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STRENGTHENING THE PROHIBITION OF FORCED
OR INDENTURED CHILD LABOR IN GOVERNMENT
CONTRACTS: A CRITICAL ANALYSIS OF FAR
SUBPART 22.15

*Miriam Amanze & Ama Eyo**

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I. INTRODUCTION

Presidential inaugurations in the United States bring opportunities to implement and strengthen policies that correspond with the new administration's goals and priorities. On January 20, 2021, President Joseph R. Biden was inaugurated as the forty-sixth President of the United States, ending the Trump era.¹ Hours after his inauguration, President Biden conveyed his change of vision by revoking many of the Trump administration's executive orders.² The Biden administration addressed a variety of social issues during the first 100 days in office, namely COVID-19, unemployment, inequality, and racial discrimination as underscored by the Black Lives Matter movement.³ Importantly, the Biden administration is also dedicated to strengthening the prohibition of child labor in the U.S. federal supply chain.

The Biden administration's intent to use government contracts to build resilient, diverse, and secure supply chains to ensure economic prosperity and national security in the United States can be gleaned from its implementation of Executive Order 14017.⁴ While there is no explicit mention of child labor concerns, President Biden has signalled through the Order an intention to use the government supply chain to achieve a range of sustainable goals.⁵

This is not the first time that President Biden has shown commitment to advancing sustainable goals through the government supply chain. An earlier example occurred during his tenure as vice president under the Obama administration, when two significant anti-slavery executive orders were executed and subsequently implemented into the U.S. federal procurement framework established under the Federal Acquisition Regulation (FAR).⁶ These executive orders, which attempted to address anti-slavery practices in the U.S. federal supply chain, include Executive Order No. 13673 on fair pay and safe

1. BBC News, *Full Transcript of Joe Biden's Inauguration Speech*, BBC News (Jan. 20, 2021), <https://www.bbc.com/news/world-us-canada-55656824> [<https://perma.cc/J4A4-QCSP>].

2. See generally 2021 Joseph R. Biden Jr. Executive Orders, FED. REG., <https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021> [<https://perma.cc/HP7B-F4QD>] (last visited Jan. 25, 2021).

3. *Covid-19: Biden Sets Ambitious Pandemic Goals for First 100 Days*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/live/2020/12/08/world/covid-19-coronavirus> [<https://perma.cc/9HCU-VSL5>]; Josh Wingrove & Nancy Cook, *Biden Went Big in His First 100 Days, and Now Comes the Hard Part*, BLOOMBERG (Apr. 22, 2021), <https://www.bloomberg.com/news/features/2021-04-22/biden-tackled-covid-economy-in-first-100-days-now-comes-border-crisis-and-more> [<https://perma.cc/QV64-JUSW>].

4. America's Supply Chains, 86 Fed. Reg. 11,849 (Feb. 24, 2021).

5. *Id.*

6. Exec. Order No. 13673, 79 Fed. Reg. 45,309 (Aug. 5, 2014); Exec. Order No. 13627, 77 Fed. Reg. 60,029 (Oct. 2, 2012). For discussions on these executive orders and their implementation into the FAR, see Cameron S. Hamrick & Roger V. Abbott, *The "Fair Pay and Safe Workplaces" Regulations and Guidance Constitute an Unreasonable Use of Federal Authority*, 46 PUB. CONT. L. J. 217, 219–21 (2017); Andrew C. Fillmore, *Thanks, Obama! "Fair Pay and Safe Workplaces" Come at the Cost of Mandatory Pre-Dispute Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 237, 237–39 (2015); Ashley Winters, *Regardless of Potential Scrutiny, the Arbitration Clause of the Fair Pay and Safe Workplaces Executive Order (2014) Should Not Have a Resounding Impact*, 31 OHIO ST. J. ON DISP. RESOL. 179, 180 (2016).

workplaces (set forth in FAR Subpart 22.20)⁷ and Executive Order No. 13627 on strengthening protections against trafficking in persons (set forth in FAR Subpart 22.17).⁸

Despite tackling slavery and exploitative practices in these executive orders, significant issues remain, especially in relation to child labor concerns in the U.S. federal supply chain. This is because, while FAR Subpart 22.15 (introduced from the 1999 Executive Order 13126 made by the Clinton administration) prohibits the acquisition of products produced by forced or indentured child labor in the U.S. federal procurement regime, fundamental questions persist regarding the use and treatment of child laborers in U.S. government contracts.⁹

This article advances suggestions on how the Biden administration and federal procuring agencies can strengthen Subpart 22.15 to ensure that federal contracting officers enforce laws relating to child labor in the procurement process and, therefore, achieve human rights protection for children. This is particularly important as the United Nations (UN) has called for an increased protection of children from child labor.¹⁰ This article asserts that strengthening Subpart 22.15 will also support the United States in achieving several targets in the UN Sustainable Development Goals.¹¹ For example, Target 8.7 of the UN goals, which concerns immediate and effective measures to eradicate forced labor, “end[s] modern slavery and human trafficking and secure[s] the prohibition and elimination of the worst forms of child labor,” and Target 12.7 focuses on sustainable contracting practices.¹²

An additional reason for strengthening child labor rules in the FAR relates to the impact of the COVID-19 pandemic and its implication for child laborers. This is because “[a]s economic contraction reduces opportunities in the labour markets for parents, it can push their children into hazardous and

7. Exec. Order No. 13673, 79 Fed. Reg. 45,309 (Aug. 5, 2014); FAR 22.20; see Ken M. Kan-zawa, *Legal and Practical Issues in Implementing Executive Order 13673: Fair Pay and Safe Workplaces*, 44 PUB. CONT. L. J. 417, 430–31 (2015).

8. Exec. Order No. 13627, 77 Fed. Reg. 60,029 (Oct. 2, 2012); Tara Woods, *Utilizing Supply Chain Transparency Measures to Combat Trafficking in Persons: A Comparative Analysis of the U.S. and Swedish Systems*, 48 PUB. CONT. L. J. 423, 428 (2019) (The objective of this EO was to “increase stability, productivity, and certainty in federal contracting by avoiding the disruption and disarray caused by the use of trafficking . . . resulting in investigative and enforcement actions” against suppliers tainted by trafficking practices prohibited in the FAR).

9. See Exec. Order No. 13126, 64 Fed. Reg. 32,383 (June 16, 1999).

10. See 2022 Theme: “*Universal Social Protection to End Child Labour*,” UNITED NATIONS, <https://www.un.org/en/observances/world-day-against-child-labour> [https://perma.cc/EC27-3XVP] (last visited Feb. 5, 2023); *UN Global Compact Announces New 2021 Action Pledge to Help End Child Labour*, UNITED NATIONS, <https://www.unglobalcompact.org/news/4683-01-21-2021> [https://perma.cc/85DT-W64A] (last visited Feb. 6, 2023).

11. See G.A. Res. 70/1, at 3 (Sept. 25, 2015) (hereafter SDGs).

12. *Id.* at 20 (For example, Target 8.7 states that governments should “[t]ake immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.”); *id.* at 22 (Target 12.7 states that governments should “[p]romote public procurement practices that are sustainable, in accordance with national policies and priorities.”).

exploitative work.”¹³ While Subpart 22.15 prohibits forced or indentured child labor in federal contracts, federal contracts are still at risk of being performed using child labor, particularly in light of the ravaging effects of COVID-19. By strengthening Subpart 22.15 now, as advocated in this article, the U.S. federal government will protect children engaged in producing goods during or after this global emergency.

Underlying this inquiry are two questions. First, how adequate is Subpart 22.15 in prohibiting child labor in the U.S. federal supply chains? Second, how can such inadequacies be remedied? The answers to these questions will be addressed by analyzing the regulation through the lens of the contracting process, beginning with the regulation’s scope and coverage, and provisions relating to procurement planning, solicitation, tendering, contract awards, and contract management. Throughout the analysis, this article will highlight appropriate provisions that effectively prohibit child labor and examine inadequate provisions by focusing on three key perspectives: the provision of legal certainty,¹⁴ comprehensive scope and coverage,¹⁵ and significant limitations or loopholes that hinder the effectiveness of Subpart 22.15.¹⁶ While many labor and anti-trafficking regulations in the FAR have been extensively discussed in academic literature, the prohibition of forced or indentured child labor under Subpart 22.15 has been discussed minimally.¹⁷ Thus, assessing the

13. INT’L LAB. ORG., COVID-19 AND CHILD LABOUR: A TIME OF CRISIS, A TIME TO ACT 9 (2020); see also INT’L LAB. ORG., COVID-19 IMPACT ON CHILD LABOUR AND FORCED LABOUR: THE RESPONSE OF THE IPEC + AND FLAGSHIP PROGRAMME 4, 10 (2020).

14. See Miriam Amanze et al., *Tackling Human Trafficking in Governments Supply Chains: Legal Certainty and Effectiveness Issues Under the Australian Commonwealth Procurement Rules Model*, 50 FED. L. REV. 479, 481 (2022); see also MARK FENWICK & STEFAN WRBKA, *LEGAL CERTAINTY IN A CONTEMPORARY CONTEXT: PRIVATE AND CRIMINAL LAW PERSPECTIVES* 1–2 (2016); James Maxeine, *Some Realism about Legal Certainty in Globalization of the Rule Law*, 31 HOUS. J. INT’L L. 27, 32 (2008); John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUST. L. J. LEGAL PHIL. 47, 50, 52 (2002).

15. ARWEL DAVIES, *Government Procurement, in* BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 274–307 (Lester S. Nicholas & Bryan Mercurio eds., 2009). Davies points out that a procurement scope and coverage consist of factors such as (1) the type of entities covered; (2) procurement threshold; (3) subject matter of the procurement; and (4) exceptions to the non-discrimination principle. These elements of FAR Subpart 22.15 scope and coverage are considered in Part III below.

16. *Loophole*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/loophole> [<https://perma.cc/6Y7X-VD93>] (last visited Feb. 26, 2023). The *Cambridge Dictionary* defines loophole as “a small mistake in an agreement or law that gives someone the chance to avoid having to do something.” In the context of this paper, a loophole refers to gaps or mistakes that affects the effectiveness of Subpart 22.15 in preventing the supply of products produced by forced or indentured child labor to federal procuring agencies. A non-procurement example of loopholes is discussed by Antonia J. Broughton, *A Workplace Exception: Exploring the Legal Loophole That Allows for Warrantless GPS Tracking of Government Employees’ Personal Vehicles*, 31 TOURO L. REV. 743 (2015), which discussed the legal loophole that allowed government employers to track an employee’s personal vehicle during working days.

17. The following articles discuss the lack of labor protection in federal contracting, with some reference to child laborers: Meghan McGuirk, *Lacking Labor Protections in the U.S. Procurement System: A Comparative Analysis of European Labor Protections in Government Procurement*, 48 PUB. CONT. L. J. 355 (2019); Nicole Fleury, *Offering the Carrot to Complement the Stick: Providing Positive Incentives in Public Procurement Frameworks to Combat Human Trafficking*, 48 PUB. CONT. L. J. 397 (2019).

inadequacies that exist under Subpart 22.15 provisions on the prohibition of forced or indentured child labor and its potential remedies will provide useful insights and significantly contribute to the existing literature on government contracting.

Next, Part II of this article discusses the regulation of government contracts and sustainable contracting under the FAR and introduces the federal legislation that aims to address child labor concerns in the U.S. federal supply chains. Part III of this article analyzes the procurement procedures under Subpart 22.15, discusses significant limitations to Subpart 22.15, and recommends changes that will strengthen the inadequate provisions highlighted. Finally, Part IV encourages the U.S. government to lead by example in addressing the regulatory and administrative deficiencies that hinder the effective prohibition of acquisitions tainted by child labor.

II. CONTEXT AND BACKGROUND: U.S. FEDERAL GOVERNMENT CONTRACTS REGIME, LABOR EXPLOITATION, AND CHILD LABOR IN THE SUPPLY CHAIN

A. The U.S. Government Contracts Regime

As the largest single global purchaser, the U.S. federal government annually procures approximately \$500 to \$600 billion worth of goods, works, and services.¹⁸ This significant fiscal expenditure requires a regulatory regime that is efficient, effective, and simple and that can be uniformly applied by all procuring agencies.¹⁹ For this reason, U.S. government contracts have been the subject of great attention from policymakers, procuring agencies at federal and state levels, non-governmental institutions, and academics.²⁰

The U.S. federal procurement system is governed by the FAR and agency regulations.²¹ In the context of exploring the prohibition of child labor in the FAR, Part 22 of the FAR is crucial to the subject matter, with the relevant regulation being Subpart 22.15, as it contains the prohibition of acquisition of products produced by forced or indentured child labor. Since the issuance of Executive Order 13126 in 1999, Subpart 22.15 has not been revised to keep

18. Christopher Yukins, *The U.S. Federal Procurement System: An Introduction*, in GW LAW FACULTY PUBLICATIONS & OTHER WORKS 69 (2017); *Federal Contract Spending: Five Trends in Five Charts*, BLOOMBERG GOV'T (Jan. 5, 2021), <https://about.bgov.com/news/federal-contract-spending-five-trends-in-five-charts-2> [https://perma.cc/N3HR-E9JM]. In 2020, the U.S. federal government spent over \$681 billion procuring goods and services due to the COVID-19 pandemic. For more data on federal procurement spending, see www.usaspending.gov [https://perma.cc/2FT8-RP75].

19. FAR 1.101; S. ARROWSMITH, *THE LAW OF PUBLIC AND UTILITIES PROCUREMENT* 1 (2014).

20. Khi V. Thai, *Public Procurement Re-examined*, 1 J. PUB. PROCUREMENT 1, 10 (2001); CYNTHIA WALKER, *Setting up a Public Procurement System: The Six Steps Method*, in PUB. PROCUREMENT: THE CONTINUING REVOLUTION 6 (Sue Arrowsmith & Martin Trybus eds., 2003).

21. FAR 1.301; OLESSIA SMOTROVA-TAYLOR, *Get Started in Government Contracting*, in HOW TO GET GOVERNMENT CONTRACTS: HAVE A SLICE OF THE 1 TRILLION DOLLAR PIE 29–35 (2012). In addition to complying with the FAR, each federal procuring agency has its own set of regulations that it abides by.

up with societal and legal developments that will “better serve the American people” and global citizens.²² The lack of U.S. federal attention to Subpart 22.15 underscores the urgency for updated solutions; this article encourages revisions that will bring the provision in line with current debates and developments.²³

B. Sustainable Contracting and Labor Exploitation

Government contracts have been used to promote objectives beyond the acquisition of goods, works, and services.²⁴ Many countries use government contract activities to support various goals including the protection of the rights of workers involved in the government supply chain.²⁵ This advancement of environmental, economic, and social agenda, including those related to addressing human rights concerns through government contracts, is referred to by many names, including sustainable procurement, green procurement, and environmentally responsible public procurement.²⁶

At an international level, sustainable contracting is so important that a specific UN Sustainable Development Goal target, SDG 12.7.1, calls for the promotion of public procurement practices that are sustainable in accordance with national policies and priorities by 2030.²⁷ This is an issue of significant

22. See JAMES F. NAGEL, *HISTORY OF GOVERNMENT CONTRACTING*, 511–18 (1999); Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 *PUB. PROCUREMENT L. REV.* 103, 108 n.29 (2002); Yukins, *supra* note 18.

23. See *infra* Part III.

24. Peter Kunzlik, *International Procurement Regimes and the Scope for the Inclusion of Environmental Factors in Public Procurement*, in *THE ENVIRONMENTAL PERFORMANCE OF PUBLIC PROCUREMENT: ISSUES OF POLICY COHERENCE* 193–219, (2003); Jolien Grandia & Joanne Meehan, *Public Procurement as a Policy Tool: Using Procurement to Reach Desired Outcomes in Society*, 30 *INT’L J. PUB. SECTOR MGMT.* 302, 303 (2017).

25. Olga Martin-Ortega, Opi Outhwaite & William Rook, *Buying Power and Human Rights in the Supply Chain: Legal Options for Socially Responsible Public Procurement of Electronic Goods*, 19 *INT’L J. OF HUM. RIGHTS* 341, 341 (2015); Don Wells, *How Ethical Are Ethical Purchasing Policies?*, 2 *J. ACAD. ETHICS* 119, 122 (2004); Stephen J. New, *Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility?*, 20 *SUPPLY CHAIN MGMT.* 697, 697–707 (2015); LOUISE SHELLY, *Human Trafficking as a Form of Transnational Crime*, in *HUMAN TRAFFICKING* 22 (Maggy Lee ed., 2011).

26. See Christopher McCrudden, *Using Public Procurement to Achieve Social Outcomes*, 28 *NAT. RES. F.* 257, 257 (2004); Craig Carter & Marianne Jennings, *Social Responsibility and Supply Chain Relationships*, *TRANSP. RSCH. PART E: LOGISTICS & TRANSP. REV.* 37, 38 (2002); Lin Li & Ken Geiser, *Environmentally Responsible Public Procurement (ERPP) and Its Implications for Integrated Product Policy (IPP)*, 13 *J. CLEANER PROD.* 705, 706 (2005); Lutz Preuss, *Addressing Sustainable Development Through Public Procurement: The Case of Local Government*, *SUPPLY CHAIN MGMT.: AN INT’L J.* 213, 214 (2009); Katriina Parikka-Alhola, *Promoting Environmentally Sound Furniture by Green Public Procurement*, 68 *ECOLOGICAL ECON.* 472, 472 (2008); Laurie Nijaki & Gabriela Worrel, *Procurement for Sustainable Local Economic Development*, 25 *INT’L J. PUB. SECTOR MGMT.* 133, 134 (2012); Miriam Mbah, *The Future of Sustainable Procurement in UK Public Procurement Regulation: An Analysis of the Green Paper on Transforming Public Procurement*, *INT’L LEARNING LAB ON PUB. PROCUREMENT & HUM. RTS.* (May 2021), <https://www.humanrightsprocurementlab.org/blog-1/the-future-of-sustainable-procurement-in-uk-public-procurement-regulation-an-analysis-of-the-green-paper-on-transforming-public-procurement-miriam-mbah-may-2021> [https://perma.cc/EZ2T-HM7K].

27. G.A. Res. 2015, *supra* note 11; Joyce Thomson & Tim Jackson, *Sustainable Procurement in Practice: Lessons from Local Government*, *J. ENV’T PLAN. & MGMT.* 421, 428 (2005); Stephen

concern in the specific case of human rights violations in government supply chains, which are expected to “prevent, investigate, punish and redress [business-related human rights abuses] through effective policies, legislation, regulations and adjudication.”²⁸ Governments have gone to extra lengths to ensure that they do not engage in business with criminals, thereby facilitating criminal schemes and increasing the risk of government contracts being tainted by unethical and illegal practices.²⁹ This was the case even during the unprecedented COVID-19 pandemic.

Several international organizations encourage governments to prevent, mitigate, or address trafficking practices that could occur through government contracts. For example, the UN, through its Guiding Principles on Human Rights, encourages governments to promote “respect for human rights by business enterprises with which they conduct commercial transactions.”³⁰ Other international organizations such as the International Labour Organization³¹ and the Organisation for Security and Co-operation in Europe (OSCE), argue that governments (including the United States) have an inescapable obligation to eliminate exploitative practices adopted by their suppliers.³²

Regarding the U.S. approach to sustainable contracting and prevention of labor exploitation, under Article II of the Constitution and the Federal Property and Administrative Services Act 1949, U.S. presidents are permitted to issue executive orders to oversee various aspects of federal contracts including suppliers’ behaviors in such contracts.³³ As a result, several executive orders that advance the federal government’s economic, environmental, and social policies have been issued and implemented into the FAR.³⁴ Regarding

Brammer & Helen Walker, *Sustainable Procurement in the Public Sector: An International Comparative Study*, INT’L J. OF OPERATIONS AND PROD. MGMT. 452, 457 (2011).

28. Rep. of the Off. of the High Comm’r, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework,”* at 3, U.N. Doc. A/HRC/17/31 (2011) [hereinafter UNHRC].

29. UN OFF. ON DRUGS AND CRIME, *GLOBAL REPORT ON TRAFFICKING IN PERSONS 2020*, at 4 (2020).

30. UNHRC, *supra* note 28. It notes that states “should promote respect for human rights by business enterprises with which they conduct commercial transactions.” *Id.* at 8. For in-depth discussions on the legal status of the UN Guiding Principles, see Rep. of the Off. of the High Comm’r, *Frequently Asked Questions About the Guiding Principles on Business and Human Rights*, at 8, U.N. Doc. HR/PUB/14/3 (2014).

31. The following ILO Conventions and Recommendations are relevant to the exploitation of workers: International Labour Organisation, *Forced Labor Convention*, 1930, No. 29; International Labour Organisation, *Forty-Hour Week Convention*, 1935, No. 47; International Labour Organisation, *Convention Concerning Minimum Age for Admission to Employment*, 1973, No. 138; International Labour Convention, *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 1999, No. 182.

32. OSCE OFFICE OF THE SPECIAL REPRESENTATIVE AND CO-ORDINATOR FOR COMBATING TRAFFICKING IN HUMAN BEINGS, *ENDING EXPLOITATION—ENSURING THAT BUSINESSES DO NOT CONTRIBUTE TO TRAFFICKING IN HUMAN BEINGS: DUTIES OF STATES AND THE PRIVATE SECTOR* 42, 47, 93, 97 (2014), <https://www.osce.org/secretariat/126305> [<https://perma.cc/AQA6-2TFW>].

33. 40 U.S.C. §§ 121, 701; see also Daniel P. Gitterman, *The American Presidency and the Power of the Purchaser*, 43 PRESIDENTIAL STUD. Q. 225, 225–51 (2013).

34. KHI THAI & DAVID DRABKIN, *US Federal Government Procurement: Structure, Process and Current Issues*, in *PUB. PROCUREMENT* 89–104 (Louise Knight et al. eds., 2007).

economic policies, FAR Part 19 promotes small business programs by requiring federal entities to set aside specified contracts for small and disadvantaged businesses (SDBs) owned largely by minorities such as women, Black Americans, Hispanic Americans, and other minorities in America.³⁵ Another economic policy promoted by the FAR is the Buy American regime, which is implemented in FAR Part 25, following the Buy American Act of 1933.³⁶ This policy essentially limits procuring agencies from buying foreign goods or services, and promotes the acquisition of products produced or manufactured in full or in part in the United States.³⁷ Similarly, FAR Part 23 promotes environmental policies of the federal government.³⁸ For example, Executive Order 13693 on “planning for federal sustainability in the next decade” requires federal agencies to continue protecting the environment by adopting measures such as mandatory life cycle costing, drug-free workplace, renewable energy, and environmentally friendly evaluation criteria.³⁹

Social policies are regulated mainly under FAR Part 22.⁴⁰ Implementing these FAR provisions shows that the federal government is not politically neutral in matters involving human and labor rights violations. However, these regulations require a thorough analysis to determine their application and impact. This article focuses primarily on FAR Subpart 22.15, which prohibits the use of forced or indentured child labor in the U.S. federal supply chain.

C. Child Labor in the U.S. Supply Chain and Early Prohibition Under Federal Law

Child labor is the employment of a child⁴¹ whose work is “mentally, physically, socially or morally dangerous” and “interferes with their schooling.”⁴² While

35. FAR Part 19 details the procedures for awarding contracts to small businesses. FAR 19.201; FAR 19.501; 13 C.F.R. § 124.103 (2022). This initiative was initially met with criticisms as outlined in the case of *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). See K. Morgan, *Government Contracting in the 21st Century*, 14 PREVENTIVE L. REP 30, 30–40 (1995).

36. FAR 25.000; 41 U.S.C. §§ 8301–8305.

37. Yukins, *supra* note 18; Paul H. Gantt & William H. Speck, *Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order*, 7 J. PUB L. 378, 382–83 (1958); Laurence A. Knapp, *The Buy American Act: A Review and Assessment*, 61 COLUM. L. REV 430, 430–31 (1961).

38. FAR 23.000.

39. Exec. Order No. 13693, (*revoked by* Exec. Order No. 13834). Executive Order (EO) 13693 was signed March 19, 2015. *Id.* This Executive Order replaced Executive Order 13423 on strengthening federal environmental, energy, and transportation management and Executive Order 13514 on federal leadership in environmental, energy, and economic performance, improving the environment and encouraging a sustainable mode of production. *Id.*; see also Exec. Order No. 13423; Exec. Order No. 13514.

40. FAR Subpart 22.3 regulates contract work hours and safety standards. FAR 22.3. Subpart 22.15 governs the prohibition of forced or indentured child labor. FAR 22.15. Subpart 22.17 addresses trafficking in persons, and Subpart 22.20 requires federal entities to provide fair pay and safe workplaces to persons involved in the government supply chain. FAR 22.17; FAR 22.20.

41. “Child” is defined by the UN and ILO as a “person under eighteen years.” Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 3, Dec. 12, 2000, 2237 U.N.T.S. 319; Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *supra* note 31, art. 3.

42. *What Is Child Labour*, INT’L LAB. ORG., <https://www.ilo.org/ipcec/facts/lang--en/index.htm> [<https://perma.cc/8VVR4-6CXR>] (last visited June 29, 2021); see also Per Miljeteig, *Introduction:*

it is recognized that the ideas of childhood and child-appropriate activities vary across national borders and not all work carried out by a child is child labor, this definition of child labor is consistent with the U.S. definition of “oppressive child labor” under the Fair Labor Standards Act (FLSA).⁴³

Globally, there are approximately 160 million child labor victims, with “16.8 million more children aged 5 to 11 in child labour in 2020, than in 2016”.⁴⁴ The International Labour Organisation (ILO) notes that this figure is likely to increase due to the COVID-19 pandemic and, thus, makes the issue a persistent problem that should be addressed.⁴⁵ While various national legislation and international conventions have sought to abolish child labor, this criminal activity continues to be reported, especially within government suppliers’ practices, including within the U.S. procuring agencies.⁴⁶ Thus, the passing of laws and rules such as Executive Order 13126 and its implementation as FAR Subpart 22.15 is itself evidence that child labor exists in the U.S. supply chains. Also, evidence shows that suppliers use child laborers in sourcing or mining minerals, working in farms, fisheries, sewing apparels, and carrying materials to a construction site.⁴⁷ For example, in Bangladesh, many in the workforce producing licensed apparel for the U.S. Department of Defense were children.⁴⁸ Further, over 150 goods produced by child labor in seventy-seven countries are listed in the U.S. Department of Labor (DoL) list of goods produced by forced labor and child labor, and thirty-four products

Understanding Child Labour, 6 CHILDHOOD 6, 5–12 (1999) (discussing the complexities of regulating child labor laws).

43. Miljeteig, *supra* note 42, at 6. The ILO states that helping around the house, work placements, and earning money outside school hours and during holidays are not categorized as child labor if the work does not affect the child’s physical and mental development and interfere with the child’s schooling. *What Is Child Labour*, *supra* note 42. “Oppressive child labor” means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being. Fair Labor Standards Act, 29 U.S.C. § 203 (1938).

44. INT’L LAB. OFF. & U.N. CHILDREN’S FUND, CHILD LABOUR: GLOBAL ESTIMATES 2020, TRENDS AND THE ROAD FORWARD 8 (2021).

45. *Id.*

46. *Id.*; see also Andrew J. Samet, *Keynote Address: Child Labor and the New Millenium*, 21 WHITTIER L. REV. 69, 73–76 (1999).

47. NAT BURKE, POLICY REPORT: CREATING MARKETS FOR CHILD-FRIENDLY GROWTH: ADDRESSING CHILD LABOR THROUGH G20 PUBLIC PROCUREMENT 3, 10 (2014); Eric V. Edmonds & Nina Pavcnik, *Child Labor in the Global Economy*, 19 J. ECON. PERSP. 199, 199–204 (2005).

48. Ian Urbina, *U.S. Flouts Its Own Advice in Procuring Overseas Clothing*, N.Y. TIMES (Dec. 22, 2013), <https://www.nytimes.com/2013/12/23/world/americas/buying-overseas-clothing-us-flouts-its-own-advice.html> [https://perma.cc/P43-ZG4C].

from twenty-five countries are listed on Executive Order 13126 list of products produced by forced or indentured child labor (“the List”).⁴⁹

The possibility that federal agencies procure products produced by child labor has led to federal laws that seek to eradicate this form of slavery from the U.S. supply chain. For example, the Walsh-Healey Act requires government suppliers to adhere to rules relating to child labor when producing and supplying specified goods to federal procuring agencies.⁵⁰ Despite the early prohibition of child labor in this manner, the Act has been assessed as inadequate as it fails to comprehensively tackle this practice across the U.S. global supply chain because its sole focus is on goods produced within the United States, Puerto Rico, and the Virgin Islands.⁵¹

In addition to the Walsh-Healey Act and the FLSA, FAR Subpart 22.15 is another significant provision that seeks to tackle child labor in the federal government supply chain. In Part III below, this article turns attention to the analysis of Subpart 22.15, with a clear focus on examining provisions that lack legal certainty, create loopholes, and hinder the elimination of child labor from the U.S. supply chain.

III. THE ANALYSIS OF SUBPART 22.15: SCOPE, PROCUREMENT PROCESS, AND PROCEDURES

To effectively tackle child labor and other exploitative practices, the federal government must implement provisions that cover the entire contracting process from planning to contract management.⁵² Adopting this cradle to grave approach arguably reduces the likelihood of federal agencies awarding contracts to suppliers that produce goods, works, or services tainted by inhumane and human rights violations. This section of the article focuses on the cradle to grave approach by analyzing Subpart 22.15 procedures under the four key stages of the contracting process: procurement planning, solicitation of bids, contract award, and contract management.⁵³ Throughout the analysis, the article focuses on the adequacy of Subpart 22.15 in prohibiting federal agencies from procuring products tainted by forms of child labor. As noted in

49. U.S. DEP’T OF LAB.’S BUREAU OF INT’L LAB. AFFS., 2020 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR (2020) [hereinafter 2020 LIST OF GOODS]; U.S. DEP’T OF LAB.’S BUREAU OF INT’L LAB. AFFS., 2020 LIST OF PRODUCTS PRODUCED BY FORCED OR INDENTURED CHILD LABOR (2020) [hereinafter 2020 LIST OF PRODUCTS].

50. 41 C.F.R. § 50-201.1 (2022); see also 41 U.S.C. §§ 6501–6511. The Act requires government suppliers to adhere to “to specifically prescribed representations and stipulations . . . pertaining to . . . the use of child labor or convict labor on the contract . . . for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding \$10,000.” *Id.*

51. 41 U.S.C. §§ 6501–6511.

52. Claire O’Brien et al., *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions*, INT’L LEARNING LAB. (July 19, 2016), <https://www.oecd.org/governance/procurement/toolbox/search/Public-Procurement-and-Human-Rights-A-Survey-of-Twenty-Jurisdictions-Final.pdf> [<https://perma.cc/NKP7-42XN>].

53. NIGEL CALDWELL ET AL., *The Purchasing Process in Public Procurement*, in PUBLIC PROCUREMENT: INTERNATIONAL CASES AND COMMENTARY 149 (Louis Knight et al. eds., 2007).

Part I, to determine the subpart's adequacy, issues relating to legal certainty, the comprehensiveness of subpart's scope and coverage, and loopholes that hinder the effectiveness of the subpart's procedures will be examined. However, before progressing with these matters, the article reviews the scope and coverage of Subpart 22.15.

A. Scope and Coverage of Subpart 22.15

The prohibition of acquisitions of products produced by forced or indentured child labor under Subpart 22.15 shows that the U.S. government is committed to eradicating unlawful and unethical practices from the federal government supply chains. Subpart 22.15 contributes to this goal by seeking to limit the likelihood of procuring agencies acquiring products produced under conditions that violate children's human rights. This section of the article examines provisions relating to the scope and coverage of Subpart 22.15 and highlights significant limitations of the definition of forced or indentured child labor, covered acquisitions, and the title of the regulation.

1. Definition of Forced or Indentured Child Labor

As noted earlier, the prohibition under Subpart 22.15 is specifically limited to goods produced by forced or indentured child labor. Underpinning the issue of the scope and coverage of Subpart 22.15 is the question of the definition of forced or indentured child labor. This concern is reflected in FAR 22.1501, which provides:

[A]ll work or service-

- (1) exacted from any person under the age of 18 under the menace of any penalty for its non-performance and for which the worker does not offer himself voluntarily; or
- (2) [p]erformed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.⁵⁴

The above definition reflects four salient elements of forced or indentured child labor: (1) age, (2) work or services, (3) involuntary labor, and (4) menace of penalty. The elements of forced or indentured child labor are a combination of the elements of child labor (age and work or services)⁵⁵ and the elements of forced labor (involuntary and menace of penalty).⁵⁶ The combination of forced labor and child labor to arrive at the subpart's prohibition of forced or

54. FAR 22.1501.

55. See discussions *supra* Part II.C (definition of child labor); *What Is Child Labour*, *supra* note 42.

56. ILO, Forced Labor Convention, 1930, No. 29; *id.* art. 2(1) (defining forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"). ILO, C29 Forced Labour Convention, art. 2(1), (June 6, 1930) (entered into force May 1, 1932). According to the ILO, this definition consists of three elements (involuntariness, work or service, and the menace of any penalty), which must all be present to constitute the term forced labour. See *What Is Forced Labour; Modern Slavery and Human Trafficking*, INT'L LAB. ORG., <http://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm> [https://perma.cc/4J8H-23D5] (last visited June 1, 2021).

indentured child labor is severely inadequate when it comes to legal certainty, comprehensive coverage, and clarity.

The definitions of the first three elements—age, work/service, and involuntariness—are not in dispute because they are clearly outlined by the FAR. However, “menace of penalty” is problematic because it is not defined in Subpart 22.15 and, thus, ambiguous. The regulation fails to provide concrete examples of actions considered as “menace of penalty.” This omission in the subpart creates legal uncertainty because it does not indicate when a contractor’s practice or actions could be deemed as a penalty and affect the classification of a product as that produced by force or indentured labor. For example, while nonpayment, physical violence, and threats toward child laborers are easily classified as menaces of penalty, more subtle mistreatment, such as reducing working hours to limit the amount earned, threats of dismissal, or other covert discriminatory actions, are not as readily identifiable. Stakeholders may resist reporting contractors’ rudimentary standards of decency to the DoL because of this unclear definition and, therefore, may prevent those products manufactured using forced or indentured labor from being added to the list of products.⁵⁷

Additionally, the limited coverage of forced and indentured child labor in Subpart 22.15 fails to comprehensively confront all forms of economic exploitation of children by federal contractors. The government should take a broader approach to the acquisition of goods produced or manufactured by “child labor,” rather than limiting child exploitation to only forced or indentured child labor. If widened to cover to child labor more broadly, Subpart 22.15 will include several forms of child labor practices, leading to a thorough attack on this form of economic exploitation in the U.S. federal supply chain. This solution will contribute to the U.S. prohibition of all forms of child labor, even those outside the field of government contracting, including “work that is likely to harm the health, safety or morals of children.”⁵⁸

57. *Principles for International SweatFree Federal Government Procurement* (SweatFree Communities, Working Draft, 2009).

58. Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *supra* note 31, art. 3, defined worst forms of child labor as:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

The federal government has considered the widening Subpart 22.15's prohibition of child labor, as evidenced by the subpart's current scope being consistent "with other federal legislation that prohibit child labor" as described by the DoL.⁵⁹ However, this mere consideration is unsatisfactory. The replacement of "forced or indentured child labor" with "child labor" defined more broadly does not shape current law for the better because U.S. federal legislation already widely prohibits child labor.

For example, the FLSA prohibits importing goods produced or manufactured by child labor, which is arguably a similar agenda pursued by Subpart 22.15.⁶⁰ Significantly, the FLSA protects children by setting conditions under which they are employed or, in certain circumstances, prohibiting their employment altogether.⁶¹ The term "oppressive child labor" is used in the FLSA to describe children's employment. This term does not have the same meaning as forced or indentured child labor. Oppressive child labor is "a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer . . . in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health of well-being."⁶² This definition, consistent with that in the ILO Worst Forms of Child Labor convention, differs from the definition of forced or indentured child labor because it does not require the elements of involuntariness or penalties. If consistency with federal law was the main criteria for prohibiting forced or indentured labor, then the FLSA's term and definition should have been adopted. Prohibiting all forms of child labor will not create inconsistencies in federal child labor laws.⁶³ Rather, it will contribute to the elimination of child labor from the supply chain and generally in society.

2. Coverage—Excluded Acquisitions

Another issue with Subpart 22.15 concerns goods that are subject to the subpart's specific procurement procedures. Subpart 22.15 makes it clear that its

59. U.S. DEP'T OF LAB., FREQUENTLY ASKED QUESTIONS: EXECUTIVE ORDER 13126 OF 1999 (1999), https://web.archive.org/web/20170212061114/https://www.dol.gov/ilab/reports/pdf/EO_FAQS_2014.pdf [<https://perma.cc/256Y-ERPZ>]. The Office of Child Labor, Forced Labor, and Human Trafficking (OCFT) in the Bureau of International Labor Affairs (ILAB) confirmed under question eleven that the DoL prohibited products made by forced or indentured child labor because it is consistent with current U.S. law.

60. 29 U.S.C. § 212(a).

61. *Id.* § 212; WILLIAM G. WHITTAKER, CONG. RSCH. SERV., RL31501, CHILD LABOR IN AMERICA: HISTORY, POLICY AND LEGISLATIVE ISSUES 8 (2005), <https://ecommons.cornell.edu/handle/1813/78676> [<https://perma.cc/DKH2-XPC6>].

62. 29 U.S.C. § 203(1)–(2).

63. World Day Against Child Labour, UNITED NATIONS, <https://www.un.org/en/observances/world-day-against-child-labour/background> [<https://perma.cc/6C84-CCY8>] (last visited Feb. 27, 2023) (defining child labor as "work carried out to the detriment and endangerment of a child, in violation of international law and national legislation. It either deprives children of schooling or requires them to assume the dual burden of schooling and work.").

procurement procedures apply to goods that “exceed the micro-purchase threshold” of \$3,500 and that are found on “the list” (“List”) of products requiring contractor certification as to forced or indentured child labor.⁶⁴ Thus, there are two exclusionary measures that affect the comprehensive coverage of Subpart 22.15: the exclusion of acquisitions by threshold and exclusions resulting from goods not found on the List.

Regarding the exclusion by threshold, Subpart 22.15 should comprehensively cover all acquisitions irrespective of the contract value. This is because Executive Order 13126’s objective is to prevent procuring agencies from buying products produced or manufactured by forced or indentured child labor, which should include products below the micro-purchase threshold.⁶⁵ Additionally, excluding micro-purchase contracts from the scope of Subpart 22.15 might encourage procuring agencies to split contracts into lots, thereby avoiding compliance with the provisions of Subpart 22.15. By delineating a threshold, the government may be protecting the administrative resources of procuring agencies as micro-purchase acquisitions are easily acquired and insignificant to the volume of goods procured under the FAR.⁶⁶ Despite the potential administrative advantage of the micro-purchase threshold, the requirement for certification that a supplier will not supply products manufactured by child labor as discussed in Part III B and D is not rigorous and so should be adapted to cover micro-purchase contracts. Thus, to comprehensively eliminate child labor from the federal supply chain, all federal acquisitions should be targeted by Subpart 22.15.

The second exclusionary measure affecting Subpart 22.15’s scope and coverage relates to the exclusion of goods or products, which do not appear on

64. FAR 22.1501. The List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor is published by the Department of Labor (DoL). U.S. DEP’T OF LAB., LIST REQUIRED BY EXECUTIVE ORDER 13126 (2022); see also FAR 22.1503-4. For discussions on the contract award certification, see Part III.D.1 above. As of March, 25, 2019, there are thirty-four products from twenty-five countries on the List. U.S. DEP’T OF LAB., LIST REQUIRED BY EXECUTIVE ORDER 13126 (2022). The List has been subject to various amendments since its first publication. For example, in 2010, the DoL included bricks, cotton, electronics, and toys produced in China to the List. *Id.* Furthermore, in May 2011, charcoal from Brazil was removed from the List following a rigorous consultation and inspection of data. Notice of Final Determination Revising the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Pursuant to Executive Order 13126, 76 Fed. Reg. 31,365 (May 31, 2011), <https://www.federalregister.gov/documents/2011/05/31/2011-13342/notice-of-final-determination-revising-the-list-of-products-requiring-federal-contractor> [<https://perma.cc/8VSV-XWNB>]; Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor, 83 Fed. Reg. 5771 (Feb. 9, 2018).

65. Exec. Order No. 13126, 64 Fed. Reg. 32,383 (June 16, 1999).

66. See FAR 13.203. Goods under the micro-purchase threshold are procured using the simple acquisition procedure. It allows greater flexibility to the procuring entity by allowing such procurement to be carried out without opening the contract to competition through the publication of the contract notice. Such procedure is afforded to micro-purchase goods because the administrative cost of carrying out proper procedure does not create value for money when compared to the actual contract value. As such, it is argued that goods acquired through this procedure are recurring products such as office stationeries (depending on the quantity) or toiletries. Ralph C. Nash & John Cibinic, *Simplified Acquisition: Keep It Simple*, 10 NASH & CIBINIC REP. 4 (1996).

the List, even if there are credible allegations of forced or indentured child labor used in producing or manufacturing the goods in whole or in part.

Essentially, the absence of a product from the List does not mean that the product is not produced or manufactured by forced or indentured child labor. On the contrary, an omission of a product from the List only signifies that the DoL does not have a “reasonable basis” for believing that the said product should be listed.⁶⁷ For example, the DoL’s refusal to add carpets from India on the List, despite strong evidence of “a significant prevalence of forced labor and child labor” for such carpets, did not mean that such carpets were not manufactured using forced or indentured child labor.⁶⁸ Such refusal from the DoL suggests that indisputable evidence of forced or indentured child labor (e.g., unchallenging evidence of penalties employed to force children to work) is required to satisfy the reasonableness test. Proving the element of “force” may be challenging because it requires strong evidence without any guidance of what constitutes a penalty. The DoL’s standard makes it difficult for goods to be added to the List, which means that unlisted goods produced by forced or indentured labor could still be supplied to federal procuring entities.

As a result, the Subpart 22.15 (EO 13126) list should be replaced with another list produced by the federal government.⁶⁹ Authorized by the Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA) and developed by the Bureau of International Labor Affairs (ILAB), the “list of goods . . . produced by forced labor or child labor” adopts a zero-tolerance approach, resulting in 155 goods from 77 countries.⁷⁰ In addition to a large number of goods on the TVPRA list, the List appears to follow a less stringent and objective standard, as it requires evidence relating to the nature, date, source of information, collaborative reports, and data for a product to appear on the List.⁷¹ The replacement of EO 13126 list with the TVPRA list will result in more goods being subject to Subpart 22.15 procedures and should significantly contribute to the elimination of child labor from the supply chain.

3. Subpart 22.15’s Title

A further concern relates to the imprecise title of Subpart 22.15, labeled the “prohibition of acquisitions of products produced by forced or indentured

67. FREQUENTLY ASKED QUESTIONS, *supra* note 59.

68. U.S. Department of Labor, Notice of Final Determination Regarding the Proposed Revision of the List of Products Requiring Federal Contractor Certification as to Forced or Indentured Child Labor Pursuant to Executive Order 13126, 81 Fed. Reg. 68,062 (Mar. 10, 2016); KARA SIDDHARTH, *Tainted Carpets: Slavery and Child Labor, in INDIA’S HAND-MADE CARPET SECTOR* (FXB Center for Health and Human Rights: Harvard School of Public Health, 2014); Steven H. Tenzer, *Harvard Study Finds Abuses in India’s Carpet Industry*, HARV. CRIMSON (Feb. 3, 2014), <https://www.thecrimson.com/article/2014/2/3/Harvard-study-india-child-labor-carpets> [<https://perma.cc/T7TF-53RW>].

69. 2020 LIST OF PRODUCTS, *supra* note 49.

70. Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109–64, 105(b)(2)(C); 2020 LIST OF GOODS, *supra* note 49.

71. Paul C. Rosenthal & Anne E. Hawkins, *Applying the Law of Child Labor in Agricultural Supply Chains: A Realistic Approach*, 21 UNIV. CAL. DAVIS J. INT’L L. & POL’Y 157, 167 (2014).

child labor.”⁷² This title lacks legal certainty because it does not represent the procedures under Subpart 22.15 and, thus, is misleading. A literal interpretation of the title suggests that Subpart 22.15 is a regulation that automatically prohibits procuring agencies from procuring products manufactured by forced or indentured child labor. However, this interpretation is incorrect because Subpart 22.15’s procedures are designed to ensure contracting officers follow a rigorous procedure that reduces the possibility of goods produced by forced or indentured child labor from being supplied to federal procuring agencies. The title should reflect its purpose and intention. For example, government could amend the title to “mitigating the acquisitions of products manufactured by forced or indentured child labor.” This updated title would provide more clarity and precision.

B. Subpart 22.15 and Procurement Planning

Procurement planning signifies the beginning or foundation of any contracting exercise and is a crucial stage of the contracting process. Planning effectively leads to better risk identification and management, provides a well-developed specification, and allows procuring agencies to be proactive throughout the rest of the procurement process.⁷³ The planning stage generally requires procuring agencies to carry out market analysis, due diligence, and risk assessments, develop the technical specification, and prepare the procurement documents needed for soliciting bids. Under the FAR, procurement planning is regulated under FAR Part 5, which governs the publication of procurement opportunities, and FAR Part 7, which governs acquisition planning. The following subsection discusses limitations affecting the planning stage, with specific focus on the planning due diligence and the solicitation documents.

1. Planning Due Diligence

Contracting officers (COs) are required to carry out due diligence by checking the proposed acquisition against the list of products manufactured by forced or indentured child labor.⁷⁴ This due diligence serves as an “alert that there is a reasonable basis to believe that such product may have been mined, produced or manufactured by forced or indentured child labor.”⁷⁵ This may then enable procuring agencies to apply the rest of the procedures under Subpart 22.15.

This level of due diligence may slow the elimination of forced or indentured child labor from the U.S. supply chain because the due diligence is tailored toward the listed end product. This means that if the listed product is used in making the end product, then Subpart 22.15 would not apply. For example, the listed products of cassiterite, tungsten ore, and coltan from Congo procured as an end product would give rise to Subpart 22.15 procedures. However, if

72. FAR 22.1503.

73. KHI V. THAI, INTERNATIONAL HANDBOOK OF PUBLIC PROCUREMENT 11–12 (2009).

74. FAR 22.1503(a).

75. *Id.*

the same listed product from the listed country is used in producing or manufacturing an end product (e.g., mobile phones which use coltan to make the capacitors), the final product would fall outside Subpart 22.15. The subpart's focus on end products creates a loophole, which may result in procuring agencies acquiring end products produced (in part) by forced or indentured child labor. To mitigate this issue, Subpart 22.15 should apply to all listed products, irrespective of whether the agency is procuring the listed product as an end product or as a product used to manufacture the end product.

This recommendation is not without flaw because it could create the effect of an increased administrative workload for COs. The listed products are not "consumer friendly" and could be "meaningless to the ordinary American consumer."⁷⁶ Also, contracting officers, arguably, may not be knowledgeable on the use of listed products in producing end products and, therefore, would be required to carry out a higher level of due diligence on each acquisition to determine if a listed product could be used in an end product. The U.S. government should create a supplementary list outlining end products that are manufactured using materials or minerals found on the List be provided to contracting officers. This would mean that end products such as mobile phones, laptops, and other electronic appliances, for example, if made with coltan from the listed country, will appear on the supplementary list and give rise to the application of Subpart 22.15 procedures.

2. Solicitation (Procurement) Documents

Where an acquisition exceeds the micro-purchase threshold, FAR 22.1505 stipulates that the solicitation document for that acquisition should include FAR 52.222-18, "Certification Regarding Knowledge of Child Labor for Listed End Products."⁷⁷ FAR 52.222-18 states:

The Government will not make award to an offeror unless the offeror, by checking the appropriate block, certifies to either paragraph (c)(1) or paragraph (c)(2) of this provision.

(1) The offeror will not supply any end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in a corresponding country as listed for that end product.

(2) The offeror may supply an end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture such end product. On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor."⁷⁸

76. Kimberley-Joy Lockley, *Ending America's Reliance on Child Labor: Closing the Loophole in* § 212, at 9 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2213423 [<https://perma.cc/3X6X-WF44>].

77. FAR 22.1505.

78. FAR 52.222-18.

The inclusion of FAR 52.222-18 at the planning stage is advantageous for many reasons. First, it demonstrates the government's stance on the use of forced or indentured child labor within its supply chain from the outset, as procuring agencies will not award a contract without a certification. Second, it indirectly creates a self-elimination process whereby potential bidders seeking to compete in the procurement opportunity for a listed end product who engage in forced or indentured child labor will exclude themselves from the tendering process. Finally, the certification prompts potential bidders to, at a minimum, investigate the existence or extent of this illegal practice within their operations.

While the inclusion of FAR 52.222-18 at the planning stage is advantageous, the clause does not stipulate when the certification will be required from the offeror (contractor). Rather, it states that "the Government will not make award to an offeror."⁷⁹ Potential suppliers are not informed of when to submit the certification. This omission creates uncertainty, and, for this reason, FAR 52.222-18 lacks legal certainty.

C. Subpart 22.15 and Tendering or Solicitation of Bids

The tendering or solicitation stage in the contracting process presents numerous opportunities for tackling forced or indentured child labor. This is because the information presented in the solicitation document is used to assess potential suppliers' eligibility and capability, including excluding contractors that do not meet the requirements for participating further in the tendering exercise. As COs must assess potential suppliers' capabilities and capacity to perform the contract in a manner that satisfies the qualification standards outlined in FAR Part 9, they can use this stage to explore issues related to their concerns around suppliers' use of child labor in the contract.⁸⁰

The qualification procedure under FAR Part 9 requires COs to determine the "responsibility" of potential suppliers by considering their financial resources, performance records, integrity and business ethics, technical capability, and legal standing.⁸¹ Contractors that do not meet the agency's responsibility determination should be excluded from the procurement process.⁸² Relevant to the issue of child labor is the "integrity and business ethics" ground under FAR Part 9's qualification standards; this arguably relates to suppliers' reputation of complying with laws (e.g., labor laws) and adoption of unethical practices in their operations and supply chains.⁸³ The provision requires that the assessment of contractors' integrity and business ethics should focus both

79. *Id.*

80. John B. Warnock, *Principles or Practical Responsibility: Sixty Years of Discussion*, 41 PUB. CONT. L. J. 881, 881 (2012).

81. FAR 9.104-1.

82. Yukins, *supra* note 18.

83. Christopher R. Hedon, *Responsible Responsibility: A Renewed Case for Considering a Prospective Contractor's Compliance with Labor and Employment Law Prior to Contract*, 48 PUB. CONT. L. J. 593, 593-614 (2019); Danielle Berezney, *History Repeating: Déjà Vu of Failed Labor Law Regulations in Government Contracting*, 47 PUB. CONT. L. J. 269 (2018); Christopher Yukins & Michal Kania,

on past conduct and current ability to meet the contract.⁸⁴ In the past, illegal practices such as fraud, corruption, conflicts of interest, bribery, and other related offences had taken the front seat, while other practices such as child labor, forced labor, and other exploitative practices were not given significant considerations as qualification requirements.⁸⁵

Despite the generic consideration of a potential supplier's responsibility under FAR Part 9, neither FAR Subpart 9.1 nor Subpart 22.15 has no explicit reference to child labor. This omission presents a loophole that enables contractors to escape the determination of irresponsibility. Despite the omission of child labor from the FAR responsibility determination, engaging in such practices should lead to an exclusion under the business and ethics disqualification ground.⁸⁶ Such exclusion should only be made if the contractor violated child labor laws or if there was an administrative order against the contractor for engaging in forced or indentured child labor.⁸⁷ Without judicial and administrative decisions, which are difficult to obtain due to the geographical span of the crime and the vulnerability of the victims, contractors that continue to perform government contracts through forced or indentured child labor escape exclusion as a result of the loophole in Subpart 22.15.

To improve the effectiveness of Subpart 22.15, when assessing integrity and business ethics, COs should consider contractors' past or present slavery practices (including forced or indentured child labor). Such consideration should include the review of credible reports alleging that the contractor has engaged in forced or indentured child labor.⁸⁸ Additionally, procuring agencies should require potential contractors to submit a solicitation certification alongside their bid.⁸⁹ Doing so has the advantage of encouraging contractors who want to contract with the federal government to assess forced or indentured labor practices within their operations before bidding for a government contract. It also enables COs to assess the business ethics of potential contractors by automatically excluding those unable to provide the certification. Slavery practices such as forced or indentured labor should "have no place" in the federal

Suspension and Debarment in the U.S. Government: Comparative Lessons for EU's Next Steps in Procurement, (GWU Legal Studies Research Paper No. 2019-39).

84. Robert F. Meunier & Trevor B. Nelson, *Is It Time for A Single Federal Suspension and Debarment Rule?*, 46 PUB. CONT. L. J. 553–56 (2017); Kara Sacilotto & Craig Smith, *Suspension and Debarment: Trends and Perspectives*, 48 PROCUREMENT LAW. 3, 3–10 (2012).

85. GABRIELLA M. RACCA & ROBERT C. PERIN, *Corruption as a Violation of Fundamental Rights: Reputation Risk as a Deterrent Against the Lack of Loyalty*, in INTEGRITY AND EFFICIENCY IN SUSTAINABLE PUBLIC CONTRACTS: BALANCING CORRUPTION CONCERNS IN PUBLIC PROCUREMENT INTERNATIONALLY 36 (2014); Schooner, *supra* note 22, at 103–05; Christopher Yukins et al., *A Comparative View of Debarment and Suspension of Contractors in Brazil and in the USA*, 66 ADMIN. & CONST. L. REV., 61, 70 (2017).

86. Hedon, *supra* note 83.

87. *Id.*

88. Examples of credible reports are reports from the ILO, UN, Human Rights Watch, and other authoritative organizations.

89. See *infra* Part III.B(2).

acquisition of goods or services as it affects the integrity and reputation of the federal government.⁹⁰

D. Subpart 22.15 and Contract Awards

Following the determination of responsibility and evaluation of bids, the contractor that meets the procuring agency's requirements may be selected for contract award. However, before the contract is signed, procuring agencies may enter negotiations or require further documentation from the chosen contractor. Under Subpart 22.15, where the acquisition relates to a product found on the List, contracting officers must execute two measures relating to contract award. First, they must obtain a contract award certification from suppliers and, second, include child labor provisions as part of the contract clauses.⁹¹

1. Contract Award Certification

As mentioned in Part III.B.2, contracting officers must obtain a certification from the successful contractor.⁹² The certification, which is the same as that contained in FAR 52.222-18, must be submitted to the CO before the contract award, thereby addressing the lack of legal certainty that exists in the clause. The contract award certification provides contractors with a choice of an absolute or qualified certification. An absolute certification means that the contractor "will not supply any end product on the List."⁹³ Consequently, there is an outright declaration that in no circumstance will such product be supplied to the procuring agency. In contrast, a qualified certification means that the contractor commits to making "a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any end product."⁹⁴ In essence, before making a qualified certification, contractors must carry out some due diligence to determine whether forced or indentured child labor is present in the production or manufacturing of the end product.

90. Yukins & Kania, *supra* note 83.

91. FAR 22.1503; FAR 22.1505.

92. FAR 22.1503(c)1-2:

It will not supply any end product on the List that was mined, produced, or manufactured in a country identified on the List for that product, as specified in the solicitation by the contracting officer in the Certification Regarding Knowledge of Child Labor for Listed End Products;

(2) (i) The offeror may supply an end product listed in paragraph (b) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture such end product.

(ii) On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor.

93. FAR 22.1503(c).

94. FAR 22.1503(c)(2)(i).

While the use of absolute certification is desirable and an advantageous means of prohibiting child labor from the federal government supply chain, a qualified certification weakens the federal government's prohibition because certifying in good faith is the weakest form of due diligence⁹⁵ as it raises debateable issues. For example, determining what is meant by a "good faith effort" is incredibly subjective and can only be applied on a case-by-case basis. Thus, it is likely that contractors with multi-tier global supply chains will rely heavily on qualified certification because it places a lesser burden on them and presents them with opportunities to potentially escape liability when any listed end product produced by forced or indentured child labor is incidentally supplied to procuring agencies. Further, with the current lack of contractors' transparency and insufficient government resources to carry out in-depth due diligence on contractors' practices, a qualified certification presents a loophole for suppliers and does not adequately address forced or indentured child labor.

Despite the limitation in a qualified certification, the general requirement of a contract award certification is an advantageous measure for ensuring that contractors do not supply products produced by forced or indentured child labor. This is because under FAR 22.1504(a), the certification creates a legal obligation that is subject to remedial measures against the contractor.⁹⁶ Additionally, engaging in forced or indentured child labor could lead to investigations by "the agency's Inspector General, the Attorney General, or the Secretary of the Treasury."⁹⁷

2. Contract Clauses

In addition to the contract award certification measure, procuring agencies can insert a clause into the contract that will address situations where a contractor has supplied products manufactured by forced child labor. According to FAR 22.1505, FAR 52.222-19 must be included in all contracts "for the acquisition of supplies that are expected to exceed the micro-purchase thresholds."⁹⁸ FAR 52.222-19 essentially outlines the excluded countries and their contract thresholds. It requires suppliers to cooperate with authorities to "enforce laws prohibiting the manufacture or importation of products mined, produced or manufactured by forced or indentured child labor" by providing access, records, documents, persons, or premises required to conduct investigations,

95. International Labor Rights Forum, *Government Procurement and the Rights of Workers in Contractors' Supply Chains*, INT'L LAB. RIGHTS FORUM, Feb. 25, 2015, https://laborrights.org/sites/default/files/publications/Procurement_Worker_Rights_2_9_15.pdf [<https://perma.cc/4V77-453K>].

96. FAR Subpart 22.1504(a)(1) states that the "Government may impose remedies" if "[t]he contractor has submitted a false certification regarding knowledge of the use of forced or indentured child labor." FAR 22.1504(a)(1). The remedies available to procuring agencies under Subpart 22.15 are discussed in part E below.

97. FAR 22.1503(e).

98. FAR 22.1505(b).

detailed grounds for violating the clause, and the remedies to the procuring entity for such violations.⁹⁹

If FAR 52.222-19 is breached, it will arguably lead to contractual remedies or criminal prosecution. This argument is supported by the Supreme Court ruling in *United States v. Winstar Corp.*¹⁰⁰ where the court ruled that the “ordinary principles of contract construction and breach” apply to federal contracts.¹⁰¹ Practically, this has led to the enforcement of the FAR provisions against contractors that import goods mined, produced, or manufactured, wholly or in part, under forced child labor.¹⁰² Thus, contractual remedies such as damages, withhold orders, and costs for re-tendering the goods should be available to the government when a breach of the FAR rules occurs. Additionally, where the contractor fails to cooperate with an investigation as required under FAR 52.222-19, it is a violation of the clause, leading to remedies such as termination of the contract and suspension of payment.¹⁰³ Some of these remedies also apply to the violation of Subpart 22.15.

E. Subpart 22.15 and Contract Management

Contract management plays a vital role in the success of a contract because it requires procuring agencies to monitor contract performance and assess risks or issues affecting contract performance.¹⁰⁴ This means that any measure that addresses issues arising after contract award and during contract performance can be used a contract management tool. Thus, measures relating to administration, audits, site visits, quality control, capacity building, sanctions, and remedies are examples of such contract management tools and are detailed in subchapter G of the FAR.¹⁰⁵

99. FAR 52.222-19(b).

100. *United States v. Winstar Corp.*, 518 U.S. 839, 869–70. (1996).

101. *Id.* at 871.

102. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT: JUNE 2020*, at 523 (2020). According to the report, DHS enforces the law that prohibits the importation of goods mined, produced, or manufactured, wholly or in part, under forced labor conditions, including forced child labor. DHS received fifty-three allegations and issued six Withhold Release Orders within the reporting period for shipments of goods on grounds they were produced by forced labor. Sarah Robitaille, *Is the FAR Enough? The Persistent Problem of Human Trafficking in Government Contracts*, 51 PUB. CONT. L. J. 4, 645, 664–65 (2022).

103. FAR 52.222-19(c)(2) (“The Contractor has failed to cooperate, if required, in accordance with paragraph (b) of this clause, with an investigation of the use of forced or indentured child labor by an Inspector General, Attorney General, or the Secretary of the Treasury.”).

104. *Contract Management Guide*, CHARTERED INST. OF PROCUREMENT & SUPPLY, https://www.cips.org/documents/CIPS_KI_Contract%20Management%20Guidev2.pdf [<https://perma.cc/RP4S-RKXE>] (last visited July 8, 2021).

105. FAR Subpart G contains provisions relating to contract administration, auditing, quality assurance and contract management. See FAR 42.1; see also FAR 42.2; FAR 46.4; M. Ernita Joaquin & Thomas J. Greitens, *Contract Management Capacity Breakdown? An Analysis of U.S. Local Governments*, 72 PUB. ADMIN. REV. 807, 807–16 (2012); William G. Resh & John D. Marvel, *Loopholes to Load-Sbed: Contract Management Capacity, Representative Bureaucracy, and Goal Displacement in Federal Procurement Decisions*, 15 INT’L PUB. MAN. J. 525, 528 (2012); Barbara S. Romzek & Jocelyn M. Johnston, *Effective Contract Implementation and Management: A Preliminary Model*, 12 J. PUB. ADMIN. RES. & THEORY 423, 427 (2002).

1. Violation of Subpart 22.15

Under Subpart 22.15, four grounds give rise to sanctions against contractors that supply products tainted by forced or indentured labor. The first ground of violation occurs when contractors submit false certifications “regarding knowledge of the use of forced or indentured child labor for listed end products.”¹⁰⁶ Where a contractor fails to cooperate with child labor investigations as stipulated under FAR 52.222-19, a violation occurs. Additionally, a contractor violates Subpart 22.15 if forced or indentured child labor is used in the mining, production, and manufacturing process.¹⁰⁷ Finally, where a contractor supplies an “end product or components” produced “wholly or in part” by forced or indentured child labor, such contractor has violated Subpart 22.15.¹⁰⁸

False certifications concerns arise when an absolute certification was submitted to the procuring agency. This is based on the argument that an absolute certification merely requires a contractor to state that it will not supply an end product produced by forced or indentured child labor. In contrast to a qualified certification, it will be challenging to argue that a contractor provided a false certification as procuring agencies would need credible evidence that show that the contractor did not make a “good faith effort” or was aware of forced or indentured child labor being used in the production or manufacture of the product before issuing the certification.¹⁰⁹

The third and fourth grounds are advantageous and noteworthy because they outrightly prohibit contractors from engaging in the illegal and inhumane treatment of child workers.¹¹⁰ For example, a literal interpretation of the third ground suggests that contractors who use forced or indentured child labor to produce goods have violated the subpart even if such goods are not supplied to the procuring agency.¹¹¹ Thus, this prohibition will widely affect all contractors performing contracts within the scope and coverage of Subpart 22.15.

Similarly, the fourth ground is directed explicitly at contractors who supply goods produced by forced or indentured child labor products. Thus, where a supply violates the third ground, it has automatically violated the fourth and final ground. Despite the comprehensive coverage of violation grounds, procuring agencies will require strong evidence of the contractor manufacturing products through forced or indentured labor to assert that the contractor has violated the third and fourth grounds. This problem is escalated in contracts

106. FAR 22.1504(a)(1).

107. FAR 52.222-19.

108. *Id.*

109. *See supra* Part III.D.1.

110. The second ground of failing to cooperate with investigations is also noteworthy and was discussed in Part III.D.2.

111. FAR 22.1504(a)(3) (“The contractor uses forced or indentured child labor in its mining, production, or manufacturing processes.”).

performed outside the United States because of shortages of resources in monitoring such contracts.¹¹²

2. Remedies

When a violation of Subpart 22.15 occurs, procuring agencies are entitled to terminate the contract when it is in their best interests, as emphasised in *United States v Corliss*.¹¹³ Additionally, procuring agencies may issue suspension and debarment orders against contractors, in accordance with procedures under FAR 9.407.¹¹⁴ The suspension of suppliers is a “serious action to be imposed on the basis of adequate evidence, pending the completion of an investigation or legal proceedings.”¹¹⁵ This makes suspension an interim remedy utilised when further investigation is required to determine a final remedy to be imposed on a contractor. The period of suspension for violating Subpart 22.15 is subject to the discretion of the suspending officers. However, the suspension period will terminate either when the contract is terminated or when debarment is imposed.

In contrast to suspensions, debarment in public procurement is often termed the “death penalty” sanction because it disengages contractors from competing in future government procurement opportunities for three years, thereby limiting future earnings and profits.¹¹⁶ Irrespective of the sanction imposed on contractors for violating Subpart 22.15, the contractor will face severe financial and reputational consequences.¹¹⁷ Thus, these remedies are proportionate to the severity of human rights violations that occur when forced or indentured child labor is used by contractors in their productions, operations, and supply chains.

3. The Prohibited Party—Contractors/Offerors

The term “contractor” or “offeror” is used in conformity to the language adopted under Subpart 22.15. According to FAR 22.1503 and 22.1504, the terms “contractor” and “offeror” are used (interchangeably) to describe the entity that must submit a contract award certification.¹¹⁸ Interestingly, both terms are undefined in Subpart 22.15, and the term “contractor,” while used predominantly throughout the FAR, is not defined in the FAR. However, the definition of an “offeror” is drawn from FAR 2.101 and refers to the bidder.¹¹⁹

112. FAR 22.1503(f). An enforcement agency includes an Inspector General, the Attorney General, or the Secretary of the Treasury.

113. *United States v. Corliss Steam Engine Co.*, 91 U.S. 321, 321 (1875).

114. FAR 22.1504(b).

115. FAR 9.407.

116. FAR 9.4; Yukins, *supra* note 18. For general discussions on debarment, see Sope Williams-Elegbe, *Debarment in Africa: A Cross-jurisdictional Evaluation*, 3 PUB. PROCUREMENT L.REV. 71, 71–90 (2016).

117. See Williams-Elegbe, *supra* note 116, at 71–90.

118. See FAR 22.1503-4. For discussions on the contract award certification, see Part III.D.1 above.

119. “Offeror” means offeror or bidder. FAR 2.101.

While the terms may be interpreted to mean the entity awarded a public contract, they note that the use of terms in this manner is more than semantics because the literal interpretation of a contractor or offeror excludes subcontractors. This lack of explicit reference to subcontractors hinders the effectiveness or comprehensive prohibition of forced or indentured child labor from the U.S. federal supply chain.¹²⁰ This interpretation could mean that subcontractors in countries with little or no national prohibition of forced or indentured child labor may engage in this prohibited practice when producing goods (in whole or in part) for the federal contractors. Further, this loophole not only hinders the effectiveness of Subpart 22.15, but also provides a plausible defense that would allow contractors to limit their liability when an end product is produced partly by forced or indentured labor.

For example, if a contractor is awarded a contract to supply laptops to the Department of Justice (DoJ), it can outsource the production of the hardware parts to a subcontractor who engages in forced or indentured child labor. The parts tainted by forced or indentured child labor are shipped to the contractor for assembling, packaging, and delivery to the DoJ. In this example, while the end product supplied to the procuring agency was not produced by forced or indentured labor by the contractor, it is still tainted by this practice as a result of the subcontractor who is not subject to Subpart 22.15 procedures. Thus, while the contractor's lack of knowledge could be a plausible defence, forced or indentured child labor continues to exist in the federal government supply chain.

To remedy this, Subpart 22.15 should be reframed to explicitly prohibit both contractors and subcontractors from supplying products by forced or indentured child labor. Such prohibition is not revolutionary as FAR Subpart 22.17 on the prohibition of trafficking includes both contractors and subcontractors. Alternatively, procuring agencies should require their contractors to request similar contract award certifications from their subcontractors and submit to the agency before such end product is supplied. To effectively and comprehensively eliminate child labor from the government supply chain, all federal suppliers must be prohibited from engaging in this practice.

IV. CONCLUSION

In conclusion, the 1999 Executive Order 13126 issued by President Clinton and now implemented as Subpart 22.15 is a step in the right direction in addressing the acquisition of products manufactured by forced or indentured child labor. However, as the discussions show, some weaknesses remain, which raises the need for the Biden administration to introduce changes to strengthen Subpart 22.15. Specifically, weaknesses relating to legal certainty,

120. In addition to the literal interpretation of the term offeror, the authors believe that subcontractors are excluded from Subpart 22.15 due to the approach adopted in similar anti-slavery FAR provisions. For example, Subpart 22.20 explicitly includes subcontractors. Further discussion on Subpart 22.20 is outside the scope of this paper. See Hamrick & Abbott, *supra* note 6, at 221.

the subpart's scope and coverage, and significant loopholes that hinder the effectiveness of eliminating child labor exist in Subpart 22.15. Until the United States addresses such inadequate provisions, its federal government supply chain will continue to be tainted by child labor.

In addition to the weaknesses outlined in this article, Subpart 22.15 contains notable provisions that attempt to tackle forced or indentured child labor. Such provisions include rules on carrying out due diligence against the DoL list of products manufactured by forced or indentured labor; rules on inserting the certification requirement in all solicitations; rules on requesting certification before contract award; and rules on inserting a clause that requires contractors to comply with investigations. Despite these advantageous provisions, critical limitations outlined in this paper show the importance of strengthening Subpart 22.15 into a regulation that can adequately tackle all forms of child labor in the government's supply chains. The strengthening of Subpart 22.15 as advocated by the authors will contribute to eliminating child labor from the supply chain. Additionally, such strengthening of Subpart 22.15 could lead to other countries adopting similar provisions in their regulated procurement frameworks.