

Principled Purchasing: Contractual Tools for Social Responsibility

Consultation Note on the Buyer MCCs and the Buyer Code

This document is intended as an accompaniment to the draft Buyer MCCs and Buyer Code (see memo for background). It provides an overview of the suggested changes to [Version 1.0](#) of the MCCs, alongside more detailed signposting to explain the changes in more specificity and provide prompts for Consultation feedback and input.

While we note that there are multiple areas of consideration with regards to contracts (for example, implementation and enforcement), this Consultation process focuses **specifically on the content of the revised MCCs, with a particular focus on the Buyer MCCs, and the Buyer Code**. In other words, at this stage of the Principled Purchasing project, we are concerned with receiving feedback on the **content** of the provisions circulated, rather than the feasibility and enforcement aspects.¹ We do, however, intend to address those aspects at a later stage, so if you have particular thoughts on feasibility and enforcement that you would like to share for future consideration, please feel free to do so by email or on a separate call.

Updates to the MCCs: Overview

As has been consistently noted, Version 1.0 of the MCCs placed undue emphasis on the supplier's responsibility to identify and address human rights violations, **ignoring the fact that the buyer's purchasing practices can be a serious contributing factor to the occurrence of violations**. Version 1.0 of the MCCs also overlooked the importance of ensuring that buyers and suppliers be *jointly* responsible for the human rights performance of the supply contract, in particular with respect to **providing remedy** to victims of severe human rights harms. Version 1.0 also did not address how buyers should manage **contract termination**, in particular with respect to assessing and mitigating the human rights impacts that might result from termination.

In response to these shortcomings, we have made a number of proposed changes that aim to **balance the obligations of the buyer and supplier**. The vast majority of these recommended changes are contained in **Sections 1 and 2 of the MCCs** (Section 2 is entirely new) and can be understood as addressing three phases of the buyer-supplier relationship:

- 1) **the contract negotiation stage recommendations**, which involve guidance on how to determine the contract price, negotiate the delivery schedule, and carry out due diligence ([Section 1](#))
- 2) **the contract implementation or performance stage recommendations**, which involve guidance on how to navigate situations where the buyer wants to change aspects of the contract or of a particular contract order, for whatever reason (including, for example, a pandemic), so as to minimize pressure on the supplier ([Section 1](#)); and guidance on how a supplier and buyer should *jointly* assume responsibility for providing remedy to workers who have suffered severe human harm during the contract's performance ([Section 2](#))
- 3) **the contract termination stage recommendations**, which involve guidance for a buyer wanting to terminate a contract because of a Schedule P violation, in particular, the recommendation that they refrain from doing so unless and until the supplier proves themselves unable and/or unwilling to remedy the human harm that resulted from the breach and/or to take measures to prevent future harm. And, the recommendation that buyers wanting to terminate for other reasons (e.g.

¹ We recognise that contractual content may itself have an impact on enforcement, so this distinction may not always be as clear as indicated. The inclusion of third-party rights, for example, is not under consideration at this point.

change in market conditions), that they consider the human rights impact of their decision and follow certain steps to exit responsibly (Section 2)

Changes to other sections are more moderate, with the most substantial shift occurring in Section 6, where it is stipulated that neither Buyer nor Supplier should benefit from human rights breaches.

A clause by clause signposting of the changes is provided below, with prompts for feedback under each Section. For the purposes of the consultation, we will largely focus on two sections, Section 2 first, followed by Section 1. The Sections are therefore explained below, in that order. If time allows, we will also invite feedback on the Buyer Code. We very much welcome participants submitting their thoughts on the Buyer Code in writing, especially if we don't get to it during the call.

UPDATES TO THE MCCs BY SECTION

Below, we provide brief notes on the *suggested changes to each clause of MCCs Version 1.0, on which we are seeking feedback*. In some cases, these are edits or additions to existing clauses. Where entirely new clauses are suggested, these are in red. We suggest using this document alongside the draft MCCs to review the suggested changes. As noted above, the most significant changes are contained within Sections 1 and 2. We have included a box with feedback prompts at the end of these sections to indicate where we would most appreciate your thoughts.

Section Two: Remediating Human Rights Harms Linked to Contractual Activity

Overview: This section is entirely new. The key point to note is that we have moved from a liability regime (where only the supplier could be in breach) to a remediation regime where the buyer and the supplier are *jointly* responsible for remediating harm. We have also included a clause to ensure that human rights impacts are considered in any termination.

2.1 Joint Remediation

In Version 1.0, if there was a Schedule P violation / breach of contract, the remedy focused on compensating the buyer for the breach rather than on remedying the harm to the victims. In this clause the focus is on providing joint remedy for the affected stakeholder.

Suggested clause (summarised): In the event that a Schedule P [or a Schedule Q] breach results in a severe human rights harm the Buyer and Supplier shall jointly develop and fund a remediation plan, including benchmarks and milestones for achieving remedy for victims, and judicial and nonjudicial dispute resolution mechanisms, as appropriate. Parties shall engage with applicable stakeholders.

2.2 Right to Cure

Version 1.0 had no right to cure, which meant that in the event of a Schedule P violation, the supplier would be in breach without an opportunity to correct course.

Suggested clause (summarised): In the event of a breach by Supplier, Buyer shall give notice of default to Supplier and trigger a commercially reasonable, mutually agreed, cure period (i.e. Buyer gives Supplier an opportunity to cure Schedule P breaches instead of moving immediately to termination and other remedies—like money damages)

2.3 Right to Terminate Following Failed Remediation

Version 1.0 said that the buyer could terminate immediately in the event of a Schedule P breach without giving the supplier an opportunity to fix the problem and without providing remedy to victims. The

proposed change makes it so that the buyer can terminate but only as a last recourse after remediation has failed.

Suggested clause (summarised): Buyer shall have a right to terminate the contract following failure to remediate – especially when Supplier proves unwilling or unable to do its part to remediate.

2.4 Right to Immediate Termination

This provision preserves the right for the buyer to terminate the contract immediately if it turns out that they are dealing with a supplier who engages in fraudulent or corrupt conduct.

Suggested clause (summarised): The agreement may be terminated by Buyer without providing a cure period if Supplier has engaged in fraud with respect to its obligations under the Agreement.

2.5 Considerations in Respect of Any Termination

Version 1.0 allowed the buyer to walk away from the contract at any time without considering the human rights impact of its decision.

Suggested clause (summarised): Buyer shall give due regard to the potential human rights impact of any termination (including Force Majeure events) and shall exit the agreement responsibly.

Feedback Prompts for Section Two

The above section provides an overview of Section Two, which is an entirely new Section. In the course of the consultation, we would particularly appreciate your feedback on:

2.1 Joint Remediation: In Version 1.0, (1) only the supplier could breach the contract based on its human rights performance; (2) in the event of a Schedule P violation / breach of contract, the remedy focused on compensating the buyer for the breach rather than on remedying the harm to the victims. Here, responsibility is allocated more fairly between the buyer and the supplier, there is a right to cure (2.2), and remedy is focused on the affected stakeholder rather than on the provision of compensation for either party (buyer or supplier) (see also 6.4). The Operational Grievance Mechanism in the next section is also intended to support this approach.

What do you think of this approach overall? Do we also need to add a provision for collaborative remediation? Based on your experience, have you seen successful examples of a joint remediation plan, as outlined? What features of successful models could we “translate” into MCCs?

2.5 Termination: In the wake of Covid-19, in particular, we have endeavored to include MCCs that ensure responsible exits from supply agreements. ***What do you think of this approach and the content/wording of these obligations?***

Section One: Representations, Warranties, and Covenants on Abusive Labor Practices

Overview: Changes to this section are intended to create an operational shift in the buyer-supplier relationship, so the buyer assumes a greater level of responsibility. Clauses 1.4, 1.5 and 1.6, in particular, focus on the balancing of obligations and mutual consideration. Clause 1.7 is included as an aspirational or principle setting clause.

1.1 Compliance

Version 1.0 required the supplier to warrant that its subcontractors, agents, intermediaries etc. are in compliance with Schedule P. We have softened the compliance requirement on the supplier by adding 'reasonable diligence'.

Suggested Addition: amended to require compliance to the Supplier's knowledge after reasonable diligence.

1.2 Schedule P Compliance Through the Supply Chain

This addition softens—to a certain extent—the supplier's due diligence obligation relative to Version 1.0.

Suggested Addition: Supplier shall use "all commercially reasonable efforts" to ensure compliance, including the implementation and use of ongoing monitoring tools.

1.3 Supplier's Policies

This addition is designed to bring more compliance feedback from stakeholders, including from workers, to the supplier's attention.

Suggested Addition: Supplier's Policies shall further include appropriate qualitative and quantitative compliance indicators and provide mechanisms for Supplier and its Representatives to receive feedback from both internal and external stakeholders regarding compliance.

1.4 Buyer's Commitment to Support Supplier Compliance with Schedule P

Version 1.0 placed all responsibility for compliance on the supplier. This clause introduces an obligation for the buyer to support / not interfere with the supplier's compliance with Schedule P; in other words, this clause asks the buyer to commit to engaging principled purchasing practices.

Suggested clause (summarised): Buyer should have policies in place to support Supplier's compliance with Schedule P. To support Supplier's compliance, Buyer should engage in responsible purchasing practices and provide (financial/technical/in kind) assistance to Supplier, as the latter (reasonably) requests. Buyer should also have a mechanism in place for receiving feedback on its compliance with its own policies from both internal and external stakeholders, including Supplier.

1.5 Provision of Information

Version 1.0 stipulated that only the supplier should deliver information and materials to the buyer on Schedule P, creating a one-way responsibility.

Suggested Amendment: amended to establish a *reciprocal* obligation so both the buyer and supplier are required to maintain and provide information to the other party on Schedule P as needed.

1.6 Placing and Changing Orders

Version 1.0 entirely overlooked the impact of order changes on human rights compliance. This is a brand-new clause intended to address the potential human rights impact of buyers changing their orders.

Suggested clause (summarised): Buyer must take into account Supplier's production and financial capacity when placing orders. In addition, Buyer must take certain measures to ensure that order changes do not compromise Supplier's human rights performance.

1.7 Living Wage

Version 1.0 made no reference to reasonable pricing and had no provision for contract prices that could support a living wage.

Suggested clause (summarised): Supplier and Buyer shall cooperate in good faith to determine a living wage and agree a contract price that allows Supplier to pay this.

1.8 Operational Level Grievance Mechanism

Version 1.0 said nothing about OLGMs, which are a UNGP requirement. This is the only Supplier-focused MCC we have added.

Suggested clause (summarised): Supplier warrants that it has in place an adequately funded and governed non-judicial operational-level grievance mechanism (“OLGM”).

Feedback Prompts for Section One

The above section provides an overview of the suggested changes to Section 1. We would particularly appreciate your feedback on:

1.4 Buyer Commitment to Support Supplier Compliance with Schedule P: Apportioning more responsibility to the buyer is central to this exercise.

Does this provision place sufficient emphasis on the buyer's own responsibility for ensuring the human rights performance of the contract? Are additions or changes needed? Have you seen examples of successful Buyer assistance that we could draw upon to include here?

1.6 Placing and Changing Orders: This clause is also included so as to apportion more responsibility to the buyer at the time the order is placed and if/when it wants to change the order.

What do you think of the approach / wording of these obligations? Is it feasible for buyers to renegotiate the terms when they want to make a change to their order? If not, what other measures would work better? Are more specific provisions required to protect the supplier from the impact of order changes? If so, what would be required?

We focused on order changes (design changes, or increases/decreases in requirements) but perhaps we should add something on payment terms as well?

1.7 Living Wage: This is an aspirational clause.

Can it meet the working group's 'operationally likely and legally effective' criteria? Is more detail required to strengthen the Living Wage commitment? What specific content would be needed to strengthen this clause? (i.e isolated labour costs / labour minute costing, LW rate for production minutes booked)

1.9 OLGM: The onus for the operational level grievance mechanism is placed purely on the supplier.

Knowing that including workers as 3rd party beneficiaries to the contract (giving them rights to sue directly under the contract) is “off the table,” would this clause, along with 1.1, 2.1, and 2.2 offer a good vehicle for including workers' voices in the assessment of the contract's human rights performance or can changes to this provision / additional provisions be imagined?

Schedule Q: The Buyer Code

The Buyer Code is an entirely new document. As per the memo, the Buyer Code could be included in the supply agreements as part of Schedule P, or as a new schedule to the MCCs (Schedule Q). If included in this way, these provisions would be enforceable by the parties. Alternatively, the Buyer Code might exist on the company's corporate governance books as a matter of general corporate policy. If adopted as corporate policy, the Buyer Code would be enforceable by management or owners, depending on the corporate governance structure of the company.

Whichever option the buyer chooses, the main objective in providing a template for a pan-industry Buyer Code is to inspire buyer-companies to develop their own version, suited to their particular needs, industries, and human rights concerns.

Feedback Prompts for the Buyer Code

If there is time during the consultation, we would appreciate your feedback on the following points:

1. What is your opinion on the content of the Code? Is it missing any significant provisions? Do any sections need to be strengthened or adapted? In particular, we could use feedback on remedy, change orders, responsible exits and payment terms.
2. The MCCs have been drafted to reflect some of the key commitments contained in the Buyer Code. Are there sections of the Code that you would like to see 'converted' into MCCs? Or, alternatively, are there aspects of the MCCs you think should be moved into the Code?
3. What do you think of the organisation of the Code, particularly its accessibility to a diverse audience? If you think reorganisation is necessary, how would you suggest doing that?

If you have feedback on the MCCs or Buyer Code that you were not able to share at the meeting for any reason, please feel free to reach out to us and arrange another time to talk or to submit your feedback in writing.

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