



## Prevent Human Trafficking

### Though Enacting California Government Procurement Policies

#### GOALS

The primary goal of this measure is to create an opportunity for California retailers and manufacturers to demonstrate leadership in eradicating human trafficking. Additionally, with the information required of businesses, the measure empowers consumers to reward companies that proactively work to eliminate human trafficking.

During President Obama's term in office, there was a major push at the federal level to put strong protections into place preventing any products tainted by trafficked labor from being purchased through federal procurement processes. Legislation adopting this standard for California Procurement would greatly increase the impact of the federal government efforts as California spends nearly \$10 billion in procurement annually. Enacting a California government procurement policy would not only have a substantial impact in terms of specific purchases, but would also assist efforts to convince companies seeking to maintain their business with the state to change their practices.

#### BACKGROUND

Transparency laws<sup>1</sup> on state government procurement<sup>2</sup> have been rare, with California a pioneer in successfully enacting the California Transparency in Supply Chains Act of 2010 (S.B.657)

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<sup>1</sup> Transparency laws are laws that encourage "public officials, civil servants, managers and directors of companies and organizations and board trustees to act visibly, predictably and understandably to promote participation and accountability" for human rights through public disclosure. See Transparency Accountability Initiative, "What is Transparency" in *Definitions* (2014), <http://www.transparency-initiative.org/about/definitions> (last visited May 20, 2014).

<sup>2</sup> Government procurement relates to when the government purchases goods or services on the open market. "Generally, procurement starts at the planning stage where governments determine their needs. Governments then must solicit bids and provide notice of the terms of the bid. After this solicitation and notice, they then evaluate bids for the capacity to perform the contract obligations. Next, they award the contract and insert their compliance obligations. Finally, a government would enforce the obligations stipulated in the contract." See Robert Stumberg, Anita Ramasastry, and Bama Athreya, *Government Procurement: Promoting Procurement Policies that Ensure Business Respect for Human Rights: Summary of Forthcoming Report*, INT'L CORP. ACCOUNTABILITY ROUNDTABLE (ICAR) (Dec. 2013), [http://issuu.com/\\_icar\\_/docs/icar\\_government\\_procurement\\_project/1?e=6698884/5726290](http://issuu.com/_icar_/docs/icar_government_procurement_project/1?e=6698884/5726290) (last visited May 20, 2014).

(Transparency Act).<sup>3</sup> To date, statewide and federal attempts to adopt additional transparency legislation have been unsuccessful. However, at the federal level, President Obama's Executive Order (E.O.) 13627 on Strengthening Protections Against Trafficking in Persons in Federal Contracts bolstered anti-trafficking protections by requiring contractors and subcontractors awarded federal contracts to comply with anti-human trafficking policies and procedures on reporting, recruitment and wage plans, housing plans, and trafficking prevention procedures.<sup>4</sup> Additionally, as early as 2002, "Sweat-free" procurement<sup>5</sup> measures have been adopted in many states. These laws focus only on workplace conditions and child labor, however, not addressing recruitment practices leading to human trafficking.<sup>6</sup>

A California government procurement policy to combat human trafficking is thus long overdue. It has the potential to create change in company supply chain management and oversight nationwide, if not globally, due to the state's unique and powerful market position.

## NEED FOR ACTION

In October 2007, the California Department of Justice released a report entitled "Human Trafficking in California," produced by the California Alliance to Combat Trafficking and Slavery Task Force. This first, comprehensive report on the situation made a number of important findings, including the need for:

- 1) Increased leadership within the business community to proactively eradicate slavery and human trafficking.
- 2) Enhanced awareness among Californians about human trafficking and slavery that exists throughout the state

More than 10 years later, the state, which is the 5<sup>th</sup> largest economy in the world, has done little to follow these recommendations.

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<sup>3</sup> California Transparency in Supply Chains Act, ch. 556, 2010 Cal. Stat. 93, <http://www.state.gov/documents/organization/164934.pdf> (adding CAL. CIV. CODE § 1714.43 (West 2010) and CAL. REV. & TAX. CODE § 19547.5 (West 2010)).

<sup>4</sup> Executive Order on Strengthening Protections Against Trafficking in Persons in Federal Contracts, Exec. Order No. 13627, 3 C.F.R. 13627 (Sept. 25, 2012), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201200750/pdf/DCPD-201200750.pdf>.

<sup>5</sup> Sweat-Free Procurement refers to a "code of conduct, which sets labor standards that vendors and contractors must meet in their supply chain in order to have a business relationship with the consumer." The code of conduct seeks to prevent sweatshop conditions, generally including "respect[ing] local and international laws; eliminating child labor, forced labor, and discrimination in the workplace; paying non-poverty wages; prohibiting forced overtime; and allowing workers to form unions." See SweatFree [sic] Communities, "Code of Conduct" in *Campaign Vocabulary*, <http://www.sweatfree.org/vocab> last visited May 20, 2014).

<sup>6</sup> Adrian Barnes, *Do They Have to Buy from Burma?: A Preemption Analysis of Local Anti-sweatshop Procurement Laws*, 107 Colum. L. Rev. 426, 428-29 (2007) (citing Cal. Pub. Cont. Code § 1103 (West 2000) (effective Jan. 1, 2000)).

The proposed statutory language for a California government procurement policy to combat human trafficking takes advantage of existing federal standards created almost 10 years ago. This proposal is beneficial for the business community as it creates a similar regulatory scheme. Modelling state law on federal law will further allow California to adopt a successful model proven to have significant, positive impacts. Companies who already receive federal and California contracts would have to do nothing new to comply with California's new procurement measures. Conversely, compliance with California's law for companies who do not currently have federal contracts would increase their access to, and eligibility for, federal contracts, which in turn would create positive incentives for business compliance.

## **BILL PROPOSAL**

This bill proposal adopts the approach taken federally by E.O. 13627, promulgated in 2012<sup>7</sup> and requires:

- **Scope:**
  - Defines victims of trafficking to include both sex and labor trafficking victims.
  - Includes in the protective framework **any goods or services**, other than public utilities.
- **Prohibits:**
  - Trafficking-related conduct and requires contractors and subcontractors that enter into contracts with the California Government to maintain a compliance plan during the performance of the contract or subcontract.
- **Requires:**
  - Any California government contractor and subcontractor to certify, prior to receiving the award, that it has a compliance plan and, to the best of its knowledge and belief, neither it nor any of its subcontractors has engaged in any trafficking-related activities.
  - Public posting on the contractor or subcontractor's website, including awareness program(s), reporting policies, recruitment and wage plan, housing plans, and procedures to prevent subcontractors at any tier of the supply chain, from engaging in human trafficking.
- **Enforcement:**
  - If trafficking cases are found, the contractor or subcontractor shall certify that it

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<sup>7</sup> A second option for bill language is also proposed and this section would be updated if that approach is the one taken. The second proposed option only requires contractors who seek procurement, or garment or apparel laundering, contracts with any *state* agency in California to certify under penalty of perjury their compliance with the *federal* standards for Government contracting. Contractors who do not compete for any federal contracts would have to certify under penalty of perjury that they are not competing for any federal contracts at the time of applying for a state contract.

has taken appropriate remedial and referral actions.

- In accordance with California agency procedures, contracting officers must notify the agency official responsible for initiating suspension or debarment actions, and law enforcement if appropriate, if they become aware of any trafficking activities present in a contracting company's supply chains that could then justify termination of the California contract.

## **SUGGESTED STATUTORY LANGUAGE**

### **Option 1**

#### **LEGISLATIVE COUNSEL'S DIGEST**

Existing law requires every contract entered into by a state agency for the procurement of equipment, materials, supplies, apparel, garments, and accessories and the laundering thereof, excluding public works contracts to certify that no equipment, materials, supplies, apparel, garments, or accessories provided under the contract are produced by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor, or exploitation of children in sweatshop labor.

Existing law requires the Department of Industrial Relations to establish a contractor responsibility program, on or before February 1, 2004, including a Sweat Free Code of Conduct. Existing law also requires the appropriate procurement agency, in consultation with the Director of Industrial Relations, to employ an approach to implement the Sweat Free Code of Conduct, as specified. Existing law requires the Department of Industrial Relations to explore mechanisms to ensure that businesses that contract with state agencies are in compliance with those provisions.

Existing law requires every retail seller and manufacturer doing business in California and having annual worldwide gross receipts that exceed \$100 million to disclose its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.

Existing law authorizes contracting between state agencies and private contractors and sets forth requirements for the procurement of goods and services by state agencies and the various responsibilities of state agencies and the Department of General Services in implementing state contracting procedures and policies.

Existing law prohibits Federal contractors and subcontractors from using misleading or fraudulent recruitment practices during the recruitment of employees; charging employees recruitment fees; destroying, concealing, confiscating or otherwise denying access by an employee to the employee's identity documents; failing to pay return transportation costs upon the end of employment for contracts and subcontracts performed outside the United States; directly supporting or promoting trafficking in persons, the procurement of commercial sex acts, or the use of forced labor in the performance of the contract or subcontract. Contractors and subcontractors that enter into contracts with the Federal Government must maintain a compliance plan during the performance of the contract or subcontract to be publicly posted on the contractor or subcontractor's website, including awareness program(s), reporting policies,

recruitment and wage plan, housing plans, and procedures to prevent subcontractors from any tier from engaging in trafficking in persons. Each such contractor and subcontractor shall certify, prior to receiving the award that it has the compliance plan and either, to the best of its knowledge and belief, neither it nor any of its subcontractors has engaged in any trafficking-related activities; or, if abuses have been found, the contractor or subcontractor has taken appropriate remedial and referral actions.

This bill would require contractors entering procurement or laundering contracts with any state agency in California to certify compliance with the Federal standards for Government contracting unless they do not compete for Federal contracts. Contractors who do not compete for any Federal contracts must certify noncompetition under penalty of perjury.

This bill would not become operative until [                      ].

***The people of the State of California do enact as follows:***

**SECTION 1.** The Legislature finds and declares all of the following:

(a) Millions of men, women, and children throughout the world are victims of severe forms of trafficking in persons (“trafficking” or “trafficking in ‘persons’”)—defined in section 103 of the Trafficking Victims Protection Act (TVPA), 22 U.S.C. 7102(8), to include sex trafficking in which the commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age, or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion, for the purposes of subjection to involuntary servitude, peonage, debt, bondage, or slavery.

(b) States such as California, Florida, New York, Nevada and Ohio are particularly vulnerable to human trafficking because of factors including: proximity to international borders, number of ports and airports, significant immigrant population, and large economies that include industries that attract forced labor.<sup>8</sup>

(c) Human trafficking is the fastest growing criminal enterprise in the 21st century – a \$150 billion-dollar a year industry.

(d) Human trafficking undermines the rule of law and creates instability. Trafficking in persons feeds the vulnerability of marginalized populations, tearing families and communities apart. It damages the environment and corrupts global supply chains and labor markets that keep the world’s economies thriving.<sup>9</sup>

(e) The United States has long had a zero-tolerance policy regarding Government employees and contractor personnel engaging in any form of this criminal behavior. As the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons.

(f) The State of California similarly recognizes the responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons.

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<sup>8</sup> *Id.*

<sup>9</sup> US Dept. of State, “Letter from Secretary John F. Kerry,” in *Trafficking in Persons Report 2013* (2013), <http://www.state.gov/documents/organization/210737.pdf> (last visited May 20, 2014).

(g) This Act seeks to improve safeguards against trafficking in persons to strengthen compliance with anti-trafficking laws and will promote economy and efficiency in California procurement. These safeguards, which have been largely modeled on successful practices in the private sector, will increase stability, productivity, and certainty in California contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions.

**SECTION 2.** Section [10491] is added to the Public Contract Code, to read:

(a) A company is ineligible to, and shall not bid on, or submit a proposal for, a contract with a state agency for goods or services related to products or services that were produced by or benefited from trafficking in persons in any of the following types of trafficking-related activities:

- (1) using misleading or fraudulent recruitment practices during the recruitment of employees, such as failing to disclose basic information or making material misrepresentations regarding the key terms and conditions of employment, including wages and fringe benefits, the location of work, living conditions and housing (if employer provided or arranged), any significant costs to be charged to the employee, and, if applicable, the hazardous nature of the work;
- (2) charging employees recruitment fees;
- (3) destroying concealing, confiscating, or otherwise denying access by an employee to the employee's identity documents, such as passports or drivers' licenses; and
- (4) for portions of contracts and subcontracts:
  - (i) performed outside the United States, failing to pay return transportation costs upon the end of employment, for an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a California contract or subcontract;
  - (ii) not covered by subsection (a)(4)(i) of this section, failing to pay return transportation costs upon the end of employment, for an employee who is not a national of the country in which the work is taking place and who was brought into that country for the purpose of working on a California contract or subcontract, if the payment of such costs is required under existing temporary worker programs or pursuant to a written agreement with the employee;
  - (iii) provided, however that the requirements of subsections (a)(4)(i) and (ii) shall not apply to:
    - a. an employee who is legally permitted to remain in the country of employment and who chooses to do so; or
    - b. an employee who is a victim of trafficking and is seeking victim services or legal redress in the country of employment, or an employee who is a witness in a trafficking-related enforcement action;

- (5) other specific activities that the Federal Acquisition Regulatory (FAR) Council identifies as directly supporting or promoting trafficking in persons, the procurement of commercial sex acts, or the use of forced labor in the performance of the contract or subcontract.

(b) The Department of General Services shall establish in the State Administrative Manual or the State Contracting Manual policies and procedures for all state agencies, departments, boards, and commissions to implement the contract prohibition of this section.

(c) For the purposes of Section 2 of this Act, “goods or services” includes apparel, garments, or corresponding accessories, equipment, materials, or supplies and services.

(d) Companies contracting with the state shall by contract clause agree to cooperate fully in providing reasonable access to allow contracting agencies and other responsible enforcement agencies to conduct audits, investigations, or other actions to ascertain compliance with the TVPA, this Act, or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor; and

(e) Contracting officers must notify in accordance with agency procedures the agency’s Inspector General,<sup>10</sup> or the agency official responsible for initiating suspension or debarment actions, and law enforcement, if appropriate, if they become aware of any activities that would justify termination under section 106(g) of the TVPA, 22 U.S.C. 7104(g),<sup>11</sup> or are inconsistent with the requirements of this order or any other applicable law or regulation establishing restrictions

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<sup>10</sup> In the alternative, the agency specified may be the Attorney General.

<sup>11</sup> **22 U.S.C. 7104(g)** Termination of certain grants, contracts and cooperative agreements

The President shall ensure that any grant, contract, or cooperative agreement provided or entered into by a Federal department or agency under which funds are to be provided to a private entity, in whole or in part, shall include a condition that authorizes the department or agency to terminate the grant, contract, or cooperative agreement, or take any of the other remedial actions authorized under section 7104b(c) of this title, without penalty, if the grantee or any subgrantee, or the contractor or any subcontractor, engages in, or uses labor recruiters, brokers, or other agents who engage in--

(i) severe forms of trafficking in persons;

(ii) the procurement of a commercial sex act during the period of time that the grant, contract, or cooperative agreement is in effect;

(iii) the use of forced labor in the performance of the grant, contract, or cooperative agreement; or

(iv) acts that directly support or advance trafficking in persons, including the following acts:

(I) Destroying, concealing, removing, confiscating, or otherwise denying an employee access to that employee’s identity or immigration documents.

(II) Failing to provide return transportation or pay for return transportation costs to an employee from a country outside the United States to the country from which the employee was recruited upon the end of employment if requested by the employee, unless--

(aa) exempted from the requirement to provide or pay for such return transportation by the Federal department or agency providing or entering into the grant, contract, or cooperative agreement; or

(bb) the employee is a victim of human trafficking seeking victim services or legal redress in the country of employment or a witness in a human trafficking enforcement action.

(III) Soliciting a person for the purpose of employment, or offering employment, by means of materially false or fraudulent pretenses, representations, or promises regarding that employment.

(IV) Charging recruited employees unreasonable placement or recruitment fees, such as fees equal to or greater than the employee’s monthly salary, or recruitment fees that violate the laws of the country from which an employee is recruited.

(V) Providing or arranging housing that fails to meet the host country housing and safety standards.

on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor, and further requiring that the agency official responsible for initiating suspension and debarment actions consider whether suspension or debarment is necessary in order to protect the State's interest.

(f) Except as provided in subsection (3) of this section, companies contracting with the state must ensure that provisions in solicitations and clauses in contracts and subcontracts, where the estimated value of the supplies acquired or services required to be performed outside the United States exceeds [\$50,000], include the following requirements pertaining to the portion of the contract or subcontract performed outside the United States:

- (1) that such contractor and subcontractor maintain a compliance plan during the performance of the contract or subcontract that is appropriate for the size and complexity of the contract or subcontract and the nature and scope of the activities performed, including the risk that the contract or subcontract will involve services or supplies susceptible to trafficking. The compliance plan shall be provided to the contracting officer upon request, and relevant contents of the plan shall be posted no later than the initiation of the contract performance at the workplace and on the contractor or subcontractor's website (if one is maintained), and shall, at a minimum include:
  - (i) an awareness program to inform employees about:
    - (I) the policy of ensuring that employees do not engage in trafficking in persons or related activities, including those specified in subsection (a) of this section, the procurement of commercial sex acts, or the use of forced labor; and
    - (II) the actions that will be taken against employees for violation of such policy;
  - (ii) a process for employees to report, without fear of retaliation, any activity that would justify the termination under section 106(g) of the TVPA, or is inconsistent with the requirements of this Act, or any other applicable law or regulation establishing restrictions on trafficking in persons, the procurement of commercial sex acts, or the use of forced labor;
  - (iii) a recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees to the employee, and ensures that wages meet applicable host country legal requirements or explains any variance;
  - (iv) a housing plan, if the contractor or subcontractor intends to provide or arrange housing, that ensures that the housing meets host country housing and safety standards or explains any variance; and
  - (v) procedures to prevent subcontractors at any tier from engaging in trafficking in persons, including those trafficking-related activities described in subsection (a) of this section, and to monitor, detect, and terminate any subcontractors or subcontractor employees that have engaged in such activities; and



- (2) that each such contractor and subcontractor shall certify, prior to receiving an award and annually thereafter during the term of the contract or subcontract, that:
  - (i) it has the compliance plan referred to in subsection (f)(1) of this section in place to prevent trafficking-related activities described in section 106(g) of the TVPA and this Act; and
  - (ii) either, to the best of its knowledge and belief, neither it nor any of its subcontractors has engaged in any such activities or, if abuses have been found, the contractor or subcontractor has taken the appropriate remedial and referral actions;
- (3) provided, however, that the requirements in subsections (f)(1) and (2) of this section shall not apply with respect to contracts or subcontracts for commercially available off-the-shelf items.

**SECTION 3.** (a) Section 2 of this bill shall not become operative until [            ].  
(b) Section 2 of this bill shall become inoperative upon [    ].

**Option 2:**

***The people of the State of California do enact as follows:***

Section [10491] of the Public Contract Code is [added] to read:

[Section 1] (a) Every contract entered into by any state agency for the procurement or laundering of apparel, garments, or corresponding accessories, or the procurement of equipment, materials, or supplies, other than procurement related to a public works contract, shall require that contractors certify under penalty of perjury:

- (1) Compliance with Executive Order 13627 and its [regulations],<sup>12</sup> [or]
- (2) They are not competing for any federal contracts at the time of applying for a state contract.

(b) Contractors are ineligible to, and shall not bid on, or submit a proposal for, a contract with a state agency for goods or services if they do not certify compliance with Executive Order 13627 and its related regulations when promulgated.

(c) Contractors shall exercise due diligence in ensuring that their subcontractors comply with Executive Order 13627 and its [regulations]. Contractors shall require each subcontractor to sign the certification under penalty of perjury.

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<sup>12</sup> See 78 Fed. Reg. 59325 (Sept. 26, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-26/pdf/2013-23501.pdf> (public comment period for this proposed rule ended on December 20, 2013). See also 78 Fed. Reg. 59317 (Sept. 26, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-09-26/pdf/2013-23311.pdf> (public comment period ended on December 20, 2013 for this proposed rule); 78 Fed. Reg. 69812 (Nov. 21, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-11-21/pdf/2013-27878.pdf> (extending comment period deadline).

### **Coalition to Abolish Slavery & Trafficking (CAST)**

Systemic change is at the core of CAST's mission. Taking a survivor-centered approach to ending modern slavery, CAST has a proven track record of working directly with survivors of human trafficking which builds an important bridge between practice and policy to inform effective policy initiatives. By developing broad-based partnerships, CAST effectively advocates for policies that work to end human trafficking and help survivors rebuild their lives.

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