. In addition, the current system incentivizes the prime contractor to account for costs associated with layers of several subcontractors and charges these costs to the U.S. government. Eliminating subcontractors or "middle people" indeed saves the U.S. government money, as it cuts out the profit margin within these layers.

Further, we believe that it is insufficient for contractors and subcontractors to be required to interview trafficking victims as the means of monitoring the quality of their compliance plans. We think victims should have access to government and/or credible non-governmental organizations (including registered unions) to conduct such interviews. Our collective experience indicates that employer interviews in such circumstances, even when well intentioned, are almost never effective. The imbalance in power, even if merely perceived, prevents the truth from coming out. Indeed, workers are trafficked in supply chains because of their pre-existing desperate economic situations. Those economic realities will not have changed because an employer asks for information about abuse, and the answers elicited from a trafficked employee are therefore unlikely to be dependable in that environment. Thus, an independent and confidential complaint mechanism, discussed above, is critical. Family members also should be able to report trafficking or concerns about risks of trafficking through relevant channels on behalf of the victims.

In reference to the FAPIS database, we recommend that any allegation of trafficking should be put in this database. Federal contracting officers should take into account allegations recorded in FAPIS when considering a new contractor's bid. We are fully cognizant of the difference between an allegation and a verified finding of trafficking, but verification of this conduct is often difficult to obtain, and it is our experience that where there is enough smoke there is almost certainly a fire. While a single finding of trafficking-related activity should be a disqualifying event, we also suggest that a certain number of allegations over a fixed period of time should be as well. Furthermore, the contractor selection criteria should proactively reward companies with robust compliance programs.

We are concerned that contractors and subcontractors may change their corporate name or structure if/when they have a violation. In response, we suggest an administrative action that would require disclosure of key personnel (not only the name of organization).

Trafficking takes many forms, and identifying and understanding the complexities and subtleties involved is an enormously difficult undertaking. We therefore advocate for robust training programs for Contracting Officers, so they fully understand the nature of trafficking associated with federal contracts and the effective policies and practices necessary to prevent it.

We further recommend that contractors and subcontractors be required to provide all workers with the phone number (1-888-373-7888), texting number (233733), email address, and website address for the National Human Trafficking Resource Center (NHTRC) hotline, including general information about what the NHTRC does. Information about the hotline could be shared during worker training and orientation procedures. Similarly, posters with the NHTRC hotline information should be posted in a place that is clearly conspicuous and visible to workers, and it should be provided in a language understood by workers, describing human trafficking and labor exploitation in non-technical and accessible ways. The NHTRC is funded by the Department of Health and Human Services (HHS) and is a 24-hour confidential, multilingual, multi-modal hotline and resource center. This hotline number is provided in the U.S. Department of State's "Know Your Rights" pamphlet to everyone coming to the United States on a work visa. Since December 2007, the hotline has received nearly 100,000 calls related to human trafficking and other forms of labor exploitation (as of December 2013). The NHTRC is staffed by experienced call specialists that can connect victims to assistance, receive tips, provide training and technical assistance, and offer general information and referrals. Because the NHTRC is operated by a non-governmental organization, workers do not need to fear retaliation by an employer or a legal response by a government agency when reporting grievances.

As the United States government has a stated a "zero tolerance" policy for human trafficking, we believe it is crucial to design an Executive Order compliance standard that reflects that commitment and leads to its full realization. We believe, and can demonstrate, that a "zero tolerance" approach is feasible with the right provisions and have set forward some general and specific recommendations above that can reach that reality. Our chief concern is that the existing proposed regulations contain too many exceptions and loopholes that will severely weaken genuine enforcement of the letter and spirit of the Executive Order. Certainly, there is a real possibility that contractors will subcontract for amounts less than $500,000 in order to evade regulation altogether. A rigorous implementation strategy is essential to reaching an effective zero tolerance status. It is critical to uphold high standards even if doing so requires the design and implementation of new approaches by the contractor community that are not immediate, but rather longer-term. Human trafficking within government procurement is a sufficiently complex and extensive problem that change will not be instantaneous. Nonetheless, the elimination of trafficking in U.S. government purchasing operations is achievable with strong requirements and rigorous enforcement, including clear penalties for those seeking to maintain the status quo.

Thank you very much for your consideration of our comments and suggestions.

Sincerely,

Coalition to Abolish Slavery and Trafficking (CAST)

Coalition of Immokalee Workers (CIW)

ECPAT-USA

Free the Slaves

International Justice Mission

Polaris Project

Safe Horizon

Solidarity Center

Verité

Vital Voices Global Partnership

World Vision

ATEST is a diverse alliance of U.S.-based human rights organizations, acting with a shared agenda to prevent and 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, Polaris Project, Safe Horizon, Solidarity Center, Verité, Vital Voices Global Partnership, and World Vision.