

Evaluation by Public Agencies of Compliance by Outside Providers of Products and Services with Standards of Conduct for the Respect and Protection of Human Rights

Introduction

The purpose of this document is to propose criteria that a public agency like Regional Transit (RT) may use for evaluating the “responsibility” of business enterprises with which the agency may contract or has already contracted. Specifically these criteria address the extent to which those enterprises comply with their duty to respect and avoid harm to human rights throughout their operations.

The first section sets forth the basis for the obligation of public agencies to respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction. The second section proposes specific criteria and suggestions regarding the types of evidence or documentation that can be used by public agencies to perform the evaluation.

Basis of Obligation

In June 2011, the United Nations (UN) Human Rights Council unanimously endorsed the *Guiding Principles for Business and Human Rights*ⁱ (*Guiding Principles*) presented to it by the Special Representative of the UN Secretary-General, Professor John Ruggie of Harvard University. This endorsement established the *Guiding Principles* as the global standard of practice that is now expected of all governments and businesses with regard to human rights.

The *Guiding Principles*, building upon efforts that began with the *Global Sullivan Principles*ⁱⁱ in 1977 and expanding upon the *UN Global Compact*ⁱⁱⁱ released in 2000, recognize (a) States’ existing obligations to respect and protect certain universally recognized human rights; and (b) business enterprises’ responsibility to respect and avoid harm to those human rights. (*Guiding Principles*, p. 1 (General Principles).) These premises apply to all States, including nation states and subnational and local agencies; to all business enterprises throughout their operations regardless of size, sector, location, ownership and structure; and to all commercial transactions between public agencies and businesses, including procurement and contractual activities (*Guiding Principles*, pp. 1, 3-4, 8, 10-11, 13-15 (Principles 1, 2, 5, 6, 8, 11, 12, 13)).

Pursuant to the *Guiding Principles*, a public agency contracting with business enterprises for goods and services in the course of carrying out its mandated duties and functions considers whether the enterprises’ operations have caused or contributed to human rights abuses and whether the enterprises have undertaken actions to avoid or mitigate any such abuses. Upon finding that an enterprise has caused or contributed to severe human rights abuses or multiple minor human rights abuses without mitigation, the public agency may determine that the enterprise is not responsible and may exclude it from contracts with the agency. In effect, the public agency uses its contractual power to carry out its duty to protect human rights by contracting only with responsible enterprises that respect human rights throughout their operations. Similarly, as discussed in a report issued by the International Corporate Accountability Roundtable in 2014 (*Guiding Principles. Turning a Blind Eye? Respecting Human Rights in Government Purchasing*^{iv}), the U.S. government’s procurement process can be used to secure government suppliers’ respect for human rights in accord with the government’s duty under the UN’s “Protect, Respect and Remedy” Framework.

Business enterprises throughout the world, recognizing the close connection between their commercial success and responsible operations in the areas of human rights, labor and the environment, are incorporating the *Guiding Principles* into their operations and joining the *Global Compact* and industry-specific agreements that commit them to respect and operate in accordance with internationally recognized human rights. See, e.g., the *International Code of Conduct for Private Security Service Providers*.^v Governmental members of the Organization for Economic Co-operation and Development (OECD), including the United States, have adopted and implemented principles and standards for business enterprises based on the *Guiding Principles*. See *OECD Guidelines for Multinational Enterprise*.^{vi}

Members of the public procurement community have recognized their responsibility to support economic, social and sustainable communities and the public good in the course of carrying out their procurement activities. See the *Values and Guiding Principles of Public Procurement* of the National Institute of Governmental Purchasing.^{vii} Indeed, the first of four key reforms to the federal contracting

Standards of Conduct for the Respect and Protection of Human Rights

system recommended in *The Road to Responsible Contracting*^{viii} is, “Institute more rigorous responsibility screening of prospective bidders to ensure that federal contracts are not awarded to employers that are significant or repeat violators of workplace, tax or other laws.” Members of the public are also voicing their expectations that governmental agencies like RT serve their interests and act as stewards of the public good. RT has recently heard public testimony from stakeholders who do not want RT to initiate new or continue existing contracts with companies having a record of violating human rights.

Accordingly, when RT finds it necessary to procure contracted services from outside business enterprises, whether small or large, it should recognize its public responsibility to assure that those businesses provide their services in an ethical manner consistent with the obligations of public agencies under the *Guiding Principles*. As indicated in the analysis by Nancy Fleischer submitted via email to RT’s General Counsel and Board on January 21, 2016, the *Guiding Principles* provide criteria and standards applicable to RT’s process for determining the responsibility of contractors. Under section 16.1 of the *RT Procurement Policy Manual*, RT must consider, not only contractors’ past performance, technical capability and financial ability to perform contracted work; RT must also consider contractors’ integrity, business ethics and compliance with public policy -- factors consistent with the responsibility of business enterprises under the UN *Global Compact* and the *Guiding Principles* to avoid and mitigate the occurrence of human rights abuses in their operations. To that end, the following section identifies and discusses various criteria and types of evidence that RT may use in determining whether or not prospective and current contractors responsibly avoid harm to human rights in their operations.

Development and Use of the Evaluation Criteria

The criteria and types of evidence suggested here for evaluating the responsibility of business enterprises to respect human rights in their operations are based upon principles and standards set forth in the *Guiding Principles* discussed above and in other, more specific guidelines and standards requiring business enterprises to respect the human rights of all persons affected by their operations, including the UN *Global Compact*, and the *Guidance on Responsible Business in Conflict-Affected and High-Risk Areas*. See also the *International Code of Conduct for Private Security Service Providers* (cited above), and the *OECD Guidelines for Multinational Enterprises* of the Organization for Economic Co-operation and Development, which specifically apply the *Guiding Principles*.

The term “human rights” in the suggested criteria is a reference to the internationally recognized human rights that are the focus of the *Guiding Principles* and that are specifically identified in the *International Bill of Human Rights*^{ix} and the International Labor Organization’s *Declaration on Fundamental Principles and Rights at Work*^x. As set forth in the *Guiding Principles* and related guidelines and standards, business enterprises may adversely impact these rights directly through their operations or indirectly by providing services or equipment to public or private parties for uses that violate human rights. Prominent among the identified rights are those requiring nondiscrimination in employment on the basis of race, ethnicity, gender and disability—requirements currently imposed on RT contractors.

The criteria offered below specifically follow Principles 15 through 22 and 29 of the *Guiding Principles*, providing that business enterprises of all sizes and types take an active role in assuring respect for human rights throughout their operations by adopting and publicly communicating human rights policies and procedures (Criterion 1), assessing the actual and potential adverse human rights impacts resulting from their operations and their business relationships (Criterion 2), acting upon the assessment findings to cease any currently harmful practices, remediate the harm caused by past practices, and prevent harm in the future (Criterion 3), and publicly reporting and disseminating information about their human rights record (Criterion 4). Each of these actions is an essential component of the business enterprise’s responsibility under the *Guiding Principles* and should be considered in the evaluation of the enterprise’s responsibility; no one action should be regarded as dispositive of the business enterprise’s responsibility with respect to human rights.

Standards of Conduct for the Respect and Protection of Human Rights

In using the following criteria to determine business enterprises' responsibility pursuant to chapter 16.1 of the RT Procurement Policy Manual, RT is encouraged to adapt the criteria and suggested evidence to the type of service to be provided, the magnitude of the contract expenditure anticipated, and most importantly, the size of the business and the extent to which its operations pose a risk of adverse human rights impacts. What may be applicable to large companies providing services internationally may not be applicable to vendors operating within a limited geographic region.

Further, RT is encouraged to include in its Requests for Proposals (RFPs) and Requests for Qualifications (RFQs) notice of its intention to use human rights criteria in determining applicant "responsibility" as well as a description of the criteria to be used and the type of information or evidence that will be considered during staff's responsibility evaluation. We also suggest that RT consider using a pre-bid screening phase for determinations of human rights compliance. Although a large number of companies have already developed and adopted policies and procedures pursuant to the *Guiding Principles* (and thus may be able to furnish information directly relevant to the criteria), some business enterprises seeking to participate in RT procurements may not have done so yet and may only have in place policies and procedures to comply with requirements for employers under federal and state labor laws.

CRITERION 1: Commitment to Operate in Compliance with Human Rights Principles

- C1.0 Has the business enterprise indicated its commitment and intention to operate in compliance with the *Guiding Principles* and the internationally-recognized rights listed in the *International Bill of Human Rights* and the International Labor Organization's *Declaration on Fundamental Principles and Rights at Work*? (*Guiding Principle*, Principles 15, 16)

Evidence to use in assessing the extent of compliance with Criterion 1:

The information obtained by agency staff for determination of contractor responsibility pursuant to section 16.5 of the RT Procurement Policy Manual may include:

- E1.1 A statement of policy (such as a "code of conduct") approved at the most senior management level of the business enterprise, acknowledging the responsibility and commitment of the enterprise and its personnel to respect and protect human rights in accordance with internationally recognized standards of conduct appropriate for the industry in which it is engaged. The statement of policy should:
- a. express expectations that enterprise personnel, business partners and other parties directly linked to its operations, products or services will support, respect and protect the internationally recognized human rights.
 - b. identify the person(s) within the enterprise responsible for implementing and enforcing the policy and for performing audits or assessments of the impacts on human rights by effectiveness of that policy, and the date of the policy's adoption.
 - c. be communicated internally and externally to all personnel, business partners and other relevant parties and stakeholders, e.g., by posting the policy on bulletin boards, websites or other media commonly used by the enterprise for notices to personnel, business partners and stakeholders.
- E1.2 Copies of signed and dated letters or statements of agreement by the business enterprise to comply with the standards of conduct established by an internationally recognized organization promoting respect for and protection of human rights such as the *Guiding Principles*, the *UN Global Compact* principles, the *ILO Fundamental Principles*, etc.
- E1.3 Copies of any awards or citations received by the enterprise honoring it for its efforts in advocating for the respect of human rights by business enterprises or for undertaking efforts within its own organization, subsidiaries, business partners or supply chain to do so.

Standards of Conduct for the Respect and Protection of Human Rights

CRITERION 2: Impacts of Business Operations on Human Rights

- C2.1 Does the business enterprise have procedures for assessing the human rights impacts of its operations as part of its standard operating procedures?
- C2.2 Has the enterprise performed assessments to identify adverse human rights impacts/violations in its operations that may have occurred in the past or may be occurring currently?
- C2.3 Has the enterprise performed assessments to identify potential adverse human rights impacts that may occur in the future?
- C2.4 Have human rights violations resulting from enterprise operations been documented by internationally-recognized human rights organizations, major non-governmental organizations (NGOs) or organizations with a local or regional focus? (See <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> and https://en.wikipedia.org/wiki/List_of_human_rights_organisations).

(Guiding Principles, Principles 17, 18)

Evidence to use in assessing the extent of compliance with Criterion 2

The information obtained by agency staff for determination of contractor responsibility pursuant to section 16.5 of the RT Procurement Policy Manual may include:

- E2.1 Copies of signed and dated procedures for assessing human rights impacts of business operations, integrated with the standard operating procedures of the enterprise.
- E2.2 Copies of formal reports assessing the enterprise's past operations for adverse human rights impacts, prepared for stakeholders by the enterprise with the assistance of internal and/or independent external human rights experts.
- E2.3 Verifications of the findings in these formal reports by recognized independent entities.
- E2.4 Documentation gathered by agency staff, submitted by the business enterprise, submitted by other parties, and/or presented at public hearings of any human rights violations committed in the past or being committed currently either a) directly by the business enterprise through its operations and/or b) indirectly by providing services or equipment to public or private parties for uses that violate human rights. The documentation may be in the form of formal reports or adjudicatory decisions and accounts by recognized authorities and other reliable sources.
The business enterprise should be afforded an opportunity to respond to this documentation with evidence refuting the human rights violations or documenting its termination of the business practices giving rise to the violations and its remediation of the violations.

Note: Agency staff's conclusion that a business enterprise has violated human rights in the course of its operations is solely for the purpose of evaluating the enterprise's responsibility and qualification to contract with RT. Staff's determination has no use in any civil or criminal forum outside RT's procurement process.

CRITERION 3: Remediation and Mitigation of Human Rights Impacts

- C3.1 Has the enterprise ceased current activities by its personnel or by entities to which it is linked by a business relationship that are adversely impacting human rights, as identified by the evidence considered under Criterion 2?
- C3.2 Has the enterprise made good-faith efforts to remediate the harm to victims of past and current human rights violations resulting from enterprise activities, as identified by the evidence considered under Criterion 2?

(Guiding Principles, Principles 19, 20, 22, 29)

Standards of Conduct for the Respect and Protection of Human Rights

Evidence to use in assessing the extent of compliance with Criterion 3

The information obtained by agency staff for determination of contractor responsibility pursuant to section 16.5 of the RT Procurement Policy Manual may include:

- E3.1 Reports prepared by internal or external personnel with documented human rights expertise on the tools (e.g., surveys, questionnaires) used to assess and confirm the remediation of past adverse human rights impacts and mitigate any identified potential impacts in the future.
- E3.2 A copy of a grievance mechanism established by the business enterprise to assess and resolve complaints by individuals and communities of adverse human rights impacts.
- E3.3 A copy of any dated directives issued by business management mandating that those activities or practices found to have resulted in adverse human rights impacts/violations be terminated
- E3.4 Copies of line items in adopted budgets of the business enterprise providing funds for the remediation of adverse human rights impacts.
- E3.5 A copy of a report(s) or statements issued by the business management confirming that the harmful activities or practices have ended.
- E3.6 Copies of reports or statements issued by representatives of human rights organizations, legal representatives of those affected, or by those affected themselves, verifying that the harmful activities or practices are no longer occurring.
- E3.7 Copies of correspondence, records of conversations or transcripts of meetings with the affected groups or relevant stakeholders.

CRITERION 4: Communication of Human Rights Assessment, Remediation and Mitigation

- C4.1 Has the enterprise communicated to stakeholders and members of the public its efforts to remediate past and current adverse human rights impacts resulting from its operations and to mitigate potential adverse impacts in the future?

(Guiding Principles, Principle 21)

Evidence to use in assessing the extent of compliance with Criterion 4

The information obtained by agency staff for determination of contractor responsibility pursuant to section 16.5 of the RT Procurement Policy Manual may include:

- E4.1 Copies of notices, bulletins, reports or other written documentation transmitted to its stakeholders and distributed publicly using specified methods

Standards of Conduct for the Respect and Protection of Human Rights

References Cited

- ⁱ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Human Rights Council, 2011, accessed at <http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples>
- ⁱⁱ Leon H. Sullivan Foundation. Text of *The Global Sullivan Principles*, 1977, accessed at http://www.thesullivanfoundation.org/about/global_sullivan_principles
- ⁱⁱⁱ *UN Global Compact: Corporate Sustainability in the World Economy*, 2000, accessed at <https://www.unglobalcompact.org/> .
- ^{iv} Stumberg, Robert, A. Ramasastry, and M. Roggensack, *Turning a Blind Eye? Respecting Human Rights in Government Purchasing*, 2014, “Executive Summary”, p.1, Institute for Corporate Accountability Roundtable (ICAR), accessed at <http://icar.ngo/initiatives/procurement/>
- ^v *International Code of Conduct for Private Security Service Providers*, Confederation Suisse, 2010 accessed at http://icoca.ch/en/the_icoc
- ^{vi} *OECD Guidelines for Multinational Enterprises*, 2011, accessed at <http://www.oecd.org/corporate/mne/>
- ^{vii} Chartered Institute of Procurement & Supply and the Institute of Public Procurement, *Values and Guiding Principles of Public Procurement*, 2012, accessed http://www.globalpublicprocurement.org/Documents/Resources/VGPs/Values_Guiding_Principles.pdf
- ^{viii} Sonn, Paul and T. Gebreselassie, *The Road to Responsible Contracting*, National Employment Law Project, 2009, p. 1.
- ^{ix} The *International Bill of Human Rights* comprises the following documents: *Universal Declaration of Human Rights*; *International Covenant on Economic, Social and Cultural Rights*; *International Covenant on Civil and Political Rights* and its two *Optional Protocols*, accessed at <http://www.un-documents.net/a3r217.htm> and <http://www.un.org/en/universal-declaration-human-rights/> and <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>
- ^x International Labor Organization, *Declaration on Fundamental Principles and Rights at Work*, 1998, rev. 2010, accessed at <http://www.ilo.org/declaration/lang--en/index.htm> and <http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO>