January 9, 2017

Via Email

Office of Management and Budget
Office of Federal Procurement Policy
ATTN: Mr. Porter Glock


Dear Mr. Glock:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the proposed Anti-Trafficking Risk Management Best Practices & Mitigation Considerations Guidance issued by the Office of Federal Procurement Policy (“OFPP”) (the “proposed best practices”).1 The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Councils and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.2

Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Marian Blank Horn, Kristine B. Kassekert, and Heather K. Weiner, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Battle Space and Contingency Procurements.”

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I. INTRODUCTION

The Section wishes to again express its continued support for the Government’s efforts to eradicate trafficking in persons and modern day slavery. OFPP’s latest proposed best practices follow the course set by the Administration nearly four years ago when the President issued Executive Order (“E.O.”) 13627, Strengthening Protections Against Trafficking in Persons in Federal Contracts. Since then, the Government has taken significant steps to combat human trafficking in its contractors’ supply chains, including the 2015 amendment of the Federal Acquisition Regulation’s (“FAR”) policy on combating trafficking in persons (“CTIP”).

The current best practices seek to assist contractors and Government contracting professionals with implementing these important changes in federal CTIP policies, in particular implementing the new FAR CTIP policy. The Section generally applauds the best practices as providing needed guidance to contractors while appropriately leaving the implementation of those practices to contractors and subcontractors as necessary given the nature and size of their supply chain. Nonetheless, there are potential interpretive issues that could be clarified in the final best practices to ensure that the best practices (a) cannot be interpreted to create obligations for contractors and subcontractors beyond those in the FAR CTIP policy, (b) minimize the impact of the best practices on small businesses by permitting use of internal compliance mechanisms to assess their supply chain for risk areas, (c) make the use of risk assessment a consistent feature of the best practices and the Government’s consideration of mitigating factors to ensure businesses are focused on risk areas in their supply chain and the Government appropriately credits contractors and subcontractors for focusing on those areas, and (d) ensure that the Government does not penalize a contractor when it investigates a report of a violation of the FAR CTIP policy in good faith and deems the information pertaining to the violation to not be credible and, therefore, does not report the information to the Government.

II. BACKGROUND

The best practices provide guidance to federal government contractors after nearly two years of revisions in federal CTIP policy. E.O. 13627, along with Title XVII of the National Defense Authorization Act for Fiscal Year 2013, known as the Ending Trafficking In Government Contracting Act, provided the basis for the 2015 revisions to the FAR CTIP policy and implementing provisions. See 80 Fed. Reg. 4967 (Jan. 29, 2015). The revised set of CTIP rules create a broad new compliance framework to cover trafficking in persons and trafficking-related activities, beyond the historical prohibitions on using trafficked labor. To accomplish that goal, the FAR Council rewrote the policy section of the FAR CTIP Subpart, FAR 22.1703, and the CTIP contract clause at FAR 52.222-50, greatly increasing the protections and processes required to prevent and deter trafficking in persons and trafficking-related activities. OFPP, in conjunction with Office to Monitor and Combat Trafficking in Persons in the Department of State and the Department of Labor, as Co-Chairs of the Procurement and Supply Chains Committee of the Senior Policy Operating Group of the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons, have taken that revised policy a step further with the proposed best practices. The proposed best practices are designed to both assist contracting officials and contractors “determine if a contractor is taking adequate steps to meet its anti-trafficking responsibilities under the FAR” and “promote clarity and consistency in the
implementation of anti-trafficking requirements” in the contracting community. See 81 Fed. Reg. 88707.

The proposed best practices have three parts: (1) Attachment A, a summary of the regulatory changes in the 2015 revisions to the FAR CTIP policy, (2) Attachment B, an “Anti-Trafficking Risk Management Best Practices and Mitigation Considerations,” and (3) Attachment C, a set of answers to frequently asked questions about the revised FAR CTIP policy.

III. COMMENTS

A. Best Practices List

The Section believes the proposed best practices generally provide valuable guidance to the contracting community. The Section recommends, however, clarifications to the language of certain portions of the proposed best practices.

First, Attachment B, ¶ A addresses internal steps for contractors to comply with the FAR CTIP rule. Among the internal steps is a suggestion to implement a code of conduct and policies addressing human trafficking:

Code of conduct and policies around trafficking. The entity has reviewed its internal practices, including its recruitment processes, to prevent any fraud or coercion from occurring at any level of the organization. As part of this review, the entity developed a code of conduct and/or corporate policies on: hiring recruiters and conducting recruitment, disciplinary processes for employees that commit violations, otherwise ensuring that no prohibited activity takes place, and complying with host country employment law and housing standards (if housing is provided).

Attachment B, ¶ A.1.b. The best practice is described using the words “code of conduct and/or corporate policies” rather than the FAR language of “compliance plan.” Compare id. and FAR 52.222-50(h). Developing a code of conduct and/or corporate policies addressing human trafficking is a laudable best practice, but the FAR CTIP policy does not require all contractors to have a written policy addressing human trafficking.3 See FAR 52.222-50(h). Rather, only

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3 We also request that you consider, as a possible best practice for consideration by government contractors, the ABA Model Principles on Labor Trafficking and Child Labor adopted by the ABA House of Delegates on February 10, 2014. These voluntary Principles, together with their related Policies (or Commentary and Guidance) are generally consistent from a substantive law perspective with the steps taken by the Government to combat human trafficking in its contractors’ supply chains including the 2015 amendment of the FAR’s policy on CTIP. See, e.g., E. Christopher Johnson, Jr., Business Lawyers Are in a Unique Position to Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking and Child Labor, THE BUSINESS LAWYER, (Fall 2015, Volume 70, Issue 4); Sam Witten et al., ABA Guidelines May Help Companies Prepare for New Federal Rules on Human Trafficking, Seller Beware Blog (May 20, 2014), http://www.consumeradvertisinglawblog.com/2014/05/aba-guidelines-may-help-companies-prepare-for-new-federal-rules-on-humantrafficking.html. In addition, their structure is conducive to modification in a manner to make them fully consistent with FAR 52.222-50’s requirement that contractors maintain a compliance plan that is appropriate to the size and complexity of the contract, the nature
contracts and subcontracts that have estimated values that exceed $500,000 and that are for supplies that will be acquired or services performed outside the United States are subject to the requirement to have a compliance plan that addresses specific aspects of human trafficking as set out in FAR 52.222-50(h). This best practice should be revised to state that a “compliance plan” is not required but is recommended for contractors that do not meet the requirements in FAR 52.222-50(h).

Attachment B, ¶ A.1.b. discusses identification of high risk portions of the supply chain and proposes using “third-party audits, external consultants or experts, or other mechanism.” Many small businesses, including those that perform work overseas on government contracts, do not have the resources to utilize third-party consultants on human trafficking. This best practice should also suggest internal constituencies that could be utilized, if properly trained, to identify high risk portions of an entity’s supply chain as an alternative for such contractors and subcontractors. In general, where the best practices recommend external validation, provisions for internal processes should also be included to ensure appropriate guidance for small business contractors that may not be able to afford external CTIP auditors.

Attachment B, ¶ A.2 addresses external steps the contractor can take to ensure compliance with the FAR CTIP policy. Attachment B, ¶ A. 2.a states:

**Understanding the supply chain.** The entity has taken steps to map out the supplier relationships in the various tiers of its supply chain. If the entity has a complex supply chain, it has utilized risk screening tools or procedures to identify high-risk portions of its supply chain, beginning with corporate-owned facilities and tier-1 suppliers. High-risk portions of the entity’s supply chain have been identified, or work is planned to do so (e.g., through third-party audits, external consultants or experts, or other mechanisms).

The qualification in this paragraph that “[i]f the entity has a complex supply chain, it has utilized risk screening tools or procedures to identify high-risk portions of its supply chain, beginning with corporate-owned facilities and tier-1 suppliers,” is more generally applicable to the entire list of best practices. That is, each best practice, including, for example, Attachment B, ¶ A. 2.c, which recommends validating subcontractor use of appropriate recruiters and enforcement of the recruitment fee ban, should be focused primarily on the high risk portions of contractor supply chains. A best practice to recommend generally, by contrast, is that contractors begin their validation and other compliance activities by focusing on high risk portions of their supply chain to best utilize their compliance resources.
Attachment B, ¶ A.2.b suggests that contractors disseminate, and educate their supply chain on, “a code of conduct,” stating:

**Engagement with subcontractors.** The entity has disseminated a code of conduct throughout its supply chain. The code of conduct is accompanied by awareness training and direct engagement with the subcontractors to ensure that they fully understand their obligations. The entity has made clear to its subcontractors that they should disseminate the code of conduct down to their subcontractors and agents.

As noted above, the best practices use of the terms “code of conduct” and “corporate policies” differs from the language in the FAR CTIP policy, requiring a “compliance plan” for certain categories of contracts and contractors. The Section recommends harmonizing and defining those terms to ensure consistency. Furthermore, whether the proposed best practices recommends disseminating a compliance plan or a code of conduct throughout the contractor’s supply chain, each contractor and subcontractor is responsible for the conduct of their employees. Based on concerns about privity of contract and potential liability resulting from enforcing a policy on all employees of all companies in its supply chain, many contractors do not want to impose policies on subcontractors, but rather prefer to require subcontractors to implement similar standards. If the Government believes that establishing a code of conduct throughout the contractor’s supply chain is a best practice, the Section recommends revising this guidance to permit a contractor to require its subcontractor to have a code of conduct addressing human trafficking that meets the requirements of the FAR CTIP policy or, alternatively, flowing down its own such code of conduct to its subcontractors.

**B. Evaluating Contractor Compliance**

Attachment B, ¶ B addresses considerations for contracting officers in evaluating contractor compliance with the FAR CTIP policy. One of the mitigating factors suggested for contracting officers to consider when a contractor has reported a trafficking violation is whether the contractor “notified to the U.S. government immediately of any violations.” The FAR CTIP policy makes clear that the contractor need only immediately notify the Government of any “credible information” of a violation of the CTIP policy. See FAR 52.222-50(d)(1)(i). The Section recommends that OFPP rephrase this mitigating factor to be consistent with the FAR language to read: “notified to the U.S. government immediately of any credible information of any violation of the policy in FAR 52.222-50(b).” This revision would avoid an interpretation that could penalize contractors for failure to report information about a violation that was not credible.5

**C. Answers to Frequently Asked Questions**

Question number 2 in Attachment C addresses a frequent question in the contracting community, particularly from new entrants to federal government contracting: “Isn’t a

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5 The Section recommends the same change to Attachment C, answer to Question 1 where these mitigating factors are repeated.
contractor better off having a less robust plan and accompanying management structure to reduce its exposure to liability?” The answer discusses how a robust CTIP compliance plan can be considered a mitigating factor if a violation of the CTIP policy occurs. The Section recommends that the answer also mention that consideration will be given to the contractor’s efforts to identify risk areas and address them when uncovered, for example, a mitigating factor could include that the contractor has an approved risk-based equality management system and/or a risk management system that includes reference to human trafficking risks.

IV. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

James A. Hughes
Chair, Section of Public Contract Law

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