

**18-554 DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES, BUREAU OF
GENERAL SERVICES**

**C. 130: IMPLEMENTING THE STATE PURCHASING CODE OF CONDUCT REQUIRING
THAT VENDORS FURNISHING APPAREL, FOOTWEAR, OR TEXTILES TO THE STATE
PROVIDE HEALTHY, SAFE, AND FAIR WORKING CONDITIONS**

Purpose This Chapter supplements the State purchasing code of conduct, as set forth in 5 M.R.S.A. § 1825-K *et seq.*, and applies to competitive bids for sale of apparel, footwear, or textiles pursuant to 5 M.R.S.A., C. 155, sub-c. 1-A.

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§ 1. DEFINITIONS

Unless otherwise stated, for the purposes of this Chapter, the words appearing below are defined as follows:

- A. Bidder.** "Bidder" means a person responding to a solicitation issued by the State of Maine Division of Purchases with a proposal, a bid, or both, to provide to the State a good subject to this Chapter.
- B. Code.** "Code" means the Maine purchasing code of conduct, as set forth in 5 M.R.S.A. § 1825-K *et seq.*
- C. Division.** "Division" means the Division of Purchases in the Bureau of General Services, Maine Department of Administrative and Financial Services.
- D. Person.** "Person" means any individual, partnership, corporation, association, federal, state or local government entity, or public or private organization of any character.
- E. State Purchasing Agent.** "State Purchasing Agent" means the Director of the Division of Purchases in the Bureau of General Services, Maine Department of Administrative and Financial Services, or the director's authorized designee.
- F. Sub-vendor.** "Sub-vendor" means a person acting as a vendor's supplier at the point of assembly of a good covered by this Chapter.
- G. Vendor.** "Vendor" means a person who, after bidding, has been awarded a contract by, and in fact contracts with, the State to provide a good subject to this Chapter.

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§ 2. FILING REQUIREMENT

- A.** Any bidder making a competitive bid to sell apparel, footwear, or textiles to the State of Maine must file with the State Purchasing Agent a signed affidavit stating that the bidder, if awarded a State contract, shall comply with the Code and that, to the best of the bidder's knowledge, each sub-vendor named in the bid that would perform work for the bidder if it were awarded a contract, is in compliance with the Code.
- B.** Prior to submitting a bid, the bidder must:
 - 1.** Furnish a copy of the Code to each sub-vendor that would perform work for the bidder if it were awarded the contract, and then,
 - 2.** Affirmatively require that each sub-vendor inform the bidder of whether the sub-vendor is in compliance with the Code.
- C.** The affidavit executed and filed with the State Purchasing Agent by the bidder must be signed by a person authorized to commit the bidder to the Code.
- D.** The affidavit must include the unaltered text of the Code, as well as the following provisions:
 - 1.** A requirement that the bidder must comply with all applicable wage, health, labor, environmental and safety laws, legal guarantees of freedom of association, building and fire codes, and laws relating to discrimination in hiring, promotion, or compensation on the basis of race, disability, national origin, gender, sexual orientation, or affiliation with any political, nongovernmental, or civic group except when federal law precludes the State from attaching the procurement conditions provided 5 M.R.S.A., C. 155, sub-c. 1-B; and
 - 2.** A requirement that the bidder must comply with all human and labor rights treaty obligations—including those obligations regarding forced labor, indentured labor, slave labor, child labor, involuntary prison labor, physical and sexual abuse, and freedom of association—that are shared by the United States and the country in which the goods subject to this Chapter are assembled.
- E.** The affidavit must be signed and dated under oath before an official authorized by applicable law to administer oaths.
- F.** All bidders subject to this Chapter must submit the affidavits described in this section prior to the close of the bidding deadline. Bids that do not include an affidavit must be rejected by the State Purchasing Agent, unless, after reasonable investigation, it appears that the required unit or item of supply or brand of that unit or item, is procurable by the State from only that supplier.
- G.** If, after complying with the filing requirements of this Section, a bidder is awarded a contract, the bidder must, during the term of the contract, promptly inform the State Purchasing Agent of any change of which the bidder is aware in the information

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furnished in the affidavit submitted at the time of the original bid and must submit a new, updated affidavit that conforms with provisions (A) through (E) of this section.

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§ 3. COMPLAINTS OF NON-COMPLIANCE WITH THE CODE

A. The State Purchasing Agent must initiate an investigation to determine whether there has been a violation of the Code if:

- 1.** The State Purchasing Agent has independent knowledge that a vendor or a sub-vendor is not in compliance with the Code;
- 2.** The vendor informs the State Purchasing Agent that the vendor or a sub-vendor is not in compliance with the Code;
- 3.** A worker for a vendor or sub-vendor files a written complaint directly with the State Purchasing Agent that the vendor or sub-vendor, to the best of the worker's knowledge, is not in compliance with the Code;
- 4.** A third-party established and based outside the United States, on behalf of or on the basis of information from a worker or workers, files directly with the State Purchasing Agent a signed and dated written complaint that a vendor or a sub-vendor, to the best of the third-party complainant's knowledge, is not in compliance with the Code. If possible, the third-party's written complaint will be signed and dated under oath before an official authorized to administer oaths;
- 5.** A third-party established and based in the United States, on behalf of or on the basis of information from a worker or workers, files directly with the State Purchasing Agent a written complaint, signed and dated under oath before an official authorized by applicable law to administer oaths, that, to the best of the third-party complainant's knowledge, a vendor or a sub-vendor is not in compliance with the Code.

Any complaint made to the State Purchasing Agent must state with reasonable specificity each reason a party subject to the complaint is allegedly not in compliance with the Code.

B. After receiving a complaint, filed in accordance with subsection A, above, alleging non-compliance with the Code, the State Purchasing Agent must seasonably contact, in writing and by certified letter, the vendor that is that subject of the complaint to inform the vendor of, and request a response to, the allegations made within fifteen (15) calendar days of receipt of the certified letter.

C. The failure to respond to the State Purchasing Agent's request within fifteen (15) calendar days shall be deemed a strong indication that the vendor may not be in compliance with the Code, in which case the State Purchasing Agent shall require the subject vendor to execute a new affidavit, per section 2, above. If a vendor fails to respond within thirty (30) calendar days of receipt of the State Purchasing Agent's certified letter requesting a response, the State Purchasing Agent may initiate further

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action, up to and including termination of the State's contract with the subject vendor.

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§ 4. DETERMINATIONS OF COMPLIANCE OR NON-COMPLIANCE WITH THE CODE

- A.** In making a determination of whether there has been a violation of the Code, the State Purchasing Agent may take into account any factors, information, sources of information, and materials deemed reliable and relevant by the State Purchasing Agent, as determined on a case-by-case basis.
- B.** The determination of whether a party subject to a complaint is in compliance with the Code shall be solely that of the State Purchasing Agent.
- C.** After rendering a determination, the State Purchasing Agent promptly shall inform the complainant and vendor in writing.

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§ 5. CONSEQUENCES OF A DETERMINATION OF NON-COMPLIANCE WITH THE CODE

- A.** If a vendor or a sub-vendor is determined by the State Purchasing Agent to be in non-compliance with the Code, the State Purchasing Agent shall inform the vendor and engage in discussions with the vendor about the violation. The purpose of the discussions is to work in partnership with the vendor to influence the vendor to change its practices or to use its bargaining position with the offending sub-vendor to change its practices, rather than to cease doing business with the vendor or sub-vendor.
- B.** The State Purchasing Agent shall prescribe appropriate measures for the vendor to take in order to comply with the Code. Those steps may include, but are not limited to, the following:
- 1.** Requesting disclosure of names and addresses of suppliers at sub-vendors and sub-vendors' working conditions;
 - 2.** Requesting that sub-vendors provide access to independent human rights monitors;
 - 3.** Requesting that sub-vendors offer their workers the training and guidelines necessary to bring the workplace into compliance with the Code.

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§ 6. SUPPORT TO BIDDERS AND VENDORS

The State Purchasing Agent shall provide to bidders and vendors resources to assist with compliance with the Code. One such resource shall be a publicly accessible list of bidders and vendors that have adopted the Code.

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STATUTORY AUTHORITY: 5 M.R.S.A. §1825-O

EFFECTIVE DATE: **MMM DD, 200Y**

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Basis Statement

This Chapter implements the State purchasing code of conduct, as set forth in 5 M.R.S.A. § 1825-K *et seq.*, and applies to competitive bids for sale of apparel, footwear, or textiles pursuant to 5 M.R.S.A., C. 155, sub-c. I-A.

Comments and Responses

The Division of Purchases (Division) has received comments about proposed Chapter 130 from the following individuals:

- Maine State Senator Margaret R. Rotundo
- Maine State Senator Michael Brennan
- Maine State Senator Elizabeth M. Schneider
- Bjorn Claeson, Maine Clean Clothes Alliance (MECCA)
- Carl Proper, UNITEHERE
- Hee Won Khym, UNITEHERE
- Matt Schlobum, Maine Fair Trade Campaign
- Joyce Schelling, Peace through Interamerican Community Action (PICA); MECCA
- Jimmy Cook, Teamsters Local 340
- Lee Sharkey, University of Maine at Farmington Purchasing Practices Policy Committee
- Pauline Michaud, Clean Clothes Campaign of Southern Maine
- Meredith de Francesco, Bangor Clean Clothes Campaign; PICA
- Peter Sirois, Waterville Area Bridges for Peace and Justice
- Gilberto Garcia Duenas, Center for the Study and Support of Labor (CEAL)
- Kevin M. Burk, American Apparel & Footwear Association
- Dr. Alberto Legall Torres, Professionals for Social and Company Audits (PASE)
- Bill Bradbury, Cintas
- Steven A. Jesseph, Worldwide Responsible Apparel Production
- Bayardo Izaba Soliz, Nicaraguan Center for Human Rights (CENIDH)
- Alejandra Domenzain, Sweatshop Watch
- Yannick Etienne, Batay Ouyive
- Kenneth Miller
- Dennis Chinoy
- Kirsten Reberg-Horton

The following are the agency's responses to comments the rule received in writing or at a public hearing on the rule held on 25 August 2005. Where Comments were substantively the same, they have been consolidated into one Comment.

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1. COMMENT: The “reliable source” requirement seems to weigh heavily on verification of the complainant instead of verification and resolution of an alleged violation. Requiring a complainant to certify under oath that a vendor is in violation of the Code demands a much higher degree of evidence from complainants than from vendors, who only need to certify that they are in compliance with the Code “to the best of their knowledge.”

RESPONSE: The Division of Purchases (Division) agrees with this Comment and, consequently, the Chapter now requires the State Purchasing Agent to initiate an investigation after a complaint has been filed in accordance with the revised Chapter. Further, the Chapter now uniformly uses the same “best of knowledge” standard as that to which a bidder/vendor is held.

2. COMMENT: The best way to verify complaints and ensure that Code violations are rectified is to allow an independent monitor to investigate complaints and work with the company to ensure it takes the necessary steps to comply with the Code requirements.

RESPONSE: Before an independent monitor may be used by the Division, specific authority would need to be provided in the law. Prior even to that, however, the Division thinks that the use of an independent monitor first should be examined to, among other things, provide definition to the term independent monitor, ascertain what the role of such a monitor would be, and identify the fiscal and personnel resources that would be needed by the State to fund the creation and use of independent monitors.

The Division will be introducing legislation that would create a working group to study those and other appropriate considerations.

3. COMMENT: The independent monitor, not the State Purchasing Agent, should determine whether a complaint is valid and whether a company has taken steps to rectify a violation.

RESPONSE: Currently the authority to determine the validity of a complaint filed pursuant to the Code is vested in the State Purchasing Agent, as the employee and agent of the State of Maine responsible for the overall administration of the Division of Purchases in the Department of Administrative and Financial Services. The Division thinks that transferring the power of determining compliance with the Code from the State Purchasing Agent to a non-State organization would be an inappropriate delegation of both the State’s sovereignty and its responsibility under the Code.

4. COMMENT: “Independent monitor” should be defined in the Chapter.

RESPONSE: Because of revisions that have been made in response to other Comments, the term “independent monitor” no longer is used in the Chapter. Therefore a definition is not necessary.

5. COMMENT: The Chapter should require bidders to provide the names and addresses of every supplier at point of assembly, a statement of certification that the supplier(s) is in

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compliance with the Code, and the date of submission of the required affidavit by the bidder. Further, that information should be made accessible to the public as soon as possible, but in no case less than a reasonable time before a decision is made to award a contract.

RESPONSE: In the current law, the Legislature required such disclosure only as a consequence of a determination of noncompliance – not as a requirement of the initial filing. That the rule promulgated in 2002 provided for such disclosure was an error, as there was no legal authority given by the Legislature for such initial disclosure.

That said, the Division will be introducing legislation that would amend the law so as to require initial disclosure of the names and addresses of every supplier at point of assembly, as well as make that information available to the public prior to the award of a contract.

6. COMMENT: If information provided by a bidder pursuant to the Chapter changes later, the vendor should be required to submit or cause to be submitted to the Division of Purchases an affidavit with updated information.

RESPONSE: The Division agrees with this Comment and has amended the Chapter accordingly so that changes in information of which the bidder/vendor is aware must be reported.

7. COMMENT: A vendor should be required to submit or cause to be submitted annual public reports documenting internal working condition monitoring programs and their results, external audits if available, problems discovered and corrective action plans.

RESPONSE: The Division thinks that such information should be an option for the State Purchasing Agent to have and at times prescribe as a remediation measure when a determination of noncompliance is made.

8. COMMENT: The State Purchasing Agent should require a vendor to provide evidence of compliance with the Code if a complaint is filed.

RESPONSE: The Division agrees that when a complaint is filed in accordance with the Chapter, a vendor should be required to respond and, if deemed necessary by the State Purchasing Agent, furnish evidence of compliance with the code of conduct to the State Purchasing Agent.

9. COMMENT: The requirement that a complainant certify a complaint ought to be eliminated from the rule.

RESPONSE: The Division agrees with this Comment in large part, and accordingly has substantially amended the rule so that certification is required only when a complaint is filed by a third-party based in the United States on behalf of or on the basis of information from a worker or workers.

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10. COMMENT: When allegations of violations of the Code are brought to the attention of the State Purchasing Agent, the State Purchasing Agent should promptly review the allegations and, if confirmed, consider and implement appropriate enforcement action.

RESPONSE: The Division agrees with this Comment.

11. COMMENT: When determining whether there is a violation of the Code, the State Purchasing Agent should take into account relevant and reliable information including, but not limited to, information provided by the vendor and sub-vendor, reports from reputable national and international organizations, documented media reports, and credible information from local groups and organizations.

RESPONSE: The law currently permits the information stated in the Comment to be considered by the State Purchasing Agent.

12. COMMENT: When possible, the State Purchasing Agent should coordinate with an independent monitor to investigate allegations of non-compliance with the Code.

RESPONSE: Please see the Division's Responses at Comment 2.

13. COMMENT: A vendor's or sub-vendor's refusal to allow an independent monitor access to its facilities to investigate an alleged Code violation should itself constitute a violation of the Code.

RESPONSE: Were the State of Maine to sanction and employ an independent monitor that, during the course of its work, was denied access to a vendor or sub-vendor's facilities, then the State quite possibly would regard that as a violation of the Code. As to the matter of the State using such a monitor, please see the Division's Response at Comment 2.

14. COMMENT: The State Purchasing Agent should explore mechanisms employed by other governmental agencies to ensure that vendors are in compliance with the Code, including establishing working relationships with other public entities that have enacted anti-sweatshop procurement laws, as well as with non-governmental organizations having information about manufacturers, vendors, and suppliers. Another mechanism would be to develop a consortium with other public entities so as to pool funding for use of an independent monitor.

RESPONSE: The Division agrees with this Comment and would consider exploring the development of internal policies that would incorporate initiatives such as those suggested in the Comment.

15. COMMENT: The State should adopt a Sweat-Free Procurement Advisory Group to address implementation and enforcement issues.

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RESPONSE: The Division agrees with this Comment and would consider exploring the development of an internal policy that would incorporate the initiative suggested in the Comment.

16. COMMENT: The proposed rule provides a low bar for a vendor alleged to be in violation of the Code to prove compliance.

RESPONSE: In consideration of this and other Comments, the Division has amended the Chapter so that a determination of compliance or noncompliance would be made on a case-by-case basis, since each case will have unique factors to consider.

17. COMMENT: The proposed rule presents no standards or qualifications for credible independent monitoring.

RESPONSE: Please see the Responses to Comments 2 and 16, *above*.

18. COMMENT: A vendor subject to the code of conduct should have to pay part or all of the costs for the State to use and independent monitor.

RESPONSE: The Division understands this Comment, but thinks that further consideration would have to be given to the manner of funding the use of an independent monitor.

One issue, for example, that would need to be addressed is, if such costs were required to be paid by potential vendors, bids for contracts likely would have the costs for the possible use of an independent monitor built into them. Consequently, the costs for the use of the independent monitor would be passed on to the State, which would be paying for monitoring and investigations that may or may not ever occur.

Please also see the Division's Response to Comment 2.

19. COMMENT: The Division should retain its ability to determine for itself whether its suppliers and sub-suppliers are making a good faith effort to comply with Maine's purchasing code of conduct.

RESPONSE: See the Division's Response to Comment 3, *above*.

20. COMMENT: That the rules ensure parity and common requirements of all parties is an improvement to the rule.

RESPONSE: Though the Chapter has been amended in response to other Comments, the Division sought to ensure that the Chapter is balanced so that the most responsible and easiest means of reporting alleged violations of the Code exists.

21. COMMENT: That the Chapter considers a full range of potentially complicating factors in evaluating the veracity of allegations of violations of the code of conduct is an improvement to the rule.

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RESPONSE: Though the Chapter has been amended in response to other Comments, it preserves the State Purchasing Agent's ability to consider, on a case-by-case basis, the complex factors that will surround each complaint. Please also see the Division's Response to Comment 16, *above*.

22. COMMENT: The simple allegation in "media reports" should not be the sole basis of a complaint and should be evaluated in light of other evidence.

RESPONSE: The Division retains the discretion under the Chapter to weigh, on a case-by-case basis, the reliability and relevance of all sources of alleged violations of the code of conduct. That includes the discretion and ability to judge whether a media report is valid and, in and of itself, enough evidence to support an allegation of, or even prove, a violation of the code.

23. COMMENT: The Chapter ought to provide the State Purchasing Agent with the option to prescribe "appropriate measures for the vendor to take in order to comply with the code" by specifically "[r]equesting that vendors or sub-vendors demonstrate to the State Purchasing Agent that prescribed changes or improvements have been completed and implemented at the identified facilities."

RESPONSE: The Division agrees with this Comment and thinks such an option is a viable one to have as a prescriptive measure when a determination of noncompliance is made.

24. COMMENT: To the extent feasible, the State Purchasing Agent ought to rely on codes and inspection programs (e.g., that used by the Worldwide Responsible Apparel Production) to demonstrate compliance with the principles set forth by the government of Maine in the code of conduct.

RESPONSE: The Division retains the discretion under the Chapter to weigh and judge, on a case-by-case basis, the value of such code and inspection programs in the process of determining whether a vendor or sub-vendor is in compliance with the code of conduct.

25. COMMENT: All parties bringing allegations and complaints under the code of conduct should be required to sign affidavits.

RESPONSE: Please see the Response to Comment 20, *above*.

26. COMMENT: The State needs to be able to terminate contracts or take other punitive actions as a last resort in case a company is either unwilling or unable to rectify violations.

RESPONSE: The Division generally agrees with the Comment and, as a matter of contract, is prepared to take appropriate action to defend the integrity of the code of conduct law, up to and including contract termination with a vendor.