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PROTECTING TAXPAYER DOLLARS: IS THE GOVERNMENT USING SUSPENSION AND DEBARMENT EFFECTIVELY?

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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CONTENTS

Page

Hearing held on June 12, 2013 1

WITNESSES

Mr. John Neumann, Acting Director, Acquisition and Sourcing Management, U.S. Government Accountability Office
- Oral Statement 4
- Written Statement 6

The Honorable Angela B. Styles, Partner, Crowell & Moring
- Oral Statement 14
- Written Statement 16

Mr. Scott Amey, General Counsel, Project on Government Oversight
- Oral Statement 24
- Written Statement 26

APPENDIX

The Honorable Gerald E. Connolly, a Member of Congress from the State of Virginia, Opening Statement 66

PROTECTING TAXPAYER DOLLARS: IS THE GOVERNMENT USING SUSPENSION AND DEBARMENT EFFECTIVELY?

Wednesday, June 12, 2013,

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The committee met, pursuant to call, at 9:37 a.m., in Room 2154, Rayburn House Office Building, Hon. Darrell Issa [chairman of the committee] presiding.

Present: Representatives Issa, Mica, Duncan, McHenry, Jordan, Chaffetz, Walberg, Lankford, DesJarlais, Gowdy, Farenthold, Woodall, Meadows, Cummings, Maloney, Norton, Tierney, Clay, Connolly, Speier, Duckworth, Kelly, Cardenas, Horsford.

Staff Present: Alexia Ardolina, Majority Assistant Clerk; Alexa Armstrong, Majority Staff Assistant; Kurt Bardella, Majority Senior Policy Advisor; Richard A. Beutel, Majority Senior Counsel; Molly Boyl, Majority Parliamentarian; Lawrence J. Brady, Majority Staff Director; Ashley H. Callen, Majority Senior Counsel; John Cuaderes, Majority Deputy Staff Director; Adam P. Fromm, Majority Director of Member Services and Committee Operations; Linda Good, Majority Chief Clerk; Laura L. Rush, Majority Deputy Chief Clerk; Scott Schmidt, Majority Deputy Director of Digital Strategy; Peter Warren, Majority Legislative Policy Director; Rebecca Watkins, Majority Deputy Director of Communications; Meghan Berroya, Minority Counsel; Jennifer Hoffman, Minority Press Secretary; Carla Hultberg, Minority Chief Clerk; Elisa LaNier, Minority Deputy Clerk; Dave Rapallo, Minority Staff Director; Donald Sherman, Minority Counsel; Mark Stephenson, Minority Director of Legislation; Cecelia Thomas, Minority Counsel.

Chairman ISSA. The Oversight Committee exists to secure two fundamental principles. First, Americans have a right to know that the money Washington takes from them is well spent. And second, Americans deserve an efficient, effective government that works for them.

Our duty on the Oversight and Government Reform Committee is to secure these rights and to protect American tax dollars. Our solemn responsibility is to hold government accountable to taxpayers, because taxpayers have a right to know what they get from their government.

It is our job to work tirelessly in partnership with citizen watchdogs to protect these rights and to deliver the facts to the American people and bring genuine reform to the Federal bureaucracy.

In recent years, we have seen a massive expansion of government and its growth in spending. That is a given, as our economy has grown. But there is a culture that has been created that feels it is entitled to taxpayer dollars. The entitlement philosophy has grown both in the area of contracts and in grants. Today, among other things, we will examine the growth in grants. Grants are a circumvention of both competitive bidding and specific appropriation by Congress.

Today when we talk about suspensions and debarment, what we are really talking about is a common sense process that does what the American people already expect government to do: ensure that the vendors we use, whether for grants or contracts, in fact meet the expectation of the law. And when they don't, don't use them again.

We need to have a culture of zero tolerance for fraud, for criminals, for tax cheats, for those receiving taxpayer money through grants and contracts. We must have a standard that meets the expectation of the American people.

When I was a small child and all my life growing up, we have heard the expression, fool me once, shame on you. And we all know that fool me twice, shame on me. One of the problems in suspension and debarment is in fact that the system does not prevent fool me twice. In some cases, fool me twice occurs within the same agency; in some cases it occurs within different agencies who do not communicate about bad actors.

I wish I could say that this is the first debarment hearing that has been held by this committee. But this is at least biannually a hearing that we come back to again and again, because the problem isn't fixed. Several months ago, I publicly put forward draft legislation for a comprehensive suspension and debarment reform bill entitled Stop Unworthy Suspending Act, or Suspend Act. It has been posted on the committee's website since February, and I believe it is becoming time to move it forward, especially when we look at specific events that have led to us having less faith in our government. We need to restore that faith.

Year after year, Washington takes more money and Americans have seemingly less to show for it. Time and time again, we see contracts being re-issued when failure has been the previous result.

So on this issue, one that I am proud to say has been bipartisan, has been in fact one where we on this dais know there is a problem, Administration after Administration has said, give us a little more time, and we will fix it, I believe that the time to believe that it will be fixed without legislation has expired. Today's hearing is to probe into any final details before this committee seeks to move comprehensive legislation to ensure suspension and debarment is reformed.

With that, I recognize the ranking member for his opening statement.

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

This is indeed a bipartisan issue. As I was sitting here, I could not help but think about the neighborhood that I live in and that I left a few hours ago, where we have young men who make one mistake, get a record, and then are punished for the rest of their

life, jobs they can't get, opportunities they cannot take advantage of.

I am sure when they hear about big companies doing things wrong, and then finding themselves right back doing business with the government, they ask the question, where is the justice, or is it just us?

So Mr. Chairman, I thank you for calling this important hearing. Today we will examine how the government is using suspension and debarment in Federal spending to protect taxpayers from potential waste, fraud and abuse. Suspension and debarment are mechanisms by which the Federal Government protects taxpayers by prohibiting the award of new contracts or grants to individuals and businesses that are bad actors. Debarment is automatic upon conviction of certain crimes.

But Federal agencies also have the authority to suspend or debar an individual or business in cases where there has not been a conviction or an indictment, but where there is, nevertheless, ample evidence of unethical behavior or incompetence. A report issued by GAO in 2011 found that some agencies have failed for years to suspend or debar a single individual or business. For example, GAO found that FEMA had no suspensions or debarments from 2006 to 2010, despite the fact that congressional committees found numerous instances of contract waste, fraud, abuse and poor performance in the aftermath of Hurricane Katrina. What is wrong with that picture?

In another example, the Department of Justice suspended or debarred only eight contractors from 2006 to 2010. Making matters worse, a 2011 Inspector General's audit found that from 2005 to 2010, the Department issued 77 contracts and contract modifications to some of the same entities the Department suspended or debarred. Something is absolutely wrong with that picture.

Although a 2012 report by the Interagency Suspension and Debarment Committee noted that marginal improvements have been made since the release of the GAO report in 2011, it also stated that persistent weaknesses remain throughout various agencies.

The vast majority of individuals and businesses who participate in the Federal marketplace are honest and do their upmost to fulfill the terms of their Federal contracts. It is not ethical or fair when these competent government contractors lose government business to those who have performed ineffectively, inefficiently and dishonestly.

Our goal is not to punish contractors, but to protect taxpayers. Taxpayers deserve to know that the Federal contracts and grants are not awarded to those who have acted dishonestly, irresponsibly or incompetently.

Having powerful suspension and debarment tools does little good if they are not being used effectively. The GAO report found that the civilian agencies with the highest numbers of suspensions and debarments share certain characteristics. First, they dedicate full-time staff to suspension debarment process. Second, they have detailed guidance in place. And finally, they have a robust case referral process I think we need to carefully examine these best practices.

The draft Suspend Act that the Chairman is sponsoring seems, and I think that it is something we should be able to do in a bipartisan way, it is an effort to shed light and make this whole debarment process much more efficient and transparent, and make it accountable, and make sure that those who are suspended and debarred are effectively dealt with.

I look forward to working with the Chairman to further improve this legislation. As our Nation's economic recovery continues, it is important that we guard against unnecessary spending and make sure that we are doing every single thing in our power to protect taxpayer funds.

I look forward to the testimony of our witnesses today. With that, I yield back.

Chairman ISSA. I thank the gentleman.

Members may have seven days to submit opening statements and other extraneous material for the record.

We now welcome our witnesses. Mr. John Neumann is Acting Director of Acquisitions and Sourcing Management at the Government Accountability Office. Welcome.

The Honorable Angela Styles is a partner at Crowell & Moring's Washington, D.C. office, and of course the former Administrator of Federal Procurement Policy in the Office of Management and Budget.

Mr. Scott Amey is the General Counsel at the Project on Government Oversight.

Welcome all. Pursuant to the rules of the committee, would you please rise, raise your right hands to take the oath.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth and nothing but the truth?

[Witnesses respond in the affirmative.]

Chairman ISSA. Let the record reflect that all witnesses answered in the affirmative. Please be seated.

I am pleased to say you are all pretty experienced at this. So your entire opening statements will be placed in the record. We would like you to stay as close as you can to five minutes or less, to leave plenty of time for questioning, because ultimately, we will read your opening statements or in most cases have. But we certainly would like to be able to get your insight to specific questions.

Mr. Neumann?

WITNESS STATEMENTS

STATEMENT OF JOHN NEUMANN

Mr. NEUMANN. Thank you. Chairman Issa, Ranking Member Cummings and members of the committee, I am pleased to be here today to discuss the Federal Government's use of suspensions and debarments.

In 2012 alone, the Federal Government spent more than $517 billion on contracted goods and services. As you know, to protect the government's interest, Federal agencies are required to award contracts only to responsible contractors, those with a satisfactory record of integrity and business ethics and capable of performing required work.

One way to protect the government's interest is through the use of suspensions and debarments to exclude firms or individuals from receiving contracts when they engage in misconduct. My statement today highlights two key points. First, agencies we reviewed with the most suspension and debarment activity shared certain characteristics. Secondly, Federal Government efforts to oversee and coordinate the use of suspensions and debarments faced challenges.

Let me expand a little bit on my first point. In 2011, when we looked at 10 different agencies, we found that the four agencies with the most suspension and debarment activity shared three characteristics. They each had dedicated program and dedicated staff, detailed policies and procedures and practices that encouraged an active referral to process.

The first of these characteristics is the dedicated program and staff. This is needed to carry out the essential functions of an agency's program. Each of the four agencies we reviewed with active programs had dedicated staff that were focused on reviewing cases of contractor misconduct and poor performance for possible suspension and debarment.

Secondly, these agencies had detailed policies and procedures that went well beyond the guidance in the Federal Acquisition Regulation. And lastly, we found that those agencies with active programs each had practices to encourage referrals of contractor misconduct to be considered for appropriate action. This referral process required senior agency officials to promote a culture of acquisition integrity, so that suspension and debarment is understood and utilized by all staff.

The remaining six agencies we looked at in 2011 lacked these characteristics and had few or no suspensions or debarments of Federal contractors despite having billions of dollars in contract spending.

The second point that I would like to highlight is on Federal Government efforts to oversee and coordinate the use of suspensions and debarments. At the time of our review in 2011, the Interagency Suspension and Debarment committee faced a number of challenges.

This committee, as you know, is charged with monitoring and coordinating the suspension and debarment system across the Federal Government. However, it relied on voluntary participation and an informal coordination process that not all agencies participated in. We noted that agencies without active suspension and debarment programs generally were not represented at the committee's monthly coordination meetings.

In response to our recommendation, OMB issued guidance that directed Federal agencies to appoint a senior official to ensure regular agency participation in the Interagency Committee meetings, among other actions. Since then, several agencies have taken steps to address our findings and recommendations.

Chairman Issa, Ranking Member Cummings and members of the committee, this concludes my prepared statement. I am pleased to respond to any questions that you may have.

[Prepared statement of Mr. Neumann follows:]

United States Government Accountability Office

GAO

Testimony
Before the Committee on Oversight and Government Reform, House of Representatives

For Release on Delivery
Expected at 9:30 a.m. EDT
Wednesday, June 12, 2013

SUSPENSION AND DEBARMENT

Characteristics of Active Agency Programs and Governmentwide Oversight Efforts

Statement of John Neumann, Acting Director
Acquisition and Sourcing Management

GAO Highlights

Highlights of GAO-13-707T, a testimony before the Committee on Oversight and Government Reform, House of Representatives

June 12, 2013

SUSPENSION AND DEBARMENT

Characteristics of Active Agency Programs and Governmentwide Oversight Efforts

Why GAO Did This Study

Spending on contracted goods and services was more than $517 billion in 2012. To protect the government's interests, federal agencies are required to award contracts only to responsible sources. One way to protect the government's interest is through the use of suspensions and debarments, which are actions taken to exclude firms or individuals from receiving contracts or assistance based on various types of misconduct. A suspension is a temporary disqualification from government contracting, while a debarment is an exclusion for a specified period.

This testimony is based on reports GAO issued in August 2011 and September 2012 and addresses (1) characteristics of suspension and debarment programs at selected agencies and (2) governmentwide efforts to oversee and coordinate the use of suspensions and debarments. In 2011, GAO assessed suspension and debarment programs at 10 agencies from among those having more than $1 billion in contract obligations in fiscal year 2009. In 2012, GAO reviewed the extent to which DOD had processes for identifying and referring cases of contractor misconduct for possible suspension and debarment.

GAO is not making any new recommendations, but made several recommendations in prior reports on this topic. Agencies agreed with those recommendations and several have taken steps to implement them.

View GAO-13-707T. For more information, contact John Neumann at (202) 512-4841 or neumannj@gao.gov.

What GAO Found

While each agency's suspension and debarment program that GAO reviewed in 2011 was unique, agencies with the most suspension and debarment activity shared certain characteristics. These included a dedicated suspension and debarment program and staff, detailed policies and procedures, and practices that encouraged an active referral process.

- Dedicated suspension and debarment program and staff. Each of the four agencies with the most suspension and debarment activity had a dedicated suspension and debarment program and staff, which according to agency officials, cannot be accomplished without the specific focus and commitment of an agency's senior officials.
- Detailed policies and procedures. The four most active agencies also developed agency-specific guidance that goes well beyond the suspension and debarment guidance in the Federal Acquisition Regulation (FAR). For example, these agencies had guidance that included details on conducting investigatory research, coordinating with other organizations, and evaluating contractor misconduct.
- Practices that encourage an active referral process. In addition, each of the four agencies engaged in practices that encourage an active referral process. For example, the General Services Administration (GSA) Office of Inspector General looked for and referred cases based on investigations and legal proceedings.

GAO also consistently found these characteristics among the four Department of Defense (DOD) components that it examined in 2012. In contrast, agencies that GAO reviewed in 2011 that did not have these characteristics generally had few or no suspensions or debarments of federal contractors. GAO recommended that these agencies take steps to improve their suspension and debarment programs ensuring that they incorporate the characteristics identified as common among agencies with more active programs. Several agencies have taken actions to implement these recommendations.

GAO also reported in 2011 that governmentwide efforts to oversee and coordinate the use of suspensions and debarments faced challenges. Specifically, the Interagency Suspension and Debarment Committee (ISDC) relied on voluntary participation and not all agencies coordinated through the committee. To better coordinate and oversee suspensions and debarments, GAO recommended that the Office of Management and Budget's (OMB) Office of Federal Procurement Policy (OFPP) issue governmentwide guidance to ensure that agencies are aware of the elements of an active suspension and debarment program and the importance of cooperating with ISDC. In response, OMB directed the agencies to appoint a senior official responsible for the agency's suspension and debarment program and directed that this official ensure that the agency participates regularly on the ISDC. In its September 2012 annual report, ISDC noted improvements by most agencies to promote more active and effective suspension and debarment programs.

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Chairman Issa, Ranking Member Cummings, and Members of the Committee:

I am pleased to be here to discuss the federal government's use of suspensions and debarments. Spending on contracted goods and services was more than $517 billion in 2012. To protect the government's interests, federal agencies are required to award contracts only to responsible sources—those that are determined to have a satisfactory record of integrity and business ethics, and are capable of performing required work. One way to protect the government's interest is through the use of suspensions and debarments, which are actions taken to exclude firms or individuals from receiving contracts or assistance based on various types of misconduct. The Federal Acquisition Regulation (FAR) prescribes overall policies and procedures governing the suspension and debarment of contractors by agencies and directs agencies to establish appropriate procedures to implement them.

Even though the FAR specifies numerous causes for suspensions and debarments, including fraud, theft, bribery, tax evasion, or lack of business integrity, the existence of one of these does not necessarily require that the party be suspended or debarred. There are various tools that protect the government's interests, including civil and criminal penalties that may be imposed for contracting fraud and other violations. Suspensions and debarments are not a punishment, but instead are to ensure that agencies only award contracts to responsible contractors. Agencies are to establish procedures for prompt reporting, investigation, and referral to the agency suspension and debarment official. Parties that are suspended, proposed for debarment, or debarred are precluded from receiving new contracts, and agencies must not solicit offers from, award contracts to, or consent to subcontracts with these parties, unless an agency head determines that there is a compelling reason for such action.

My testimony today is based on reports we issued in August 2011 and September 2012 and addresses (1) characteristics of suspension and debarment programs at selected agencies and (2) governmentwide efforts to oversee and coordinate the use of suspensions and debarments.

In 2011, we assessed suspension and debarment programs at 10 agencies from among those having more than $1 billion in contract obligations in fiscal year 2009.[1] These agencies included:

- Defense Logistics Agency (DLA);
- Department of Commerce (Commerce);
- Department of Health and Human Services (HHS);
- Department of Homeland Security's (DHS) U.S. Immigration and Customs Enforcement (ICE) and Federal Emergency Management Agency (FEMA);
- Department of Justice (Justice);
- Department of the Navy (Navy);
- Department of State (State);
- Department of the Treasury (Treasury); and
- General Services Administration (GSA).

In 2012, we reviewed the extent to which the Department of Defense (DOD) had processes for identifying and referring cases of contractor misconduct for possible suspension and debarment at the Departments of the Air Force, Army, and Navy, and DLA.[2] The reports that this statement is based on include detailed information about our scope and methodology. Our work was performed in accordance with generally accepted government auditing standards.

[1] GAO, *Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved*, GAO-11-739 (Washington, D.C.: Aug. 31, 2011).

[2] GAO, *Suspension and Debarment: DOD Has Active Referral Processes, but Action Needed to Promote Transparency*, GAO-12-932 (Washington, D.C.: Sept. 19, 2012).

Agencies with Greater Suspension and Debarment Activity Share Common Characteristics Missing at Agencies with Less Activity

While each agency suspension and debarment program we reviewed in 2011 was unique, the four with the most suspension and debarment activity—DLA, Navy, GSA, and ICE—shared certain characteristics. These include:

- a dedicated suspension and debarment program and staff,
- detailed policies and procedures, and
- practices that encourage an active referral process.

Dedicated suspension and debarment program and staff.

Officials from these four agencies stated that having dedicated staff cannot be accomplished without the specific focus and commitment of an agency's senior officials. The existence of dedicated staff was evident at selected agencies in our 2011 governmentwide review. For example GSA had dedicated staff to refer suspension and debarment cases and coordinate with internal offices. In our review of DOD in 2012, each of the four DOD components we reviewed also had dedicated staff, including attorneys and support staff, to monitor and ensure the coordination of remedies for each significant investigation of contracting fraud.

Detailed policies and procedures.

Each of the four agencies with the most suspension and debarment activity in our 2011 review also developed agency-specific guidance that goes well beyond the suspension and debarment guidance in the FAR. For example, ICE's suspension and debarment program procedures included detailed guidance on conducting online database research, coordinating with other DHS components, preparing for legal review, and tracking cases in their database. DOD components we reviewed in 2012 also had guidance on the process for evaluating contractor misconduct. Several of the reports we reviewed by inspectors general and others regarding agency suspension and debarment programs cited the importance of agency-specific, detailed policies and procedures to an active agency suspension and debarment program.

Practices that encourage an active referral process.

The FAR directs agencies to refer appropriate matters to their suspension and debarment officials for consideration, and it allows agencies to develop ways to accomplish this task that suit their missions and structures. For example, in 2011 we noted that GSA's Office of Inspector General looked for and referred cases based on investigations and legal

proceedings. Also, ICE uses a case management system that allowed for tracking and followup on all referrals for consideration of suspension and debarment. This was also evident in 2012, when we found that all four DOD components we examined—the Air Force, Army, Navy, and DLA—had active processes to refer identified cases of contractor misconduct for appropriate action. Specifically, they used multiple sources to identify numerous cases of actual or alleged contractor misconduct and followed their procedures to refer them for appropriate action, including possible suspension and debarment. According to agency officials, when senior agency officials communicate the importance of suspension and debarment through their actions, speeches, and directives, they help to promote a culture of acquisition integrity where suspension and debarment is understood and utilized by staff.

The remaining six agencies we reviewed in 2011—HHS, FEMA, Commerce, Justice, State, and Treasury—did not have these three characteristics and had few or no suspensions or debarments of federal contractors. Based on our review of agency documents and interviews with agency officials, none of these six agencies had dedicated suspension and debarment staff, detailed policies and guidance other than those to implement the FAR, or practices that encouraged an active referral process. We recommended that these agencies take steps to improve their suspension and debarment programs ensuring that they incorporate the common characteristics we identified among agencies with more active programs, including assigning dedicated staff resources, developing detailed implementing guidance, and promoting the use of a case referral process. Most of these agencies have taken actions to implement these recommendations. For example:

- HHS created the Office of Recipient Integrity Coordination that reports to the Suspension and Debarment Official and dedicated three full-time staff positions to this office. HHS has also developed detailed policies and procedures. To promote case referrals, the revised policies and practices will be reinforced through communication and training.
- DHS recently completed the transition to a department-wide suspension and debarment policy and program and designated a suspension and debarment official to establish, maintain, supervise, and exercise oversight of the suspension and debarment program.
- At Justice, the Senior Procurement Executive in a memorandum to its Procurement Chiefs emphasized suspension and debarment as a powerful administrative tool and summarized the law and the

department's procedures that govern suspensions and debarments. In addition, the department aligned all of its suspension and debarment activities under one division.

- State issued detailed policies and procedures for suspending or debarring contractors in its Debarment and Suspension Program Handbook. This handbook also describes the department's process for referring contractor misconduct or poor performance for consideration by the suspension and debarment official.

Governmentwide Efforts to Coordinate and Oversee Suspensions and Debarments

The Interagency Suspension and Debarment Committee (ISDC), established in 1986, monitors and coordinates the governmentwide system of suspension and debarment. The committee consists of representatives from agencies designated by the Director of the Office of Management and Budget (OMB).[3] ISDC provides support to help agencies implement their suspension and debarment programs and serves as a forum for agencies to coordinate suspension and debarment actions. In 2011, we found that governmentwide efforts to oversee and coordinate suspensions and debarments faced a number of challenges. For example, according to ISDC officials, ISDC relied on voluntary agency participation in its informal coordination process, which worked well when used. However, we found that not all agencies coordinated through ISDC, and agencies without active suspension and debarment programs generally were not represented at monthly coordination meetings.

Since our 2011 report, the ISDC has taken actions to improve coordination and emphasize suspension and debarment governmentwide. For example, the ISDC has acted as a clearinghouse to provide training expertise; provided agencies with a sample practice manual and action documents, fact-finding procedures, and a case law compendium; and established a standing subcommittee dedicated to training. In addition, the ISDC established a subcommittee to review opportunities to improve practices and processes for coordinating suspension and debarment actions among agencies. In its September 2012 annual report, the ISDC noted improvements by most agencies to promote more active and effective suspension and debarment programs.

[3] Standing members include each of the 24 agencies covered by the Chief Financial Officers Act. Nine independent agencies and government corporations also participate.

These included formally establishing suspension and debarment programs, dedicating staff resources, and simplifying processes for making referrals.

In 2011, we also noted that the suspension and debarment process could be improved governmentwide by building upon the existing framework to better coordinate and oversee suspensions and debarments. We recommended that the OMB's Office of Federal Procurement Policy (OFPP) issue governmentwide guidance to ensure that agencies are aware of the elements of an active suspension and debarment program and the importance of cooperating with ISDC. In response, in November 2011, the OMB directed the departments and agencies that are subject to the Chief Financial Officers Act to appoint a senior official who shall be responsible for, among other things, assessing the agency's suspension and debarment program, including the adequacy of available training and resources. OMB also directed that this official ensure that the agency participates regularly on the ISDC.

Chairman Issa, Ranking Member Cummings, and Members of the Committee, this concludes my statement. I would be pleased to respond to any questions that you or other members of the Committee may have.

Contacts and Acknowledgments

For questions about this statement, please contact John Neumann at (202) 512-4841 or NeumannJ@gao.gov. In addition, contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Individuals who made key contributions to this testimony are Russ Reiter, Bradley Terry, and Mary Quinlan.

Mr. MICA. [Presiding] Thank you, and we will withhold questions until we have heard from all of the witnesses.

Let's recognize now Angela Styles, Partner in Crowell & Moring. Welcome, and you are recognized.

STATEMENT OF ANGELA STYLES

Ms. STYLES. Thank you very much, Congressman Mica, Congressman Cummings and members of the committee. It is an honor to be invited to testify here today.

There is little question that changes to the suspension and debarment system are needed. I commend the committee for taking a hard, bipartisan look.

Federal suspension and debarment officials exercise a powerful and highly discretionary authority that directly affects the credibility of our entire procurement system. It has to be fair and it has to be transparent. The dialogue created by your draft legislation has already created greater attentiveness to fair process, consistency and timeliness.

Because a significant portion of my legal practice involves the representation of companies and individuals in suspension and debarment proceedings before many Federal agencies, both civilian and defense, I have a unique perspective on the multitude of processes, procedures, standards of review and remedies, both written and I think very important to the committee, unwritten ones as well.

While the Federal Acquisition Regulation, the FAR, and the nonprocurement rule establish a high level framework, much of the system operates using unwritten practices and tools. While many civilian agencies are bolstering suspension and debarment programs in response to your congressional oversight, it is hard to be confident that the current written processes or the unwritten practices ensure fairness, meaning that all companies and individuals facing debarment are given a similar opportunity to properly present their case, and that the correct result is obtained.

It is important, however, to separate the process from the people. We have been extraordinarily fortunate over the years to have dedicated, objective and fair-minded civil servants running the suspension and debarment processes across the Department of Defense, the General Services Administration and the Environmental Protection Agency. The creativity and openness of the suspension and debarment officials at these three agencies has for many, many years facilitated fairness and objectivity.

For the long term, however, the system cannot be sustained on the fairness and objectivity of individual suspension and debarment officials alone. Across the government, the processes, procedures, standards of review, remedies and tools must be consistent and transparent. The lack of access and transparency is an impediment for companies that are working to improve ethics and compliance programs. When problems do arise at companies, and they arise even at the most responsible of contractors, the agencies need to be able to work in partnership with contractors toward continual improvements.

DOD, EPA and GSA learned long ago that by having an open door for contractors to discuss compliance and ethics concerns, both

parties could agree on expectations and appropriate changes to contractor programs.

From my perspective, the greatest concern are the unwritten processes across agencies. They create significant issues of fairness. I have seen this most specifically in five areas where the processes vary significantly across agencies and are not transparent to all the parties. I discuss it extensively in my written statement, but this includes show-cause letters, requests for information, access to the administrative record, the public release of information, administrative agreements and lead agency determinations. These five different areas are not articulated in the FAR. They are not available to the public to understand how the suspension and debarment process actually works on a day to day basis.

In conclusion, I think there is little question that changes are needed, and changes can add significantly to consistency among the agencies and transparency. I think making our procurement process better through ensuring that our suspension and debarment process works better will give taxpayers significantly greater confidence that the government is buying from contractors with the highest ethical standards.

And I don't mean contractors that are just meeting the law. We need contractors that understand what value-based procurement programs are, ethics and compliance programs within their companies and they need to do more than simply meet the requirements of the law. They need to lead our U.S. companies in what it means to be a responsible company.

That concludes my prepared statement and I am happy to answer any questions you may have.

[Prepared statement of Ms. Styles follows:]

STATEMENT OF ANGELA B. STYLES

PARTNER, CROWELL & MORING LLP

BEFORE THE HOUSE COMMITTEE
ON
OVERSIGHT AND GOVERNMENT REFORM

JUNE 12, 2013

Chairman Issa, Congressman Cummings and Members of the Committee, I appreciate the opportunity to appear before you today to discuss the current federal suspension and debarment process from the legal practitioner's perspective. I commend the Committee for taking a hard look at transparency and fairness in the system. Federal suspension and debarment officials exercise a powerful and highly discretionary authority that directly affects the credibility of our entire procurement system.

As the chair of Crowell & Moring's government contracts group, a significant portion of my practice involves the representation of companies and individuals in suspension and debarment proceedings before federal agencies ranging from the Department of the Air Force to the Federal Communications Commission. Over the past four decades, Crowell's 55 government contract lawyers have represented clients in suspension and debarment proceedings before virtually every federal agency. Through these representations, we have gained a unique perspective on the multitude of processes, procedures, standards of review and remedies, both written and unwritten.

While the Federal Acquisition Regulation ("FAR") and the non-procurement rules establish a high-level framework, much of the system operates using unwritten practices and tools. From Show Cause letters to administrative agreements, innovative civil servants have created valuable tools for making the suspension and debarment process fair and flexible. A problem, however, is that the unwritten processes lack transparency and consistency across agencies. With many civilian agencies bolstering suspension and debarment programs in response to congressional oversight, it is hard to be confident that the current written processes ensure (1) fairness (that all companies and individuals facing debarment are given a similar opportunity to properly present their case) and (2) the correct result is obtained.

It is important, however, to separate the process from the people. We have been extraordinarily fortunate over the years to have dedicated, objective and fair-minded civil servants running the suspension and debarment processes across the Department of Defense ("DoD"), the General Services Administration ("GSA"), and the Environmental Protection Agency ("EPA"). The creativity and openness of the Suspension and Debarment Officials ("SDOs") at these three agencies have for many, many years facilitated fairness and objectivity. I have great confidence in the abilities, objectivity and fairness of SDOs working in these three agencies. I am less confident, however, that the agencies new to suspension and debarment can ensure fairness and consistency without some modifications to the current system. For the long

term, the system cannot be sustained on the objectivity and fairness of individual SDOs alone. Across the government, the processes, procedures, standards of review, remedies, and tools must be consistent and transparent. The certainty created by transparency and consistency will only serve to bolster confidence in the process and the procurement system as a whole. In this regard, I applaud the Committee for proposing draft legislation to address transparency and consistency in the civilian agencies. From the practitioner's side, we have noticed a greater attentiveness to fair process, consistency, and timeliness since consideration of the legislation was announced in February.

The Suspension and Debarment Process

The actual process of suspension and debarment varies widely across federal agencies. In some agencies, like the Department of the Army or the Environmental Protection Agency, the SDO acts as a hearing officer that determines the outcome after a presentation of facts by lawyers within the agency assigned to the case. Other SDOs, such as the Department of the Air Force and the General Services Administration, prepare and consider the suspension and debarment cases themselves. Still others, like the Department of the Interior, have the Office of the Inspector General prepare the case and make recommendations directly to the SDO. Unfortunately, the actual roles and processes are not well articulated in regulation, making it virtually impossible to know or understand how the suspension or debarment process is intended to work or will work in practice. Indeed, for many of the civilian agencies, it appears that the processes are entirely *ad hoc*, even where more specific written procedures exist.

For some agencies, it is a struggle for even the most seasoned suspension and debarment lawyer to discern even the name and contact information of the agency's SDO, much less the process they would use to consider a suspension or debarment matter. This is particularly frustrating when a contractor wants to proactively contact an agency SDO to discuss a legal, ethics or compliance issue of concern to the agency. While the Committee on Interagency Suspension and Debarment ("ISDC") maintains a list of agency contacts for agencies that participate on the Committee, the list does not identify the SDO and only appears to be updated a few times a year (http://www.epa.gov/isdc/member.htm). There have been a number of occasions where I have had clients that want to proactively contact an SDO, only to spend hours determining the correct official and days trying to contact the individual. For many companies, the system at most civilian agencies remains impenetrable.

This lack of access and transparency is certainly an impediment for companies that are working to improve ethics and compliance programs and systems. When problems do arise at companies, and they do arise with even the most responsible of contractors, the companies and the agency need to be able to work in partnership towards continual improvements. DoD, EPA and GSA learned long ago that by having an open door for contractors to discuss compliance and ethics concerns both parties could agree on expectations and appropriate changes to contractor programs. This can't happen when it takes days to find and contact an SDO, much less when the process for consideration is *ad hoc* or difficult to discern. Even where an agency has promulgated specific information regarding process or procedures, it could take a cryptologist to interpret. One of my favorites is the Department of Health and Human Services ("HHS") Acquisition Regulation:

> When an apparent cause for debarment becomes known, the initiating official shall prepare a report containing the information required by 309.470-2, along with a written recommendation, and forward it through appropriate acquisition channels, including the HCA, to the Associate DAS for Acquisition in accordance with 309.470-1. The debarring official shall initiate an investigation. . . .The ASFR/OGAPA/DA shall promptly send a copy of the determination through appropriate acquisition channels to the initiating official and the Contracting Officer. If the debarring official determines that debarment procedures shall commence, the debarring official shall consult with OGC-GLD and then notify the contractor in accordance with FAR 9.406-3(c). . . . The OGC-GLD shall represent HHS at any fact-finding hearing and may present witnesses for HHS and question any witnesses presented by the contractor.

48 C.F.R. § 309.406-3. Who is the "initiating official," the "appropriate acquisition channel," the "Associate DAS for Acquisition," the "ASFR/OGAPA/DA," or the "OGC-GLD"? If you are a responsible contractor that wants to discuss a compliance or ethics issue with the HHS SDO, you have already given up.

Of greatest concern is when the differences in processes and the lack of transparency create issues of fairness. I have seen this most specifically in five areas where the processes vary significantly across agencies and are not transparent to all parties:

* Show Cause Letters
* Access to the Administrative Record
* Public Release of Information
* Administrative Agreements
* Lead Agency Determinations

Show Cause Letters/Requests for Information

When an agency receives negative information regarding a company or individual, the current FAR provides only two options: (1) suspend or (2) propose for debarment. Either action results in the public listing of the exclusion on the System for Award Management ("SAM") and a prohibition on receiving additional federal awards and new work under existing awards. In addition, suspension or debarment can trigger the loss of security clearances, the termination of key licenses, and the loss of state, local, and commercial business. The options are unquestionably draconian when the cause for suspension or debarment is not based on a criminal or civil judgment. The reputational and economic damage occurs before the company or individual has an opportunity to present any evidence or mitigating factors. The FAR is also inconsistent with the non-procurement rule which allows an SDO to propose an entity or individual for debarment without posting the exclusion on SAM or prohibiting additional awards while the matter is under review.

Because the FAR options of suspension or proposed debarment are particularly harsh, several agencies have instituted the use of "Show Cause Letters." In lieu of invoking the official

FAR debarment or suspension process, many SDOs issue a Show Cause Letter as a first step in the suspension and debarment process. The Show Cause Letter initiates an informal process through which the SDO and the company exchange information regarding the issue of concern, hold meetings, and attempt to reach resolution. The process allows companies a fair opportunity to present explanatory and exculpatory information. Where Show Cause Letters are used (primarily the Department of Defense and the General Services Administration), the SDO reaches a full understanding of the facts and remedial measures that have been taken to prevent recurrence, thus significantly informing the appropriate remedy.

Unfortunately, Show Cause Letters are not found in the FAR or any other regulation. As a result, the process is not known, understood, or used on a government-wide basis. Many civilian agencies believe that when presented with negative, but unproven, facts regarding a contractor, the only available actions are suspension or debarment, with little flexibility to avoid draconian and public exclusion from federal awards. Given the clear need for a process that, like the non-procurement rule, allows an entity or individual to defend against unproven facts before implementing a public exclusion, the Show Cause Letter process should be made available on a consistent government-wide basis through promulgation in the FAR.

Access to the Administrative Record

Most agencies, prior to issuing a Show Cause Letter, a suspension, or a proposed debarment, develop an administrative record to support the proposed action. However, when a company or individual receives notification of the proposed action from the SDO, the notification rarely, if ever, advises the company or individual that a more complete administrative record supporting the proposed actions exists. Only if a company or contractor hires an attorney familiar with the suspension and debarment process will they know to ask for a copy of the administrative record to assist in the preparation of a response.

To ensure that all parties are treated fairly in this process, the requirement for and availability of an administrative record should be articulated clearly in the FAR. Notably, however, I have never once been denied access to an administrative record to support a proposed action, even where the action was simply a Show Cause Letter.

Public Release of Information

Another area of significant uncertainty in the suspension and debarment process is the varying agency practices related to the public release of information. Some agencies, like the EPA, believe most records created in the process are subject to release under the Freedom of Information Act ("FOIA"). Other agencies are significantly more protective of information, concluding that their processes fall under FOIA law enforcement exemption seven. While contractors are able to protect trade secrets and confidential commercial or financial information supplied during this process under FOIA exemption 4, the possibility of information being released to the public significantly impedes the open exchange of information between the contractor and the SDO. In particular, when a contractor proactively approaches an SDO to discuss a potential compliance or ethics issue, the protection of information from public release would significantly enhance the exchange of meaningful information.

We have also recently noted a significant and disturbing trend where agencies release information related to ongoing suspension and debarment proceedings directly to legislative staff on congressional committees. The information is then subsequently released to the press. This trend appears to be a highly inappropriate end-run around the FOIA process. For the suspension and debarment process to work and for responsible contractors to feel comfortable interacting with agency SDOs, confidential information can and should be protected.

Administrative Agreements

Over time, federal agencies with active suspension and debarment processes have created additional remedies beyond simple debarment. Recognizing that debarment can result in the loss of a valuable (and often difficult to replace) contractor and can reduce competitive options and increase prices, many SDOs have looked for alternatives to debarment where the government can also be assured it is doing business with an ethical contractor. Through the use of "Administrative Agreements" between SDOs and contractors, a contractor can avoid debarment by committing to specific changes to ethics and compliance programs, including at times monitors. These agreements allow SDOs to keep a closer eye on the implementation of remedial measures following an ethical or compliance lapse and instead of losing a valuable contractor through debarment, the SDOs effectuate significant enhancements to compliance and ethics programs. The required enhancements in Administrative Agreements go far beyond the creation of a simple ethics program, training, or compliance with the FAR. Through periodic reporting from the contractor or a monitor, the SDOs create more ethical partners.

Again, however, there are problems with consistency and transparency related to this very effective tool. First, "Administrative Agreements" are mentioned only in passing in the FAR, 48 C.F.R. §§ 9.406-3(f); 9.407-3(e);1409.407-3(d). With the exception of the Department of the Air Force, which notably posts all Administrative Agreements online, the terms and conditions for use in administrative agreements are difficult, if not impossible to find. *See* http://www.safgc.hq.af.mil/organizations/gcr/adminagreements/index.asp.

Second, the actual terms of an administrative agreement vary widely among and even within the same agency. Without explanation, the variances include: (1) independent monitoring agreements; (2) independent reviews of compliance and ethics programs, (3) payment of investigation costs; (4) removal of certain employees or offices; (5) preferred supplier programs; and (6) training requirements. It is unclear when or why particular terms or conditions are used or not used. Finally, not all agencies offer Administrative Agreements, leading to the distinct possibility that one agency would debar a company based upon the same set of facts that a different agency would resolve by entering into an Administrative Agreement.

Public information about standard terms and conditions and when they should be used would significantly facilitate the process for agencies and contractors.

Lead Agency Determinations

The FAR states that "[w]hen more than one agency has an interest in the debarment or suspension of a contractor, the Interagency Committee on Debarment and Suspension, established under Executive Order 12549, and authorized by Section 873 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), shall resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency." 48 C.F.R. § 9.402. While it is a nice theoretical concept that the ISDC can resolve lead agency issues, there have been two significant problems in implementation. First, not all agencies believe they have any requirement to inform the ISDC before considering the suspension or debarment of a contractor. Second, the FAR provides no guidance on how lead agency determinations will be made.

We have confronted a number of problems for contractors under the current lead agency process. For a contractor that is proactively seeking to provide agency SDOs with information regarding a compliance or ethics issue, it is often quite difficult to determine the appropriate agency to approach. While the historical practice has been to approach the agency with the largest dollar value of contracts, that practice does not appear appropriate when the problem relates to a specific contract with a specific agency. As several of our clients have discovered, approaching the wrong agency can have dire consequences if the agency fails to "officially assert" lead agency with the ISDC. Without clear lead agency guidance, contractors can be lulled into believing a particular agency is considering the case while another agency takes a suspension or proposed debarment action without input from the approached agency or the contractor. This inappropriately places the burden on contractors to determine whether an SDO has taken appropriate steps to ensure it has lead agency and, in some cases, to educate SDOs about the lead agency process.

Miscellaneous Issues

There are two additional miscellaneous issues of note. First, the current system for suspension and debarment is not appropriately structured to deal with the suspension or debarment of individuals. As the pressure to debar has increased, many agencies have also increased the number of individual debarments. Unfortunately, however, under the current mitigating factors, there is very little opportunity to mitigate factors that might support an individual debarment. The standards, as written, are exclusively for the mitigation of corporate activity:

> It is the debarring official's responsibility to determine whether debarment is in the Government's interest. The debarring official may, in the public interest, debar a contractor for any of the causes in 9.406-2, using the procedures in 9.406-3. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors should be considered in making any debarment decision. Before arriving at any debarment decision, the debarring official should consider factors such as the following:

(1) Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any Government investigation of the activity cited as a cause for debarment.

(2) Whether the contractor brought the activity cited as a cause for debarment to the attention of the appropriate Government agency in a timely manner.

(3) Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and, if so, made the result of the investigation available to the debarring official.

(4) Whether the contractor cooperated fully with Government agencies during the investigation and any court or administrative action.

(5) Whether the contractor has paid or has agreed to pay all criminal, civil, and administrative liability for the improper activity, including any investigative or administrative costs incurred by the Government, and has made or agreed to make full restitution.

(6) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment.

(7) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the Government.

(8) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(9) Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for debarment.

(10) Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment and has implemented programs to prevent recurrence.

The existence or nonexistence of any mitigating factors or remedial measures such as set forth in this paragraph (a) is not necessarily determinative of a contractor's present responsibility. Accordingly, if a cause for debarment exists, the contractor has the burden of demonstrating, to the satisfaction of the debarring official, its present responsibility and that debarment is not necessary.

48 C.F.R. § 9.406-1. These factors leave little room for an individual to prove present responsibility to avoid debarment.

Second, the move from the Excluded Parties List System (www.epls.gov) to the System for Award Management (www.sam.gov) has been wrought with problems. Importantly, it appears to be taking days and even weeks for agencies to remove companies listed as suspended,

debarred, or proposed for debarment from SAM. In one instance, in spite of multiple efforts, it took one agency almost two weeks to remove a company from being listed on SAM. Considering the highly public natures of listings on SAM, failure to promptly remove a company can result in the loss of millions of dollars in revenue from public and private procurements. SAM clearly needs resources and proactive management of suspension and debarment information.

Conclusion

Again, it is an honor to be invited to testify here today. There is little question that some minor changes to the suspension and debarment system could add significantly to the consistency among agencies and transparency. While the consolidation of civilian agency SDO functions could serve that same purpose, I believe it could also be achieved through changes to the current FAR and non-procurement rules (including the consolidation of these two sets of rules) and significant training of the agencies with less experience using this powerful authority.

This concludes my prepared remarks. I am happy to answer any questions you may have.

Mr. MICA. Thank you. We will hold questions.

We will now turn to our next and last witness, Scott Amey. He is General Counsel, Project on Government Oversight. Welcome and you are recognized.

STATEMENT OF SCOTT AMEY

Mr. AMEY. Thank you, Congressman Mica, Ranking Member Cummings and members of the committee.

Thank you for inviting me to testify today about the state of the Federal Government's suspension and debarment system, from exposing outrageously priced spare parts to initiating the creation of the FAPIIS system, which was born out of this committee, POGO has promoted a good government agenda. Today's hearing, and improved attempts to prevent the government from doing business with risky contractors, contractors with criminal, civil and administrative misconduct records or poor performance histories, is essential to improving Federal and grant spending that now exceeds $1 trillion annually.

Everyone agrees that the Federal Government should not do business with companies that have defrauded the government or violated laws or regulations or performed poorly on contracts or had their contracts terminated for default or cause. But in reality, the government is awarding contracts and grants to such companies. The government has a two-tier system to protect the public, pre-award responsibility determinations and suspension and debarment. I discuss both in my written testimony, but I will focus today on the failures of the suspension and debarment system.

The suspension and debarment system is a vital tool in protecting agencies, government missions and programs and taxpayers. Despite a complex framework outlined in the Federal Acquisition Regulations, and comprehensive programs within certain agencies, we are still finding flaws in the system. Excluded activities are still receiving new contracts or grants. Companies can be viewed presently responsible by just firing a few employees or promising to enhance training or compliance measures.

Many agencies are not effectively using the suspension and debarment tools at their disposal, with NRC, Social Security, Commerce, HHS and Labor having 10 or fewer suspensions or debarments in recent years. Inconsistences are the norm. And we often hear about government reports and audits and media stories alleging criminal activity or poor performance one day, and a new multi-million dollar contract or grant awarded to the same entity within days.

Additionally, the length of suspension can range from anywhere from a few days to years. Referrals of the suspension and debarment actions can be slow. I am still confused at how BP was considered responsible for years after the Gulf oil spill disaster, but was only suspended two weeks after it pleaded guilty to numerous criminal counts. BPs suspension has lasted over six months. It will be interesting to see how much longer it will last, and if it will be waived or lifted prior to a new solicitation for oil or petroleum products or services.

This is the perception, that the larger contractors are too big to suspend or debar. Since 2000, POGO estimates that there have

been approximately 82,000 suspension or debarment actions levied against companies and individuals. But the number of large contractors that have been sanctioned under the system can be counted on two hands.

As far as the Suspend Act, earlier this year, Chairman Issa released a discussion draft of a bill entitled the Stop Unworthy Spending, or the Suspend Act. I applaud the chairman's handling of this draft bill and the outside the box thinking that was put into it.

We have heard for years that the suspension and debarment system is fine. But yet nearly every government report reports that there are flaws in the system. Past efforts to reform the system have been cause for mandatory suspension or debarment for certain procurement or tax-related offenses. Those efforts were shortsighted and unrealistic. SDOs need flexibility to review a contractor's present level of responsibility and mandate suspension or debarment only when necessary and not to just punish a contractor.

I agree with the chairman and the draft language in the bill that the consolidation of the suspension and debarment offices and resources will improve consistency and be a better use of the limited resources that are appropriated for suspension and debarment activities. The bill also attempts to expedite review, which is crucial. Section 5 looks to coordinate agency actions.

For years, POGO has been concerned with the lack of coordination between IGs and others within the acquisition and oversight world. POGO provides the following recommendations that should be considered as the Suspend Act is being finalized.

Mandate that IGs or other investigative units make referrals to SDOs after opening an investigation and making findings that reasonably support a basis for suspension or debarment. SDO shouldn't have to wait until the Justice Department has closed a file to make a responsibility determination.

Require SDOs to make suspension or debarment determinations within a set period of time after receiving a government referral. The determination should include a description of the referral, the SDOs justification for suspending or debarring the entity or not taking action, and any description that is concluded in a settlement or agreement.

A record should be publicly available so that SDOs are held accountable to the public. Enhance annual reporting to Congress of the spending and suspension debarment workforce, the total number of referrals, declinations, fact-based suspensions or debarments, administrative actions, anything that comes from those offices clarifies that suspension and debarment activities are inherently governmental functions that must be performed by government employees.

Release past performance data. In the past, past performance data is currently released by GAO and Federal courts in bid protest decisions and the proactive release of such information would benefit government officials, competitors and the public.

Thank you for inviting me to testify. I look forward to working with the committee to further explore how we can strengthen the suspension and debarment process.

[Prepared statement of Mr. Amey follows:]

POGO PROJECT ON GOVERNMENT OVERSIGHT
Exposing Corruption. Exploring Solutions.

Testimony of Scott Amey, General Counsel
Project On Government Oversight (POGO)
before the
House Committee on Oversight and Government Reform

"Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?"

June 12, 2013

Good morning Chairman Issa, Ranking Member Cummings, and Members of the Committee.

Thank you for inviting me to testify today about the state of the federal government's suspension and debarment system. I am Scott Amey, General Counsel with the Project On Government Oversight (POGO), a nonpartisan public interest group. Founded in 1981, POGO investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government.[1] I am pleased to testify before you on the issue of contractor responsibility, specifically the status of the suspension and debarment system.

Throughout its thirty-two-year history, POGO has created a niche in investigating, exposing, and helping to remedy waste, fraud, and abuse in government spending. Since the 1990s, there have been several major shifts in federal procurement, including increased contract spending,[2] a stretched acquisition workforce,[3] spending on services outpacing spending on goods,[4] and a host of acquisition reforms[5] implemented to make spending easier. The result is that the government is sometimes doing business with risky contractors—contractors with criminal, civil, and administrative misconduct records or poor performance histories.

Recently, we have seen contracts awarded to companies that have defrauded the government or violated laws or regulations, performed poorly on contracts, or had their contracts terminated for default or cause. Continuing to award contracts to such contractors undermines the public's

[1] For more information on POGO, please visit www.pogo.org.
[2] According to USASpending.gov, $517 billion was spent on federal contracts in FY 2012 up from $206 billion in FY 2000. http://www.usaspending.gov/explore (Downloaded June 7, 2013)
[3] Office of Management and Budget, Office of Federal Procurement Policy, *Acquisition Workforce Development Strategic Plan: Fiscal Years 2010-2014*, October 2009, p. 1. http://www.whitehouse.gov/omb/assets/procurement_workforce/AWF_Plan_10272009.pdf (Downloaded June 7, 2013)
[4] In FY 2012, contracts for services totaled $307 billion and contracts for goods totaled $210 billion. USASpending.gov
[5] The Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355), the Federal Acquisition Reform Act of 1996 (FARA) (Public Law 104-106), and the Services Acquisition Reform Act of 2003 (SARA) (Public Law 108-136).

confidence in the fair-play process and exacerbates distrust in our government. It also results in bad deals for the government and hinders mission accomplishment.

Even Stan Soloway, the president of contractor industry association the Professional Services Council, has stated that responsibility is an important factor when making contracting decisions. In an April 2007 column in *Washington Technology*, Mr. Soloway wrote: "After all, no one advocates the award of government contracts to proven crooks," and that "[n]o one wants to see his or her tax dollars go to companies or individuals that routinely and blithely violate the law."[6] He argues, however, that there are due process concerns and other questions that place contractors at a disadvantage.

The government has two systems that allow it to vet contractors and protect the public: 1) pre-award responsibility determinations and 2) suspension and debarment. I will discuss both, but my focus will be on the failures of the suspension and debarment system.

Pre-Award Responsibility Determinations

Vetting contractors prior to a contract award to determine whether they are truly responsible is required by law.[7] One of POGO's proudest achievements was convincing the government that contractor responsibility information was inadequate, and that genuine responsibility determinations were not being made as required by the Federal Acquisition Regulation (FAR). FAR Subpart 9.103 states, in part:

> (a) Purchases shall be made from, and contracts shall be awarded to, **responsible prospective contractors only**.
>
> (b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.[8] (Emphasis added)

According to FAR Subpart 9.104-1, agencies must ensure that contractors:

> (c) **Have a satisfactory performance record** (see 9.104-3(b) and Subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;
>
> (d) **Have a satisfactory record of integrity and business ethics** (for example, see Subpart 42.15).[9] (Emphasis added)

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[6] Stan Soloway, "The debate on contractor responsibility flares anew," *Washington Technology*, April 9, 2007. http://www.washingtontechnology.com/print/25_05/30430-1.html (Downloaded June 7, 2013)
[7] FAR Subpart 9.105-1. https://acquisition.gov/far/current/html/Subpart%209_1.html#wp1084058
[8] FAR Subpart 9.103.
[9] FAR Subpart 9.104-1.

Despite those requirements, POGO is concerned that pre-award contractor responsibility determinations have fallen by the wayside. Federal agencies seem more concerned with awarding contracts quickly than with ensuring the government gets the best goods or services at the best practicable price from responsible contractors.

In an effort to place a spotlight on contractor accountability issues, POGO created a Federal Contractor Misconduct Database (FCMD) in 2002.[10] The database includes information on nearly 1,300 criminal, civil, and administrative instances of misconduct for over 170 of the federal government's largest contractors. The instances cited in the FCMD have resulted in $59.4 billion in fines, penalties, settlements, and restitution paid since 1995. Although the government is recovering federal funds through prosecutions and enforcement actions, more can be done to ensure contract dollars are not awarded to risky contractors prior to a contract award.

POGO's FCMD served as the model for the government's Federal Awardee Performance and Integrity Information System (FAPIIS).[11] FAPIIS was created to provide the government with a tool to make *genuine* responsibility determinations. Despite its shortcomings and the difficulties encountered in getting it operational, POGO is pleased that FAPIIS became publicly available in April 2011.[12] Two years later, it appears that the FAPIIS data is providing the contracting officers what they need to make well-reasoned responsibility determinations and contract awards.

Despite government efforts to provide government employees with information about entities seeking federal contracts and grants, some excluded contractors and grantees still receive new federal awards. In October 2011, the Department of Defense (DoD) created a stir when it released its *Report to Congress on Contracting Fraud*,[13] which examined the extent to which the Pentagon awarded contracts to companies that defrauded the government. The report found that over a ten-year period more than 300 DoD contractors had "entered into settlement agreements or had civil judgments rendered against them" and 54 DoD contractors were criminally charged with fraud.[14]

In 2009, the Government Accountability Office (GAO) highlighted 25 instances in which companies and individuals suspended or debarred for committing "egregious offenses" were

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[10] Project On Government Oversight, "Federal Contractor Misconduct Database." http://www.contractormisconduct.org; Project On Government Oversight, "Federal Government's Largest Contractors Have Paid Billions in Fines, Penalties," March 13, 2013. http://www.pogo.org/about/press-room/releases/2013/20130313-federal-governments-largest-contractors.html

[11] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. Law 110-417, Sec. 872), October 14, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf

[12] President Obama signed into law the Supplemental Appropriations Act of 2010, which contained a provision sponsored by Senator Bernie Sanders (D-VT) that requires the GSA to post all FAPIIS information, except past performance reviews, on a publicly available website. http://www.gpo.gov/fdsys/pkg/FR-2011-01-24/pdf/2011-1323.pdf (Downloaded February 22, 2011)

[13] Department of Defense, Under Secretary of Defense for Acquisition, Technology and Logistics, *Report to Congress on Contracting Fraud*, October 2011. http://www.sanders.senate.gov/imo/media/doc/102011%20-%20DOD%20Fraud%20Report.pdf (Downloaded June 7, 2013) (Hereinafter *Report to Congress on Contracting Fraud*)

[14] *Report to Congress on Contracting Fraud*, p. 3.

awarded new contracts.[15] Contracting officials either failed to check the Excluded Parties List System (EPLS) database before awarding the contract, or, if they did check it, the clunky EPLS search engine failed to turn up the name of the suspended or debarred entity.[16] Additionally, some contractors learned that they could game the system by creating a new entity. Either way, contracts were being awarded to entities that were in timeout.

Suspension and Debarment

The federal government can suspend or debar a contractor or grantee.[17] Contractors that are determined to be nonresponsible can be suspended from receiving new contracts or grants for up to eighteen months (unless legal proceedings have been initiated within that period).[18] Debarment can last up to three years.[19] Suspension and debarment prevents a contractor from receiving new contracts, but allows them to continue working on existing contracts.[20] Suspension or debarment is "imposed only in the public interest for the Government's protection and not for purposes of punishment."[21]

Unfortunately, the suspension and debarment system is riddled with problems. First, it is inconsistently applied from agency to agency, and contracts and grants are awarded to suspended or debarred entities. As discussed earlier, despite being on the exclusions list, some suspended or debarred entities still receive federal dollars.

Another concern is whether the definition of responsible in the Federal Acquisition Regulation (FAR) allows the government to take action against an entity.[22] At the first sign of action by the Department of Justice (DOJ) or an agency, contractors (at least those that are not small businesses) fire a few employees, beef up training and compliance measures, and make all kinds of promises to the government in order to avoid the possibility of losing future contract awards. But is that system working in the interest of the government and taxpayers?

In 2011, reports by the Government Accountability Office (GAO)[23] and the Department of Defense Inspector General (DoD IG)[24] made it clear that many agencies are not effectively using

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[15] Government Accountability Office, *Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds* (GAO-09-174), February 2009, pp. 3, 8, 9, 28. http://www.gao.gov/new.items/d09174.pdf (Downloaded February 22, 2011)

[16] The EPLS was integrated into the General Services Administration's "System for Award Management" (SAM). https://www.sam.gov/portal/public/SAM

[17] FAR Subpart 9.4. https://acquisition.gov/far/current/html/Subpart%209_4.html

[18] FAR Subparts 9.407-4.

[19] FAR Subparts 9.406-4.

[20] FAR Subpart 9.405-1.

[21] FAR Subpart 9.402(b).

[22] FAR Subpart 9.1.

[23] Government Accountability Office, *Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved* (GAO-11-739), August 2011. http://www.gao.gov/assets/590/585277.pdf (Downloaded June 7, 2013) (Hereinafter *Suspension and Debarment: Some Agency Programs Need Greater Attention*)

[24] Department of Defense Inspector General, *Additional Actions Can Further Improve the DoD Suspension and Debarment Process* (D-2011-083), July 14, 2011. http://www.dodig.mil/audit/reports/fy11/11-083.pdf (Downloaded June 7, 2013) (Hereinafter *Additional Actions Can Further Improve the DoD Suspension and Debarment Process*)

the suspension and debarment tools at their disposal. According to the GAO, the most successful agencies—i.e. those with the most suspensions and debarments—share three characteristics: a "dedicated suspension and debarment program with full-time staff, detailed policies and procedures, and practices that encourage an active referral process."[25] Similarly, the DoD IG found that the Defense Logistics Agency (DLA) suspended and debarred poorly performing contractors far more frequently than the Army, Navy, and Air Force because DLA contracting personnel were more involved in and more familiar with the suspension and debarment process than their counterparts in the Services.[26]

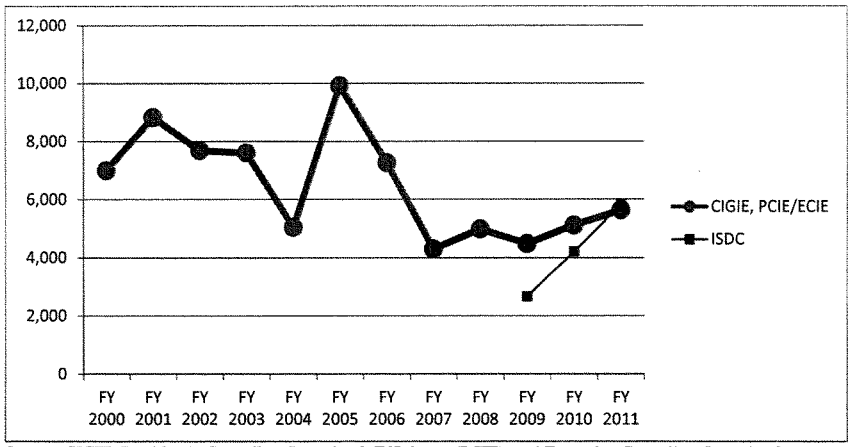
In September 2012, the Interagency Suspension and Debarment Committee (ISDC) issued its most recent accounting of agencies' suspension and debarment actions, as well as an assessment of the progress the agencies were making in strengthening their suspension and debarment programs.[27] Of the 24 agencies it examined, the ISDC found that all were implementing stronger policies, including formally establishing suspension and debarment programs, increasing personnel resources for existing programs, creating new internal monitoring mechanisms, simplifying referral processes, and implementing new automatic referral policies.[28] As a result, the ISDC found that the total number of suspensions, proposed debarments, and debarments in fiscal year 2011 increased 39 percent over the previous fiscal year and 119 percent over FY 2009.[29]

Although the ISDC's limited data shows an uptick in the use of the suspension and debarment system, the Council of the Inspectors General on Integrity and Efficiency (CIGIE) found that suspensions and debarments are on the rise but are far lower than they were at the peak in the early and mid-2000s.

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[25] *Suspension and Debarment: Some Agency Programs Need Greater Attention*, pp. 11-17.
[26] *Additional Actions Can Further Improve the DoD Suspension and Debarment Process*, pp. 14-17.
[27] Interagency Suspension and Debarment Committee, *Fiscal Year 2011 Report to Congress on Federal Agency Suspension and Debarment Activities*, September 18, 2012.
http://www.federalnewsradio.com/pdfs/2012_suspension_debarment_report.pdf (Downloaded June 7, 2013) (Hereinafter ISDC FY 2011 Report)
[28] ISDC FY 2011 Report, p. 2 (letter).
[29] ISDC FY 2011 Report, p. 8; Interagency Suspension and Debarment Committee, *Fiscal Years 2009 and 2010 Report to Congress on Federal Agency Suspension and Debarment Activities*, June 15, 2011, p. 4.
http://www.whitehouse.gov/sites/default/files/omb/procurement/reports/isdc-report-to-congress-61411.pdf (Downloaded June 10, 2013) (Hereinafter ISDC FY 2009-2010 Report)

Suspension and Debarment Actions Since FY 2000



Source: CIGIE, President's Council on Integrity & Efficiency (PCIE), and Executive Council on Integrity & Efficiency (ECIE), *Annual Progress Report to the President*, Fiscal Years 2000-2011; *Report by the Interagency Suspension and Debarment Committee on Federal Agency Suspension and Debarment Activities*, Fiscal Years 2009-2011.

Despite the recent increase in suspension and debarment actions, there are some agencies that still are not utilizing the suspension or debarment tool. I would like to think that those agencies have top-notch contractors that are not involved in illegal or questionable activities, but history proves otherwise. The Nuclear Regulatory Commission (NRC) and Social Security Administration (SSA) have zero suspensions, proposed debarments, debarments, and administrative agreements, and Commerce, Health and Human Services, and Labor have 10 or fewer such actions in FY 2011.[30] Although high totals are not indicative of a better suspension and debarment system, the infrequent use by some agencies and errors by others suggest that the government was not using the system to its fullest extent.

Additionally, according to the DOJ Inspector General (DOJ IG), from FY 2005 to 2010, the DOJ awarded 77 contracts to suspended or debarred parties, only made 17 referrals for suspension and debarment, and did not have a formal system to track the status of suspension and debarment referrals.[31] The DOJ IG noted that there were "deficiencies in DOJ's suspension and debarment process and ... officials are not uniformly checking the EPLS immediately prior to making awards."[32]

[30] ISDC FY 2011 Report, p. 22, Appendix 3.
[31] Department of Justice, Office of the Inspector General, Audit Division, *Audit of Administrative Suspension, Debarment, and Other Internal Remedies Within the Department of Justice* (Audit Report 12-01), October 2011, p. iii. http://www.justice.gov/oig/reports/2011/a1201.pdf (Downloaded June 10, 2013) (Hereinafter *Audit of Administrative Suspension, Debarment*)
[32] *Audit of Administrative Suspension, Debarment*, pp. iii.

The overall decrease in suspensions and debarments since FY 2000 has raised many questions about contractor in-house ethics and compliance programs, government referrals and enforcement, and whether contractors are too big to suspend or debar. Unfortunately, unlike the previous report that covered FY 2009 and 2010,[33] the ISDC's latest report did not include the number of each agency's suspension and debarment referrals and declinations. We are perplexed as to why the ISDC omitted this information, which provides valuable insight into the productivity and rigorousness of a particular agency's suspension and debarment program, and we hope that the ISDC considers including this information in future reports.

But even when referrals are made to a Suspension and Debarment Official (SDO), that doesn't mean the SDO acts on them. The Special Inspector General for Afghanistan Reconstruction (SIGAR) has issued government-wide warnings about individuals and entities that allegedly supported the insurgency in Afghanistan[34] and made referrals to Pentagon SDOs, but they haven't had much of an impact. In December 2012, a bi-partisan group of Senators sent an urgent letter to the Army warning that, due to a backlog of SIGAR suspension and debarment referrals before the Army SDO (60 as of November), companies and individuals suspected of actively supporting terrorism in Afghanistan are still receiving taxpayer money.[35] According to the Senate letter, the DoD set a goal of completing suspension and debarment referrals from Inspectors General within 30 days, but according to SIGAR's October 2012 quarterly report, it takes federal agencies an average of more than 10 times that long (323 days) to act on its referrals.[36] In January 2013, Army Secretary John McHugh responded to the Senate.[37] Secretary McHugh blamed the backlog on SIGAR, claiming it has not provided enough evidence to support debarment.[38] He cited FAR Subpart 9.406, which requires "a preponderance" of evidence in order to debar. What Secretary McHugh's letter does not explain, however, is whether SIGAR's referrals provided enough evidence to support suspension, for which the FAR imposes a much lower burden of proof ("adequate evidence"[39]).

Outsourcing government functions to the private sector and the changes in contracting laws have made adequately safeguarding taxpayers' interests an incredibly daunting challenge. Since 2000, POGO approximates that there have been 82,000 suspension and debarment actions levied against companies and individuals, but the number of large contractors that have been sanctioned under the system can be counted on two hands. The government's reliance on large contractors is often difficult to overcome, and therefore large contractors are in a powerful position to avoid suspension or debarment actions.

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[33] ISDC FY 2009-2010 Report, p. 5.
[34] Special Inspector General for Afghanistan Reconstruction, *Immediate Action needed to Prevent Individuals and Entities Actively Supporting the Insurgency in Afghanistan from Obtaining Contracts, Grants, or Cooperative Agreements*, October 17, 2012, p. 4. http://www.sigar.mil/pdf/investigations/2012-10-17-alert-12-3-ndda841.pdf (Downloaded June 10, 2013)
[35] Senator Jeanne Shaheen, "Bipartisan Group of Senators Call on Army to Address Concern over Contractors with Links to Terrorist Groups," December 6, 2012. http://www.shaheen.senate.gov/news/press/release/?id=beebf6cb-ce3b-4449-a3fb-b94d6c20043d (Downloaded June 10, 2013)
[36] Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress*, October 30, 2012, p. 50. http://www.sigar.mil/pdf/quarterlyreports/2012-10-30qr.pdf (Downloaded June 10, 2013)
[37] Army Secretary John M. McHugh, Letter to Senator Jeanne Shaheen, January 15, 2013. http://www.pogoarchives.org/m/co/sigar-army-response-20130131.pdf (Hereinafter McHugh Letter)
[38] McHugh Letter, pp. 1-2.
[39] FAR Subparts 9.407-2.

The need for competition can also prevent actions from being taken against large contractors—if one contractor is suspended or debarred, competition is seriously diminished or nonexistent.

Even when suspension or debarment is used against large contractors, we have seen numerous cases in which the government still fails to provide true accountability. For example, the Air Force issued a waiver (also known as a compelling reason determination)[40] in order to continue doing business with Boeing in 2005 after it was revealed that Boeing unlawfully possessed and used a competitor's proprietary documents in connection with the competition for the Air Force Evolved Expendable Launch Vehicle (EELV) contract.[41]

The inconsistent length of the suspension has been another area of concern. Suspensions have lasted a mere few days or weeks in the cases of General Electric,[42] IBM, and GTSI, a few months in the cases of Agility, Booz Allen, and L-3, or more than a year in the case of Boeing.[43] MCI/WorldCom's suspension was lifted only three days before the expiration of the government's long-distance telephone contract with the company.[44] When POGO asked about the reasons for these questionable decisions, government officials told us that such actions were necessary in order to promote competition.

The massive 2010 oil spill in the Gulf of Mexico led to discussions about whether to debar British oil giant BP. Even before the Gulf disaster, BP was on thin ice with Environmental Protection Agency (EPA) suspension and debarment officials due to safety and environmental compliance problems at its drilling and production facilities.[45] But BP is also a main supplier of fuel to U.S. military operations in the Middle East, and when the EPA considered debarring BP in 2009, pressure from DoD caused the EPA to back off.[46] Based on that dilemma and the then-ongoing investigation and prosecution by the Justice Department, the EPA SDO waited two weeks after BP pleaded guilty to 14 criminal counts and agreed to pay more than $4.5 billion in penalties before taking action to protect taxpayers.[47] It is interesting that the company was considered responsible prior to its suspension, which finally was handed down more than 30 months after the oil disaster. BP's suspension has lasted over six months and it will be interesting

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[40] FAR Subpart 9.405(d)(2).
[41] Renae Merle, "Boeing Cleared To Bid on Launches," *Washington Post*, March 5, 2005, p. E1. http://www.washingtonpost.com/wp-dyn/articles/A8571-2005Mar4.html (Downloaded June 10, 2013)
[42] *LA Times*, "Pentagon Lifts GE Suspension," June 06, 1992. http://articles.latimes.com/1992-06-06/business/fi-630_1_ge-marketing (Downloaded June 10, 2013)
[43] Project On Government Oversight, "Federal Contractor Misconduct Database." http://www.contractormisconduct.org/index.cfm/1,73,224,html?pnContractorID=0&pstDispositionTypeID=1&prtCourtTypeID=0&mcType=0&eaType=0&ContractType=0&dollarAmt=-1%2F-1&dateFrom=01%2F01%2F1995&dateTo=06%2F09%2F2013&submit=sort
[44] Project On Government Oversight, "GSA's Deal with WorldCom: Bad Business for Taxpayers," January 8, 2004. http://pogoarchive.pub30.convio.net/pogo-files/alerts/contract-oversight/co-fcm-20040108.html
[45] For more information visit BP's page in POGO's Federal Contractor Misconduct Database. http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=61&ranking=48
[46] Kim Chipman, "EPA May Prohibit BP From Getting Government Contracts After Gulf Oil Spill," *Bloomberg News*, May 21, 2010. http://www.bloomberg.com/news/2010-05-21/epa-may-prohibit-bp-from-getting-government-contracts-after-gulf-oil-spill.html (Downloaded February 22, 2011)
[47] Project On Government Oversight, *EPA Sends a Message With BP Suspension*, November 28, 2012. http://www.pogo.org/blog/2012/11/20121128-epa-sends-message-with-bp-suspension.html

to see how much longer it will last and if it will be waived or lifted prior to a new solicitation for oil or petroleum products or services.

Additionally, large contractors have the financial means, plus high-priced attorneys that enable them negotiate an alternative to suspension or debarment. The possibility of delays, litigation, and reductions in competition can mean the difference between the maximum penalty and a lesser sanction that allows the company to keep doing business with the federal government. As a result, large contractors have an unfair advantage over smaller contractors when it comes to avoiding suspension and debarment.

Based on the subjective nature of the suspension and debarment system as well as questionable referrals and use of it, today's hearing is vital to examining whether improvements should be made.

SUSPEND Act

Early this year, Chairman of the House Oversight and Government Reform Committee Darrell Issa (R-Calif.), released a discussion draft of a bill entitled the "Stop Unworthy Spending (SUSPEND) Act."[48] The bill would end individual civilian agencies' suspension and debarment programs and vest these functions in a centralized body called the Board of Civilian Suspension and Debarment. As of October 1, 2014, the Board would consolidate more than 41 civilian suspension and debarment offices. Chairman Issa expects that the SUSPEND Act will require less staffing and administrative resources than all of the current individual suspension and debarment programs, and provide much-needed transparency, consistency, and expedited review.[49]

So far, reaction to the draft bill has been mixed,[50] but POGO supports many of the draft proposals. Consolidation of suspension and debarment offices will ensure adequate staffing and resources and provide consistency, which should ensure that all contractors and grantees are presently responsible.

Consistency is needed because we often hear about government reports and audits or media stories alleging criminal activity or poor performance one day and new multi-million-dollar contracts or grants awarded to the same entity within days. Unfortunately, the reaction in the past has been for Congress to draft legislation that mandates suspension or debarment for certain offenses. That reaction is short-sighted and is not a realistic solution that benefits the federal government or taxpayers. SDOs need flexibility to review a contractor's present level of responsibility and mandated suspensions or debarments only act to punish those involved.

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[48] "Stop Unworthy Spending (SUSPEND) Act." http://oversight.house.gov/wp-content/uploads/2013/02/Draft_SUSPEND_Act_2-5.pdf (Downloaded June 10, 2013)

[49] House Committee on Oversight and Government Reform, "Issa: Stop Giving Taxpayer Dollars to Tax Cheats, Criminals, and Fraudsters," February 7, 2013. http://oversight.house.gov/release/issa-stop-giving-taxpayer-dollars-to-tax-cheats-criminals-and-fraudsters/

[50] Matthew Weigelt, "Proposal would take suspension, debarment powers from agencies," *Federal Computer Week*, February 8, 2013. http://fcw.com/articles/2013/02/08/debar-suspend-bill.aspx (Downloaded June 10, 2013)

Recommendations

POGO provides the following recommendations that should be considered as the SUSPEND Act is being finalized:

1. Mandate that IGs or other investigative units make referrals to SDOs after opening an investigation and making findings that reasonably support a basis for suspension or debarment. SDOs shouldn't wait until the Justice Department has closed a file to make a responsibility determination.

2. Require SDOs to make a suspension or debarment determination within a set period of time after receiving a government referral. The determination should include a description of the referral, the SDO's justification for suspending or debarring the entity (or taking no action), and a description of any concluded agreement or settlement. These records should be publicly available so that SDOs are held accountable to the public.

3. Enhance annual reporting to Congress to include summaries of spending and the suspension and debarment workforce; the total number of referrals, initiated fact-based cases, and administrative actions; and details about all referrals. The ISDC should provide consistent disclosures to Congress so that improvements can be made to the suspension and debarment system.

4. Suspension and debarment decisions and waivers/compelling reason determinations should be made publicly available. They are vital for contractor accountability and transparency because they explain why and how often the government does business with contractors and grantees, especially those considered risky, non-responsible entities. With over $1 trillion of taxpayer money spent every year on federal contracts and grants, we should have insight into the suspension and debarment system and, when waivers are granted, access to all the facts to ensure they were carefully considered and that the waiver was used only when necessary.

5. Classify suspension and debarment activities as inherently governmental functions (as governed by FAR Subpart 7.5) that must be performed by civil servants rather than contractors. Suspension and debarment functions require an analysis of Inspector General referrals, fact-based allegations, and contractor data and records that are highly sensitive and include proprietary matters. Such data should remain in the hands of public servants.

6. Always release past performance data. Past performance data is currently released by the GAO and federal courts in bid protest decisions. The proactive release of such information would benefit government officials, competitors, and the public—potentially reducing the number of bid protests that are filed each year.

We would do well to heed the warning of former Senator Russell Feingold (D-WI), who used the term "agency capture" to describe the government's growing subservience to the companies it does business with or regulates:

> An agency should never be in a position where it is so dependent on a contractor to perform certain functions that it cannot take appropriate actions to suspend or debar that contractor… I do not believe we should let corporations become 'too big to fail,' and I think the same should be true for our contractors. If they can't be trusted to run their businesses with integrity and to use U.S. taxpayer dollars honestly, then they should not be eligible to receive new contracts. We need to hold government contractors to a high standard.[51]

Thank you for inviting me to testify today. I look forward to working with the Committee to further explore how we can strengthen the suspension and debarment system.

[51] Statement of the Honorable Russell D. Feingold, Senate Judiciary Subcommittee on Administrative Oversight and the Courts on *Protecting the Public Interest: Understanding the Threat of Agency Capture*, August 3, 2010. http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da161a459&wit_id=e655f9e2809e5476862f735da161a459-0-1 (Downloaded February 22, 2011)

Mr. MICA. Thank you. We will start a quick round of questioning.

Mr. Neumann, this looks like we are spending about a trillion dollars a year, it looks like, of government money on contracts and also grants. Is it as bad in grants as it is in contracts as far as not compliance with getting rid of the bad players? About half a trillion of each, isn't it? And is it as bad in contracts as in grants? Did you look at both?

Mr. NEUMANN. In 2011, we did look at the total number of exclusions for both grants and contracts. But our work focused on agency actions taken under the Federal Acquisition Regulation for contracts. The same practices apply for non-procurement.

Mr. MICA. So you really didn't look at that aspect as one, just in general, you looked at the failure to comply with getting the bad actors out of the process?

Mr. NEUMANN. Certainly we looked at the agency suspension and debarment programs.

Mr. MICA. Let me ask you this.This is another one of these groundhog attempts by government where we keep going back and back and trying to clean this up and nothing is done. There have been attempts in the past, mechanisms put in place to try to make again the bad actors be identified and excluded. Is it your belief that only legislation now can remedy this? GSA had some ability to do this. OMB had some ability to take steps.

Mr. NEUMANN. I think based on our work there are a number of improvements that agencies can take.

Mr. MICA. Do we need a law with teeth in it to make certain that these things get done?

Mr. NEUMANN. We certainly need agency action.

Mr. MICA. Well, okay, they already have the ability for the agency to act, for agencies to act. It appears, and you were with OMB, Ms. Styles, OMB directed agencies to appoint senior officials responsible to the agency's suspension and debarment program. Has that taken place in all the agencies? Are you aware, Ms. Styles or Mr. Neumann? Go ahead? Yes, no, maybe?

Ms. STYLES. I can tell you from the outside perspective, not consistently, no. And to the extent that they have been appointed, it is actually very difficult to figure out who they are in certain agencies.

Mr. MICA. Is that your observation too?

Mr. NEUMANN. Yes. That is our observation as well.

Mr. MICA. They have the ability and can administratively go after some of these things. Then we have some of these programs. How much money has GSA spent on either the SAM program or EPLS program? Do you know?

Mr. NEUMANN. We didn't look at that.

Mr. MICA. They are trying to merge these two. One was to set up a list of bad players, right. And that has not been effective. That is the crux of most of the testimony that we are here for.

Now, who is responsible for again moving forward? Is it GSA and OMB? And neither have done that, is that correct, Mr. Neumann?

Mr. NEUMANN. Both OMB and GSA have roles in decisions about that.

Mr. MICA. But obviously people aren't reporting, contracts are being given and hundreds of millions of dollars to bad players, is that correct?

Mr. NEUMANN. We do know that there have been some mistakes made in the past where contractors that were debarred were given contracts.

Mr. MICA. Who is the worst? Mr. Cummings mentioned FEMA, you have HHS and Commerce, lack effective programs. Who is the worst?

Mr. NEUMANN. What we found was that there were six agencies at that time that had taken few or no suspension or debarment actions and didn't even have policies or procedures in place or dedicated staff.

Mr. MICA. In spite of, again, the requirement, administrative requirement to report, in spite of the requirement to set up a system to maintain a current list, the list hasn't been current, right? Or complete?

Mr. NEUMANN. The GSA has continued to experience problems with that. GAO has reported on that over the years. We understand they have taken steps to work with the agencies to improve that. But there are still reports of problems.

Mr. MICA. And you were at OMB, Ms. Styles. What are they doing at OMB? That is part of their, that is Office of Budget and Management, just ignoring again either the requirements to report or keeping a list that would be referred to and people disbarred or suspended being prohibited from getting these contracts or awards?

Ms. STYLES. At this point, they issued the 2011 memo, and they have policy responsibility for the EPLS, which is now in the system for award management, or SAM. The data is in SAM, it is just not as thorough and complete, and it is difficult to manage.

Mr. MICA. I have a question. You have looked at some of the legislation and commented on it. Does it have enough teeth to get the job done and make these agencies comply?

Mr. AMEY. There may be a few minor tweaks that need to be implemented. But for the most part, I think you are hitting on the problem. Unfortunately the suspension and debarment system has been around for many years, but it has been through executive order, it has been through some regulations, it has been through kind of a stovepipe mentality that the agencies are required.

You won't find anywhere in the U.S. Code other than a note in the financial chapter of the U.S. Code in Section 31 where there is a note on how the ISDC is even supposed to run. So I think that is part of the problem, we created a system but we didn't supply sufficient guidance on how that system should operate.

Mr. MICA. Well, again, every one of these hearings are absolutely stunning, of the unresponsiveness of agencies and simple things like keeping a list and then debarring or disallowing people who are bad players and ripped of the government.

Mr. Cummings?

Mr. CUMMINGS. Mr. Amey, the thing I am concerned about is ineffective and inefficient. Period. And I state it quite often, we in Congress have a lot of motion, commotion, emotion and no results. At the same time, the public, who pays us, depends upon us to carry out government in a responsible way, are shortchanged.

The question becomes when you look at, based on your research, do you get the impression that there are just some folks that just don't give a damn about whether somebody who is a bad actor continues to have opportunities over and over again? Is it that the policies are not in place?

And then I want you to comment on the chairman's bill, again, I want you to note if there are any deficiencies in it, again we want to know. It looks like a very good bill to me.

But you get tired of going down the same road over and over again and nothing, when I say nothing, nothing happens. And so what this says to the bad actors is that we could continue to do the stuff that we do and keep coming right back to the government and saying, keep me in business, not for a year or two, but for generations. So help me with this. Start with the Suspend Act. I think that is a good place to start.

Mr. AMEY. I think the Suspend Act has some great qualities to it. We would support it. There are a few minor tweaks. I think there is some room for Improvement in trying to get referrals in quicker. The biggest thing is the IGs or the oversight community conducts investigations and they may have met the burden to make a referral over to an SDO to have them start the suspension and debarment process.

Unfortunately, I hate to say it, but in reality the suspension and debarment process is being used as a punishment in its current state, because so many times we have to wait for the Justice Department to close its file and get a conviction or some kind of civil action against the company before an SDO takes action. I don't think we should be doing that. We need to protect the taxpayer.

They are two separate systems. One is accountability and to hold them criminally or civilly accountable. But the other is to protect the American taxpayer. The BP example is the best that I can think of, where I don't know why two weeks after they finally pleaded guilty that they were considered non-responsible. I am sure the EPA was looking at them and I know there were some issues with lead agency discussions. Obviously BP is a major supplier of oil and petroleum products and services to the Federal Government. So at that point, the military, the last thing they need, especially from a competition standpoint, is to be down a vendor.

However, it just boggles my mind that we had to wait nearly 30 months after the oil disaster before we could hold BP accountable and consider them non-responsible, which now they have been considered non-responsible for the last six months.

As far as the answer to your overall question, the FAR does provide a very complex system that should be followed. Do I think people want to provide bad companies with contracts or grants? No. Part of it is laziness, part of it may be they checked the excluded parties list or the SAM system a month ago and all the vendors checked out, but they didn't check the day that the award was given. So at that point, a contractor may have been suspended or debarred in that time frame.

Contractors know how to game the system. Until we end up with a system of unique identifiers and be able to track companies and their owners, we are going to have a problem. It is very difficult, the contractors know so, okay, we are suspended or debarred, but

we will open up a new entity under my wife's name, my uncle's name, my brother's name. So at that point, there is some gaming of the system. That is where you kind of have some of the flaws that GAO and some of the IGs and ISDC have pointed out through the years.

Mr. CUMMINGS. Mr. Neumann, what is the most common cause for debarment? In other words, maybe you can answer that, Ms. Styles, I don't know, what is the most common reason, one, two, three?

Mr. NEUMANN. We didn't do analysis on the reasons that were used.

Mr. CUMMINGS. Why don't you tell me a few? You know some of them, right? That is your job.

Mr. NEUMANN. Certainly contract fraud, bribery, theft, tax evasion, any other contractor misconduct, or even poor performance, are all reasons for suspending or debarring contractors in cases that we have looked at.

Mr. CUMMINGS. So somebody can be debarred for poor performance?

Mr. NEUMANN. Yes, they can.

Mr. CUMMINGS. How is that measured, Ms. Styles? In other words, what is poor performance in one person's mind may not be poor performance in another. We have a lot of situations where we see contractors come in, and this is to me, it bothers me tremendously, we saw it in the Coast Guard, I was chairman of the Coast Guard subcommittee, they will come, they will do a bid for one price, and I know they do change orders. Not change orders, but changes need to be made. But some of them were just ridiculous. Almost a third more for the cost of a ship or whatever. You begin to wonder about some of those things.

Is that the kind of stuff, talk to me, Mr. Amey.

Mr. AMEY. I don't' think that is enough to get you suspended or debarred. It is a possibility, especially if that type of information is captured in the FAPIIS system, then at that point at least it raises red flags for contracting officers. You have a frontloaded part of the system and you have a backloaded part of the system.

So you are trying to get as much information to your contracting officers pre-award to make sure that we are only truly working with those who are responsible.

Mr. CUMMINGS. I see. Thank you very much.

Chairman ISSA. [Presiding] Thank you.

I am going to follow up on the ranking member. Ms. Styles, when we look at suspension versus debarment, in your experience, and I know Mr. Amey knows this from the outside, suspension is often used for a poor performer, because piling on additional contracts by definition only makes the matter worse. In other words, if you are growing into ineffectiveness, if you are growing in a way in which you can't handle the contracts you already have, suspension is more often looked at as, if you will, temporary versus permanent. Is that roughly what we should understand for the record?

Ms. STYLES. Absolutely. There are actually measures less than suspension. So there are show cause letters from agencies to understand why they would have a termination for default. I have seen them in instances where there is poor performance on one contract,

where the agency has had them come in to the suspension and debarment official and explain why the company should not be debarred permanently because of a poor performance issue. We are seeing it more and more.

So the agencies are becoming more active and following the information that actually is available on FAPIIS on termination for default specifically.

Chairman ISSA. Mr. Amey, you mentioned BP. I want to broach that for a moment, because in any legislation, we want to make sure that we get the best value for the American taxpayer. The failure of BP to oversee a drilling rig in the Gulf versus the delivery of finished product fuel, wouldn't you agree that one of the challenges, when you get into very large companies, is you can have perfect performance over here, no logical reason for suspension or debarment, and you can have, over here, an entity that should not get access to do what they were doing again at a minimum until they prove that that bad outcome has been prevented.

Would you say that bifurcating is inherently part of it? I am using them as a large, very separated entity. I could be using Lockheed Martin or Raytheon or any number of other entities who operate in very different areas. It is one of the areas of concern for procurement officers.

Mr. AMEY. Yes, and there are ways to get around that in the suspension and debarment system. Boeing was suspended, but it was only a unit of Boeing, so the whole company was not suspended. It was only, I think, their missile division unit and some certain individuals that headed up that department. So there are ways to kind of massage that issue, especially for the larger contractors.

But in the case of BP, BP had, in our Federal contractor misconduct data base, BP I think is either one or two in the number of instances of misconduct. They had numerous instances of other environmental violations, some procurement related and some nonprocurement related instances.

Chairman ISSA. Yes, and I am not picking on BP other than from a legislative standpoint. You were very kind to call it minor tweaks. But we are concerned that this kind of legislation happens once in a generation. So whatever we leave off or we do wrong, you and the oversight, if you will, the sunlight community and the GAO and our IGs are all going to be dealing with for generations if we miss something.

That was an area that I think the ranking member and I would share that we are not asking for input as much for big companies. I think when we look at Raytheon's space activities in some program versus their being a vendor to Boeing in others, those are so big it is pretty easy to go through them. We can have an exception at some level.

But it is really the person who is delivering office supplies that is a crook versus the person delivering office supplies that makes a mistake, and making sure that we divine the difference, so that we are not losing valuable vendors. I am very concerned that we are writing thinking about big companies. I want to make sure that it works for the smallest vendor too, both to catch them when they are wrong, but not over-punish them when it is in fact a benign occurrence.

Mr. AMEY. That is where the flexibility is needed in the system, whether it is within your board or within the individual suspension and debarment offices, to look at the facts before them, look at the record that they received from the other oversight agencies within the Federal Government, talk to the company to make sure that you have a fair, level playing field.

I think actually with the consolidation you may actually find you are going to get more of that. A few years ago I talked to a suspension and debarment official and he said, if I would have known that other agencies had entered administrative agreements with this same company, I wouldn't have been the fourth. So at that point, there wasn't a sharing of information that was helpful to realize what the full record and the track record of that company was.

Chairman ISSA. Mr. Neumann, the proposal Mr. Amey gave of, if IGs were able to make direct referrals and that they were immediately considered, at least for suspension, figuring 74 major IGs and, as we consolidate, the understanding, do you believe that that would be helpful to the process, to essentially empower IGs to make findings due to their audits?

Mr. NEUMANN. Yes, we do. You saw in our 2011 report that agencies with active programs often got referrals from the IG. So they are very important to the referral process.

Chairman ISSA. Ms. Styles, having been at OMB, there is an OMB think, which is, let us manage it, we can manage it. How much should we let to Office of Management and Budget and others, versus how much do we have to put strictly into legislation, in your opinion?

Ms. STYLES. Since the ISDC was created by executive order, it would probably be helpful for that to be in statute. I do think because OMB effectively manages the FAR Council and the non-procurement rules, which means the grant process as well, that they are the right place to make consistent government-wide changes that need to happen to the rules and processes and tools. That is the only place it can really happen from a consistent basis.

Chairman ISSA. Do you see any conflict in essentially second-guessing the grant process and exceptions to suspension and debarment? Do you see that it can be bifurcated at OMB sufficiently that you are not sort of encouraged to get the money out there, and at the same time encouraged to spend it well, and at the same time being pushed for bad actors?

Ms. STYLES. The management and budget processes over there have been bifurcated for a long time. So I think they run pretty well separately in terms understanding their roles and responsibilities there.

I do think that the procurement and the grant processes need to be put together, which I know is part of your legislation. It makes no sense whatsoever to have two different processes that are absolutely inconsistent for the same suspension and debarment process.

Chairman ISSA. My time is expired. I will comment, strictly for the record, that one of the challenges that I think we face is that when you define something as a grant more broadly, not just suspension and debarment, versus procurement, you often go from a system that does a really good job of saying, you have to justify the

winner to a beauty contest with grants. That is a separate problem for this committee to make sure that grants are as objective as possible, rather than subjective.

But that is another hearing. And I am told next we go to Ms. Kelly.

Ms. KELLY. Thank you, Mr. Chairman. Good morning.

Mr. Neumann, you have looked at a number of agencies with a variety of suspension and debarment programs. I would like to talk to you about what you have learned about best practices. Your 2011 report notes that agencies with the most suspensions and debarments have dedicated full-time staff. Should all agencies have full-time staff to manage their suspension and debarment programs?

Mr. NEUMANN. Not all the agencies necessarily have full-time staff, but they do have dedicated staff that are tasked with looking for and considering cases for suspension and debarment.

Ms. KELLY. So even though they are not full-time, that is the only thing they focus on, you are saying?

Mr. NEUMANN. They do have other duties, but they do spend a portion of their time doing that. The main agencies we looked at in 2011 did have full-time staff. But our characteristic that we thought was important to note was that they dedicated program and staff with full Management commitment.

Ms. KELLY. The report also mentioned that agencies with the most suspensions and debarments also had detailed policies or guidance involving the suspension and debarment process. What do you feel are the key policies that lead to an active S&D program?

Mr. NEUMANN. There are many different policies and guidance out there at each of the agencies that are unique to the agency. It allows people in the agency to understand who to refer cases of contractor misconduct or serious poor performance or faulty appropriate officials. So those policies and procedures went beyond what is in the FAR to actually implement it. So someone at EPA knows exactly who to refer the case to.

Ms. KELLY. Okay, thank you. You indicated that agencies with the most suspensions and debarments also have an active referral process. What are the elements of an active referral process?

Mr. NEUMANN. For example, in DOD, we looked at 2012, we looked a little more deeply at the four components at DOD, we found that they actively met with the IG community, they trained contracting officers and other officials that had access to contractor records to get referrals. And they coordinated with the Department of Justice.

Ms. KELLY. Okay. Lastly, your statement also mentions other efforts underway to improve coordination of suspension and debarment programs. Can you please elaborate on those?

Mr. NEUMANN. We were pleased to see that OMB had taken action to direct agencies to participate in the Interagency Suspension and Debarment Committee. That committee is only as effective as its member agencies' participation. So that is very important. I think that is one of the key things to having a system of suspension and debarment, is having that coordination between the agencies, so that they can coordinate on many things, including sharing

practices, deciding who should be a lead agency and bringing more transparency to the process of suspension and debarment.

Ms. KELLY. Thank you very much. I yield.

Mr. CUMMINGS. Would the gentlelady yield?

Ms. KELLY. Yes.

Mr. CUMMINGS. I was just talking to the chairman about the whole idea of, when you have the debarment and then you have suspension. I was just wondering, do you have a situation where you, folks are, say for example, it appears that somebody deserves debarment. And so those who are making the decision say to themselves, well, you know, we don't want to be so harsh. So they end up giving them the suspension. In other words, if it sounds like somebody should be debarred, do they have longer suspension? Do you follow me, Ms. Styles?

Ms. STYLES. Yes. So most agencies, DOD, GSA, have been dealing with this through show cause letters. So instead of suspending a company, because if you suspend the company it becomes public, their stock prices drop, and a lot of times suspension and debarment officials have only read an article in the paper, or they don't feel like they have enough facts in a particular situation.

So they have created their own process. They issue a show cause letter, which is not a suspension, and they ask the company to come in and tell them what is going on.

Mr. CUMMINGS. And this is all private, right?

Ms. STYLES. Yes, sir.

Mr. CUMMINGS. Okay. So then the company comes in and they talk about what the issue is and then they either let them go or what?

Ms. STYLES. They oftentimes have actual filings. So it depends, the process varies by agency. Some of them may require an actual filing with the agency, some of them allow you just to come in and discuss the issue, make a presentation in person. Some agencies have both.

At that point in time, the suspension and debarment official decides whether he wants to go ahead with an official suspension or proposed debarment process, or if he believes the company is presently responsible and usually he will give the company a letter stating that they are presently responsible.

Mr. CUMMINGS. Just one last thing. Talk about communications between agencies. Mr. Amey, you were talking about that. How much communication do we have between the agencies? Then I will finish.

Mr. AMEY. My experience is that it was very little until we got the FAPIIS data base. But even then, are we getting the right and the quantity of information that we need in there for the contracting officers as well as the suspension and debarment officials, to make the proper rulings.

Mr. CUMMINGS. Thank you, Mr. Chairman.

Chairman ISSA. Thank you.

We now go to the gentleman from Tennessee, Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman.

Mr. Amey, in every industry, the more it is regulated, the more it ends up in the hands of a few big giants, because the little guys just aren't able to get the contracts or the favorable regulatory rul-

ings or various other things, or comply with all the rules and regulations and red tape. We end up with this big government, big business duopoly. We see that now in the Dodd-Frank law, because it was passed to get back at some of the big Wall Street banks and financial firms. Yet over 200 small banks have gone out of business.

I noticed in your testimony you say large contractors have a financial means, plus high-priced attorneys that enable them to negotiate an alternative to suspension or debarment. The possibility of delays, litigations and reductions in competitions can mean the difference between the maximum penalty and a lesser sanction. As a result, large contractors have an unfair advantage over smaller contractors when it comes to avoiding suspension and debarment.

What do you think the Congress can do to prevent or rectify this problem of too big to suspend or debar, this favoritism that is going toward the big giants?

Mr. AMEY. I think the regulations that we have in the FAR will work if they are utilized properly. There is a provision that allows for waivers or compelling reasons determinations. So at that point, even a suspended or debarred contractor can still get new business. And we saw it with Boeing, during their suspension, they received multiple waivers.

So if it is a large contractor and we do need them for the competition, then at that point the government can get around it. But at least they have the safety that they have been suspended, but we are going to grant them a waiver and if so, I think that waiver or justification should be publicly available so that we can all see it.

When they are too big to suspend or debar, it is a problem. When MCI WorldCom was suspended, their suspension was lifted just days before the next big huge national telecommunications contract was awarded. When I called people within the agency, they said, we needed them to compete. So at that point, we have seen some tradeoffs in the system.

Small businesses are at a disadvantage because mainly they are operated by a small number of operators, owners or have a small number of employees. So it is more difficult for them to take action, like in a large business where you can let go an executive or managers or whoever it may be that was at fault. We just don't see that with small or mid-size contractors. And they don't have the legal resources to fight, as Ms. Styles mentioned, of going in, receiving the show cause letter and then going in and doing what they need to do to protect their business. Unfortunately they are not in the same position as a large contractor with the resources they have.

Mr. DUNCAN. Well, I hope that we keep that in mind as this legislation progresses. But before my time runs out, I want to ask you about something else. In your testimony you talk about the Inspector General for Afghanistan reconstruction and how all these companies and people that were still getting taxpayer money even though they had actively supported terrorism in Afghanistan and you mentioned the December letter sent by a bipartisan group of Senators and the January 2013 reply from Secretary McHugh, in which he said there was not enough evidence.

What is the situation since then? Have you looked at any of those to see if there was enough evidence? That sound terrible, to keep giving taxpayer money to companies and people that are actively supporting terrorists.

Mr. AMEY. You are correct. We haven't looked at it because it hasn't been publicly available. I have had some meetings with people in SIGARs office. And they are still upset that the SDO within the Army wasn't acting on these. I do think that this is where, when the Secretary of the Army responded, he said, well, we didn't have enough evidence based on the evidentiary standard for debarment. But he didn't refer to whether there is enough evidence that for the lower standard for suspension.

So the fallout of that has been that the SIGAR has actually asked for suspension and debarment authority. And that is another issue that this committee may want to consider. But should IGs, as kind of the investigator, the prosecutor, the judge and the jury then, have that much power. SIGAR, at least SIGIR, the Special Inspector General for Iraq Reconstruction, are a little different. We are spending billions of dollars very quickly in a contingency environment.

Therefore I think it is worth putting on the table on whether they should have some kind of authority when they find certain evidence against contractors in those environments on whether they should have the authority to hold those contractors accountable.

Mr. DUNCAN. Thank you very much.

Lastly, very quickly, Mr. Neumann, why are there so many persistent problems with the SAM data base? Are those being corrected, do you think? A lot of complaints, apparently.

Mr. NEUMANN. We have seen problems in the past with the data base from excluded parties, and this continues in the SAM. We understand that there are numerous technical glitches, including inability to search on DUNS number, which is a unique identifier for companies. So that is something that definitely needs to be corrected. We hope that GSA is working toward that.

Mr. DUNCAN. We spend fortunes on all this technology, yet we seem to just take anything, if somebody says computer glitch, we seem to accept things that we should never accept.

Thank you, Mr. Chairman.

Chairman ISSA. Thank you. And perhaps we should let the NSA do it. They seem to be able to deal with big data bases.

[Laughter.]

Chairman ISSA. Ms. Styles, following up just on what the gentleman had asked, the proposal of special IGs dealing in foreign nations being able to essentially bypass ordinary due process and be the judge, jury and hangman, what do you think about that from OMB? Is that a process that you would support, essentially support Congress agreeing to in the case in which you are dealing with an overseas special operation generally in relation to a war zone? And I might mention that Abraham Lincoln would have supported it.

Ms. STYLES. I actually think the Army does it overseas as well. I think they have special people overseas to do it. In that situation, and I think many of your civilian agencies would tell you the same thing, they know and understand the situation, and their contrac-

tors are better, and they are able to assess the situation and deal with it in a more appropriate way, because they are there and they are close to that contractor.

Chairman ISSA. Thank you. The gentleman from California.

Mr. CARDENAS. Thank you very much, Mr. Chairman.

The Federal Acquisition Regulation requires Federal agencies to ensure that contractors have a satisfactory performance record and a satisfactory record of integrity and business ethics before they make purchases and award contracts to these individuals or companies. Does the GSA suspension and debarment data base document a contractor's past performance record on prior government contracts?

Mr. NEUMANN. There is some past performance information available. But there is information on FAPIIS, rather, that includes the administrative agreements and other things. But GSA does manage these data bases. I can get back to you with more specifics on that.

Ms. STYLES. There is a past performance information system data base that is just not publicly available. So it is part of the system that they are putting together. But it is not information that is made publicly available, it is only available to contracting officers.

Mr. CARDENAS. Are we dealing with one system or various systems?

Ms. STYLES. It is one system that we put together collectively. So it is all trying to be put into this system for award management.

Mr. CARDENAS. So different departments could actually know who is a good actor, bad actor, et cetera?

Ms. STYLES. Yes, sir.

Mr. AMEY. But there are questions about past performance information on whether it is genuine and helpful? In the past we have heard some examples of great inflation for past performance, and contracting officers will give the minimum grade that doesn't get them sued or involve litigation. So at that point, and I think it is either a GAO or recent IG report that even talked about the past performance information isn't where we really need it to be to be very helpful to contracting officers.

Mr. CARDENAS. And when you are talking about the government having to be concerned with being sued, once again, it was mentioned earlier, the bigger the corporation you are dealing with, the higher likelihood that they are going to fight with lawyers, et cetera and trying to protect their name.

Mr. AMEY. The larger a corporation and also it depends on the government's reliance on those contractors. There are a lot of contractors that we are giving hundreds of millions of dollars to, and there are a few that we are giving billions of dollars to annually. So at that point it is very difficult to hold those contractors accountable when you need them and different agencies need them on a daily basis.

Even with suspension and debarment, a contractor can still work on their existing contracts but they are not permitted to get new contracts. There are even questions there when there are options or extensions of those should suspension and debarment, the rules say it can apply and they can exercise it. But there are questions

on does that hurt government mission in the fact that you are taking someone out of the equation that was there that you are going to have a drop off and a learning curve to bring someone else in. So at times the system handcuffs the government.

Mr. CARDENAS. Yes, and the experienced legislators know that when you have legislation there is a big difference between the words can and shall, a big, big difference. So it is very permissible, when the word can is there, and it is open to interpretation.

POGO has recommended that the contractor performance and responsibility system would be improved if contracting data were made public and posted on a public website. Mr. Amey, how would making past performance information publicly available improve the government-wide suspension and debarment process?

Mr. AMEY. In multiple ways. I think it would be more helpful actually to the contractor community, because we do see a lot of bid protests and bid protests slow down the system. So at that point it would be nice for contractors when, if they lose a contract, that they are going to know right off the bat before debriefing anything else, here is what the past performance ratings were for this specific contractor, for this specific program, to have it publicly available. I would assume that we would see a decline, at least on past performance bid protests.

Also for the public. It is very difficult in the public side to hear about contractors who break the law, or violate regulations or, whether it is in a government report or in the news media. And then continually hear that they are performing well and the government keeps using them. The Army, especially in Iraq, has used multiple contractors that have had a laundry list of allegations against them. It is very difficult, I think public perception-wise, contractor-wise, to feel that we do have a level playing field for everyone in the system, both small businesses, mid-size businesses as well as large contractors.

Mr. CARDENAS. When it comes to resources for holding companies responsible for their actions and/or their standard, whether or not they are meeting our standard, are your resources increasing or declining to enforce that?

Mr. AMEY. Mine or the government's?

Mr. CARDENAS. Our government's resources. Because this is a process. It takes men and women hours and data bases, et cetera, it takes funding for us to be able to defend the government's position with these multi-billion dollar contracts, well, hundreds of billions of dollars in contracts that go across the board in any given year.

Mr. AMEY. It has kind of been an up and down system. A few years ago, many years ago, we cut back on the size of the acquisition work force, which is your contracting officers, which is our first line of defense. We have been cutting back on the IG community, which, there is return on the dollar for the investment that they make of their time in trying to fight waste, fraud and abuse.

But as government is trying to make ends meet, I don't see resources increasing in those areas, and in a lot of instances, they are probably going to shrink to minimal levels. So it is something that we have to be wary of.

Mr. CARDENAS. So less resources means it is harder to actually hold the contractors accountable?

Mr. AMEY. It can be, but that is where the consolidation of all these systems is trying to make it a little easier by having kind of a one stop shop where a contractor can go to get information on past performance, get information on present responsibility, track records, administrative agreements, which should be, in this day and age, is we are trying to automate the process to make it a lot easier, so it is a lot less staff time, a lot less paper shuffling back and forth.

But as people have mentioned, the same system has increased a lot in money, it is over budget and behind schedule. It has even been shut down because it wasn't working efficiently. So at that point even the systems that we are creating aren't working. I actually think the SAM system is a step back. The EPLS worked well if you knew how to use it. Now I even struggle, and I use these systems on an everyday basis, trying to find who is excluded in the new SAM system.

Mr. CARDENAS. Thank you, Mr. Chairman. I yield back.

Chairman ISSA. Thank you. The question for the committee might be, did we debar the person who failed on the SAM system.

[Laughter.]

Chairman ISSA. We are not going to say IBM publicly. I promise you.

We now recognize the gentleman from Utah, Mr. Chaffetz.

Mr. CHAFFETZ. Thank you, Mr. Chairman. I appreciate your holding this, and thank you all for being here.

Mr. Neumann, I want to ask you, the GAO did this great study back in 2007, April 19th of 2007. It says, thousands of Federal contractors abuse the Federal tax system. And right at the beginning, right at the very top it says, roughly there are $7.7 billion owed from Federal contractors that had unpaid Federal taxes. It went on to say that that was an understated number and gave some reasons why.

Is there any sort of update to this? Is there a way to look at this on a more regular basis since the 2007 report?

Mr. NEUMANN. I am not aware of any recent work that GAO has done to update that, but I can check and get back to you for the record.

Mr. CHAFFETZ. That would be real helpful, because Mr. Chairman, it says in the second sentence, specifically, 27,000 DOD contractors, 33,000 civilian agency contractors, and 3,800 GSA contractors owed, then if you tally them up, about $7.7 billion. Mr. Amey, I think you wanted to add something?

Mr. AMEY. If I may. Those reports were great. This issue has even come up recently with going after government employees that haven't paid their taxes, and it recently came up with contractors that haven't paid their taxes. That has been one of the systems that they have said, okay, then we need probably mandatory disclosure or mandatory suspension or debarment, is if you are a tax cheat.

So that has been kind of the knee jerk reaction on the Hill. But it would be nice, even from my perspective, to get an update on

those reports, to hold those contractors accountable in the present day.

Mr. CHAFFETZ. Yes, and I would share with the panel, as the chairman knows, we passed out two bills, one that requires Federal workers, if they haven't paid their Federal taxes, they should be prohibited from getting jobs and should be relieved of their duties if they are unable to get on any sort of payment plan. And also specifically, we did one very specific to contractors. If they haven't paid their Federal taxes, they should be prohibited from getting additional Federal contracts.

Mr. AMEY. And there were some issues with those reports, because I think they required IRS cooperation, which isn't always easy, to be able to get access to those records. But also, in the responsibility determinations, there are annual——

Ms. STYLES. I was going to add, there is an annual certification now. So what happened since that report is that there was added an annual certification. Actually you will find in SAM, you can pull it up for any contractor, that makes a certification that they don't have any delinquencies over $3,000. So that has been helpful. People have to fill it out, and they have to go and look and know and realize that they have to go pay it before they can become a contractor.

Mr. CHAFFETZ. Let me shift gears, if I could. I want to talk about the Department of Defense, where so many of these big problems are. My understanding is that DOD has set a goal of completing suspension and debarment referrals from the Inspectors General within 30 days. But the reality is these are taking close to 323 days, is the last average that we saw. So here you have the Special Inspector General, Mr. Chairman, on September 18th, 2012, sending us a letter saying that we have contractors that are affiliated with the Haqqani network, the Taliban, and/or al Qaeda, we as a responsible group here, the Special Inspector General for Afghan Reconstruction, sends this over to the Department of Defense and says, here are the problems.

And yet, not a one of them gets reviewed, let alone debarred, along this process. So how do we solve that? Why not just give the SIGAR, in that type of setting, given the fact that we are funding the very terrorists that are killing our men and women, instead of dealing with the bureaucratic mess that is the Department of Defense? Mr. Amey?

Mr. AMEY. It is a really good question. I think there is a fear factor involved there with the checks and balances in the system, to make sure that the IG isn't the one making the findings, and then also the one making the decision on the future viability of that company or individual.

Mr. CHAFFETZ. My understanding is, Mr. Chairman, the Department of Defense has one person dedicated to this. So we have tens of thousands of Americans serving overseas and yet we have billions of dollars going out the door and we have exactly one person to review this. Why do we allow that person to just ignore what the SIGAR is able to find is pretty appalling.

Mr. AMEY. I hope in my best dreams that they are not ignoring the problem. It is not an easy process.

Mr. CHAFFETZ. Yes, but if we were talking about the Army, by the way, just the Army, and this person sits in the United States of America, doesn't even sit in Afghanistan.

Mr. AMEY. I believe there are some suspension and debarment officials within Iraq and Afghanistan.

Mr. CHAFFETZ. If you can name one, if you can show me an email, point them out to us, get them back to us. Because it is not happening. And it is a travesty.

Mr. AMEY. I can't disagree with you more that 323 days seems overly excessive. So at that point I hope there is a way to turn these around. That is one of my suggestions for the Suspend Act, is to get referrals. At that point, if there is an argument over the evidence that the SIGAR provided to the Army SDO, but at least we should have some kind of decision on why it is taking so long, some kind of transparency in the system to report back on, are you considering them, have you made no decision at all.

Mr. CHAFFETZ. Mr. Chairman, as I yield back, perhaps what we should do is give the Department of Defense an opportunity to challenge it. But if unchallenged within 30 days, then they do go under suspension and debarment, make the Pentagon probatively say no, we want to keep this person to make a case for it, we just can't keep taking these chances.

I appreciate the generosity of time and yield back.

Chairman ISSA. I thank the gentleman.

We now go to the gentlelady from Illinois, Ms. Duckworth.

Ms. DUCKWORTH. Thank you, Mr. Chairman, and thank you so much for holding this hearing today. I applaud your efforts to bring more accountability, efficiency and transparency to the Federal contracting process.

The conversation we are having today is absolutely critical for fiscal responsibility of taxpayer dollars and good government oversight efforts. I am very much looking forward to working with you both on improving contracting practice at civilian agencies, which is the focus of today's hearing, and hopefully taking a closer look at the problems at the Department of Defense.

The wars in Iraq and Afghanistan have showcased some of the difficulties in managing contractors who perform government contracts overseas. So far, we have talked about debarment and the lack of debarment for folks here in the United States. But as my colleague, Mr. Chaffetz, pointed out, we have a lot of contractors overseas who are also in need of debarment. For example, in 2007, the State Department came under criticism for its handling of the prime contractor, First Kuwaiti General Trading and Contracting Company, which was tasked with building the American embassy in Iraq.

This committee raised concerns at that time about the poor workmanship performed by this contractor, as well as its past record of corruption, which may have been purposely overlooked. Suspension and debarment is one tool that the government has at its disposal to help ensure accountability when dealing with contractors. However, a tool like this is only effective if it is actually used.

Mr. Neumann, GAO's recent findings shows that there has been little use of suspension and debarment against military contractors with poor performance records and documented ethical violations,

especially overseas. Are there special circumstances when we are dealing with these overseas contractors that might account for that?

Mr. NEUMANN. At the time of my review, we did find that the Army and other DOD components had good processes and procedures in place. But they do have limited staff. They have dedicated staff, but they get thousands of referrals every year. So that is something that I would defer to the Army as to what accounts for the time that it takes them.

But it certainly seems that they should be investigating all leads. We found that they did do that in the cases we looked at, when they had sufficient evidence that there was misconduct or some other wrongdoing.

Ms. DUCKWORTH. Have they actually debarred anyone overseas?

Ms. NEUMANN. I don't recall if they had any specific cases. I think there were some that involved overseas contractors when we looked at 75 cases. I would have to check our files to see how many of those, if any, were for overseas contractors.

Mr. AMEY. I believe there is one that I know of. I think there was a company, Agility, that has been suspended. I think it is even involved in current, ongoing litigation. But you raise a good point, and it was raised by the Commission on Wartime Contracting, I think they held a hearing on it, and some of their annual reports and their final report on the under-utilization, in contingency environments of the suspension and debarment system. Again, justifications for declinations, of holding contractors accountable. They did present in the report the unique circumstances that continency contracting presents.

And then in the case of First Kuwaiti, they were the largest contractor that was building the Baghdad Embassy. SO it wasn't like, if you were, they could continue to work on that contract, but there would be some real questions about being able to use them in that environment where they have the logistics there, they have the people there.

The one thing you do have to weigh in all this is fairness and due process for the contractors. But it is also fairness for the Federal Government, because you don't want to eliminate competition or place the government at a disadvantage by ruling out contractors. And there is only a certain number of contractors that can do big picture work. That is unfortunately the way we bundle contracts now.

Ms. DUCKWORTH. But that is how we got to $800 million overpaid for food contracts in Afghanistan to Supreme. Why do you think certain agencies will refuse to initiate sanctions against a company that flagrantly disregards the law? I am thinking specifically of the case of Academie Blackwater, which continued to be used as government contractors after criminal investigation by the U.S. Attorney at the Eastern District of North Carolina found out they engaged in repeated systematic violations of U.S. laws and regulations that protect national security over an extended period of time. At what point do you say, well, you are the only game in town so we are just going to continue to work with you even though we know you are breaking national laws? At some point you have to stop.

Mr. AMEY. You are correct. It ends up being a question of competition for the Federal Government. But it also ends up being a question of present responsibility. What you are looking at is this time. The time you get a referral and you are looking at a contractor, or a grantee and you are saying, are they currently, presently responsible. Usually what happens is, once an allegation comes out against the company, they fire people, they bring in a corporate compliance monitor, they probatively self-police and do the best they can to mitigate any further, and mitigate a suspension or debarment because they don't want that to hurt their bottom line.

So a lot of times what SDOs are looking at is only, are you currently responsible now. Sometimes it may not matter what they did a week ago or six months ago.

So again, suspension and debarment is not a punishment and therefore the SDOs are somewhat limited. Unfortunately I do think that we buy too much into the promises that are given by the contractors, and I would like to see the use of suspension and debarment. If we do need them again, then grant them a waiver. And let's bring them back in and let's justify it. They're suspended from future contracts, but we need them and here is why, and let somebody justify and go on the record, so at least then we know why contractors with poor performance or that have defrauded the government are still receiving taxpayer dollars, rather than having us all sit here and scratch our heads.

Ms. DUCKWORTH. Thank you, gentlemen, Ms. Styles.

Mr. WALBERG. [Presiding] I thank the gentlelady and recognize myself for my five minutes of questioning.

Ms. Styles, you stated in your written testimony that the actual process of suspension and debarment varied widely across Federal agencies. You also mentioned that the lack of access and transparency not only creates an impediment for companies that are working to improve ethics and compliance programs, but also creates issues of fairness.

Can you describe for us further and suggest some changes that might be made to improve this process?

Ms. STYLES. Absolutely. I think what you find is you have a written system, you have the Federal Acquisition Regulation and you have non-procurement rules. The problem is that the active suspension and debarment agencies over time have really created some flexible processes to get information and to be fair to contractors. But if you are a company that either is proposed for debarment or suspended, or you are a company, believe it or not, lots and lots of companies probatively go in to suspension and debarment officials to talk about compliance and ethics issues.

So if something happens at their company, if there is an article in the newspaper, if they are under investigation, the first thing they do and the first thing we recommend is that they go in and talk to their suspension and debarment official about how they discovered the activity, how they detected it, how they fixed it, how they remediated, what they have done to enhance their compliance programs. So there is a lot of interaction that is going on between the active suspension and debarment offices and the contractors to recognize the fact that some bad things can happen in good compa-

nies who want to improve compliance programs, and you also have situations with medium size companies and small companies that get into trouble, didn't realize that they needed to have a compliance program, that they needed to have an ethics program.

So they actually work with the suspension and debarment officials through these unwritten practices and using the tools like administrative agreement to make the companies better contractors.

Mr. WALBERG. How different are the procedures between various SDO offices?

Ms. STYLES. They are vastly different. It is like night and day.

Mr. WALBERG. Describe an example of working with two different entities on very similar issues.

Ms. STYLES. So you could work with the EPA or the Army, which has a more hearing-like process, they have a suspension and debarment official that actually acts more like a hearing officer. They have people that work within the office that present the case and that work with them, a lot of times the inspector general is involved in presenting the case.

You have agencies with significantly more informal practices. So the General Services Administration, the Small Business Administration, in many respects the Air Force or the Defense Logistics Agency, they are much more informal. They will issue a show cause letter for you to come in, they will ask for some written statements.

So the practices, I think the difficulty with the system right now and the way that it can be improved is by putting a lot of these unwritten policies, procedures, practices, tools into the FAR, into a place that anybody can understand they are available, even the other civilian agencies that may not know that there is a show cause letter or that you could have an administrative agreement. So that even a medium or small company would have fair access to the system and understand.

Mr. WALBERG. So you would say consistency would be very helpful for contractors?

Ms. STYLES. Absolutely. It would be very helpful just to be able to understand the process. Because you can't read the rules and understand the process right now.

Mr. WALBERG. Seems common sense. Let me follow up. In your written testimony you mentioned you have confronted a number of problems for contractors under the current lead agency process. What were the problems and how should we address them?

Ms. STYLES. The main problem that we see is that there is no actual written in the FAR articulation of what a lead agency is. So one agency will take the lead for the entire Federal Government. So one agency makes a decision if a contractor or individual will be suspended or debarred for the entire Federal Government. As you know, many contractors work with a variety of agencies.

It is hard to understand how that actually happens. I have seen it in process where one agency sends an email to all the other agencies on the Interagency Suspension and Debarment Committee, telling them, I am taking lead agency, if you are interested or if you think you should take lead agency, let me know. It is not something that we as contractors have a lot of access or information to.

But what is important are the companies that want to probatively go in and talk to their suspension and debarment official when there is an issue. That is exactly what you want. You want early engagement between the contractors and the agencies. You can't figure out on your own which lead agency you should approach.

So we have had situations where we have approached the agency, where a contractor has the most, highest dollar value contracts. We assumed we were the right agency. We had extensive discussions and filings with the suspension and debarment official only to have a completely different agency debar the company the next day for the same issues. So that agency didn't tell the other agencies that they were considering the suspension and debarment matter of this particular company. So all the effort that this company went through to prove what they had done to remediate was for naught, because then they were publicly suspended.

Mr. WALBERG. Okay. Thank you. My time is expired. I recognize Ms. Norton.

Ms. NORTON. Thank you, Mr. Chairman. I appreciate this hearing.

Mr. Amey, I have a question for you based on a report from the Commission on Wartime Contracting 2011. The only experience I know personally about debarment and contracts comes from my own experience as Chair of the Equal Employment Opportunity Commission. We worked with the Office of Federal Contract Compliance.

Lots of folks wanted debarment and suspension and it rarely happened. But actually the OFCCP was very effective in combating discrimination because it did a lot of monitoring and nobody wanted to lose a contract or be held up as somebody who discriminated. So it did a quite effective job.

I was looking for some, recognizing that debarment, for example is a kind of nuclear weapon, I was trying to think of something short of that that would get people's attention. I note that this Commission on Wartime Contracting from a couple years ago recommended something that seems to me to be very mild and at the very least, it would have occurred, they recommended that the State Department, because they were talking about State Department funds, document in writing their justification for overturning from debarment officials the people whose job it is to evaluate this.

Their recommendations were suspension or debarment. Put it in writing, and in writing you might have thought that if you were going to overturn it, that that would signal not only to them but to other contractors, you better watch out. It is not as easy as you think.

But I understand that the State Department responded that simply putting in writing their reasons, and surely they had reasons, would have been overly burdensome. So I am flummoxed at that. Do you agree that such a requirement to put in writing why you are overturning a recommendation of those closest to the facts would be unduly burdensome?

Mr. AMEY. I do not agree with that statement of the State Department. I would like to even see it expanded further, that we see summary data, at least, at a minimum, but all data from those

SDOs offices on what it went through, what was presented by either the government or by the contractors that made them make any decisions, whether it is a declination or not. I think even if they are going to suspend or debar a contractor, I think there should be some kind of public display of that information so it does put contractors on notice.

I think it would actually help in the sense that it would act as a deterrent.

Ms. NORTON. Surely, in writing, to see they will call you out. Particularly since this information is already available. It is not like they would have to gather it, assuming they did not make an arbitrary decision. They simply have to put down the data, as you indicate, and the reasons for their decision.

Mr. AMEY. Correct.

Ms. NORTON. Are you aware of why they would have considered such a requirement, or the other two witnesses, why they would have considered a requirement burdensome? Would either of you consider such a requirement burdensome?

Ms. STYLES. Most of the suspension and debarment agencies that I work with do have something in writing to the record about what they found.

Ms. NORTON. Sure. They will make arbitrary decisions. So the notion of putting it out there as a possible deterrent, especially when, as you have indicated, it is difficult to impart. Really in the case of the State Department, it amazed me, you were talking about $200 billion in contingency contracting and about a quarter of it, $60 billion, more than a quarter of it, was attributed to fraud and waste and abuse. They should have been reaching out for some way to correct this. But I suspect they were left with nothing to do except continue as they were going along.

Do you see the same kind of waste in taxpayer dollars if this continues, and would you take action to see to it that this recommendation of two years ago from the Commission, where it was in fact implemented?

Mr. AMEY. Certainly. Unfortunately I think we see a lot of the commissions and panels that are created produce hundred-page books and reports and then they are not acted upon. There are a lot of recommendations and I know that there were some efforts last year to pass, especially in the Senate, with Senator McCaskill and Senator Webb, to pass a lot of the recommendations that were in the Wartime Commission's final report. And Unfortunately a lot of them, some got into the Defense Authorization bill but some fell on deaf ears.

It is an open issue and that is the kind of information that you hope to bring together, especially with the open process that the Suspend Act has had. I do applaud the chairman for the way that you have gone about putting it out and having a discussion draft that people can comment on. I think it is going to end up at the end of the day a better piece of legislation, because it will add a lot of debate to the current draft bill to where we can pull on the other experiences, the IG reports, GAO and what other commissions and panels have recommended.

Ms. NORTON. Ms. Styles said the information already exists. So Mr. Chairman, I will expect to see that information duly available

and recorded, since there is not a compilation of new information. I believe calling people out, expecting things to overturn what those closest to the facts have said is the least, otherwise you leave the impression you are making arbitrary decisions.

Chairman ISSA. [Presiding] Would the gentlelady yield?

Ms. NORTON. I would be glad to, Mr. Chairman.

Chairman ISSA. I agree with the gentlelady that this is an issue that this bill may be timely to send some form of a message in. Ms. Styles, from your experience, would it be helpful if either through the letter of a new law or through, if you will, the report language, we made it clear that the harvesting, maintenance and future reference for this kind of material would be essential to the evaluation?

Ms. STYLES. Absolutely. I think the agencies need to keep an administrative record.

Chairman ISSA. Not agencies. Harvesting collection, in other words, centralizing. I think back to no policeman in Detroit would fail to want to know that there was an arrest or investigation in Cleveland, even if it didn't lead to an indictment. That is sort of the way I view it, is that information, even if you can't use it in court, is valuable to know whether you have somebody you need to look at more thoroughly.

Ms. STYLES. Absolutely. You can take a look at the EPA suspension and debarment opinions that are actually public and published and it helps you as a practitioner and it should help other people understand how the decisions are made and where the lines are drawn. So to the extent you can make information public without harming companies that the suspension and debarment official actually decided didn't do anything wrong, that is always the risk that I see.

Chairman ISSA. Thank you. I thank the gentlelady.

We now go to the gentlelady from California, Ms. Speier.

Ms. SPEIER. Mr. Chairman, thank you.

I am flummoxed in some respects that this issue has been around for as long as it has. We have really done very little to address it. It is a system that is basically voluntary in terms of suspension and debarment, one in which the entity that has responsibility and has limited resources and an incomplete and unreliable data base. And we wonder why it is not working.

This is really documented from, I believe, the General Accounting Office. Here is Boeing. This is no small company. Big company. Boeing has just charged the taxpayers of this Country $2,200 for a bearing sleeve that retails for $10. This is metal tube assembly. Boeing charged the taxpayers $12,000 and the retail cost is $1,100.

Now, at some point, a big company like Boeing needs more than a slap on the hand. Now, the likelihood of us debarring Boeing is pretty remote, correct? But as long as suspension and debarment are really not options, what is going to get the attention of a Boeing? To me the only thing that is going to get the attention of a Boeing is slapping them with hefty fines. I am curious, Mr. Amey, if you have any comment on that.

Mr. AMEY. Unfortunately I would have to disagree. I don't think fines work. Boeing has a lot of money in the bank, and they paid millions of dollars in fines, when they were suspended. They were

suspended many years ago. That plus a personal conflict of interest that occurred with a high senior level official at the Air Force that went to work for Boeing in violation of conflict of interest standards, they were fined, and if I remember correctly, it was in the $600 million range.

But since that fine has been paid, there have been multiple spare parts horror story reports out by the DOD IG, that has shown that they have over billed on spare parts, on screws, nuts, bolts, and the products that you just named in the most current report. So it is possible to suspend Boeing, even if it is just a portion of Boeing. That is what happened when it was suspended before. They suspended their missile division. They didn't suspend the whole company. But it did prevent at least that division of Boeing, that is a very large company, from receiving new Federal contracts. But then it was waived.

Ms. SPEIER. So where are we?

Mr. AMEY. We are in a position where at least, if you go to suspend them, it is on record, it is, as Ms. Styles said earlier, it is kind of a public nightmare for them. It is a problem on Wall Street for a company to be suspended or debarred, and it puts everybody on notice that, before I award the next multi-million dollar contract to Boeing, I need to ask a few questions, I need to make sure that their compliance and their performance standards, as well as their level of professionalism and integrity, are at the top of the charts.

Ms. SPEIER. Mr. Chairman, I guess my question is, are some of these companies too big to suspend and debar? I think that is the situation we are in. Because in the end, even if we suspend them or debar them, in the case of Boeing, it was waived.

I am also concerned, Mr. Amey, maybe you can help me on this, John Sopko, who is the SIGAR, recently came to our Congressional Watchdog Caucus. It was pretty astonishing. We could have him come and speak to us for a full hearing and learn a great deal. He said, and with great frustration, that the Army is refusing to look at the classified evidence that SIGAR found to support suspension and debarment. My question to you, Mr. Amey, is do you think the Inspector General should have this authority? How else are we ever going to get some kind of accountability here?

Mr. AMEY. It presents a very unique situation, due to the fact of the SIGAR is operating in a contingency operation. So I may separate it from, do we want to grant all IGs the power to suspend or debar contractors? I would probably say no. But with SIGIR and SIGAR, we have had hundreds of millions of dollars pour into Iraq and Afghanistan. The money is being spent very quickly. There is a lack of oversight over the money. We are building things that aren't being used, we are building things that are being turned over, we are funding the insurgency.

So at that point, I think there needs to be, if we don't grant them the suspension and debarment authority, I think we need to tweak the system to be able to speed it up. Waiting 323 days for the SDO to make decisions on referrals is ridiculous. There needs to be more consistency in that system and speed in that system. The legislation may get there, and I think there is a point in the legislation that talks about this, only involves civilian agencies. But other agencies may enter agreements.

So that may be something where we may want to have SIGAR, SIGIR, have a special inspector general for contingency operations, whatever it is, mandatorily have to enter into an agreement with a board or with an SDO to be able to get those decisions reviewed quicker. Because as you mentioned, it is problematic, especially when it is overseas money that is just going out the door with very little result.

Ms. SPEIER. Thank you. I yield back.

Chairman ISSA. I thank the gentlelady, and I think your points are good.

Before you came in, we had multiple questions along this line. I think the ranking member and I came to an understanding that at least in report language, we are going to have a finding in the bill that this needs to be addressed. Whether we address it in explicit language or more, the next time a special IG is appointed, these powers must be managed, there will be some agreed-on language. Mr. Cummings and I have come to a general understanding. We will work out the details. We would love your input.

We now go to the gentleman from- you know, you have to sit in the front row when you come in early, because Lacy will get ahead of you.

[Laughter.]

Chairman ISSA. The gentleman from Nevada rather than Missouri. Lacy, I always see you when you come in. The gentleman is recognized. Thank you.

Mr. HORSFORD. Thank you, Mr. Chairman.

This is actually a very important hearing, and I want to commend you, Mr. Chairman, and the ranking member. Because when you follow the money, you see where there can be efficiencies identified and implemented. We desperately need to find efficiencies. Contracting is one of the major areas.

I want to ask, the amount of contracting and grant award dollars have increased from approximately $200 billion in fiscal year 2000 to over $1 trillion in fiscal year 2012. In 2009, the GAO found 25 instances in which companies and individuals suspended or debarred for committing serious offenses were later awarded new contracts. Contracting officials either failed to check the suspension and debarment data base before awarding the contract, or if they did check it, the data base failed to turn up the name of the suspended or debarred entity.

So if we had this huge increase in contracts and awards, did we have a corresponding increase in the workforce that is required to monitor whether or not these are eligible entities?

Mr. NEUMANN. GAO has done a lot of work looking at the acquisition workforce and certainly has found that there have been new challenges there, particularly at certain agencies, in identifying the right size and the training skill set needed for the acquisition workforce. So that certainly is an issue.

Mr. HORSFORD. So the POGO actually made a recommendation that the ISDC reports to Congress should include summaries of size and spending on the suspension and debarment workforce. Why is this important?

Mr. AMEY. We have seen some, first off, the ISCDs first report that was due in 2009 was delayed two years. At that point we sort

of had to sit and wait for it. At least they got the fiscal year 2011 report out in time. But I think there is an effort, especially with the legislation that is on the table with the Suspend Act, is trying to make the government more effective and efficient. Currently I don't know what the total number is of SDOs that are in the Department of Defense, that are in the civilian agencies. Earlier there was a discussion on there are some full-time, there are some part-time. So that means they are sharing hats. Is that the best system?

POGO a few years ago even found contractors, the GSA had contractors come in and support their suspension and debarment work, doing research and analytical research into the contractors that have allegations before them. So there is even a contractor workforce that is in this community, which is a little scary. That is one of the reasons why we have recommended that we have to figure out how much we are spending on this workforce, how many people are in this workforce, add consistency to the current system to make it run better.

And then also more than likely, have to put this in the hands of government employees, because a lot of the data that is front of the SDO office is proprietary or needs to be protected. Therefore, especially after the week we have had with NSA and the ties to Booz Allen and Mr. Snowden, we do have to at some point ask some questions about who is in our workforce and what do they cost.

Mr. HORSFORD. So definitely including that within a proposed legislation would be important, a workforce element within what we are trying to achieve here.

Let me ask, 1,300 criminal, civil and administrative instances of misconduct for over 170 of the Federal Government's largest contractors. Out of the information that I was able to glean, what are the largest type of offenses that we are seeing contractors making? And specifically I want to know, there was an ad hoc hearing conducted where members heard from low wage workers who are employed by these Federal contractors who are being paid minimum wage with no benefits, even though the contractor was required to pay prevailing wage or Davis-Bacon wage rates and failed to do so.

Is that an issue? If so, where can we find the documentation for that, and what are the other type of offenses that these contractors are making?

Mr. AMEY. The information you are referring to is in the Project on Government Oversight's Federal Contractor Misconduct data base. We collect annually the data on the top 100 government contractors. So even though it is top 100, people have moved in and out. That is why it is 172.

And you are hitting an issue. A few years ago, suspension and debarment only applied for procurement. Then it was expanded and it went non-procurement. So you could have a labor violation, a tax violation, an anti-trust violation, a worker, labor issues, consumer protections. So our data base includes all that.

Born out of that, out of this committee in 2008, they passed a law to create a Federal Awardee Performance and Integrity Information System, it is called FAPIIS. That system is supposed to gather information. But it was only limited to procurement. So what I would recommend is, and you may want to go back and look

at the scope of the FAPIIS legislation and see if it needs to be expanded to include the type of information you are referring to to make sure that that is on the radar of a contracting officer prior to award to see what the track record is.

And also to the suspension and debarment officials in trying to make a determination of present responsibility. You want them to have the most accurate, complete and up to date report as possible on the contractors that we are working with to avoid risky contractors that put government agency mission and projects in jeopardy.

Mr. HORSFORD. Thank you, Mr. Chairman. I hope that we can be as inclusive as possible with your proposed legislation and take some of these other provisions into account, your draft, as being considered by the full committee. Thank you.

Chairman ISSA. Thank you. The ranking member and I will be meeting in a few days to work out the final tweaks as a result of this. We would welcome your input for that.

We now go to the always noticed gentleman from Missouri, Mr. Clay.

Mr. CLAY. Thank you, Mr. Chairman. I don't mind bringing up the rear. I will try not to take all of the five minutes.

Mr. Neumann, Chairman Issa has a draft bill that would call for a board of civilian suspension and debarment that would consolidate more than 41 civilian agency and government corporation's suspension and debarment functions into one centralized board. This board would be responsible for, among other things, ensuring the excluded parties list is current, as well as employing a transparent case Management system that would allow the public to be informed of all cases.

How effective do you believe this board would be in improving efficiency and transparency?

Mr. NEUMANN. Given that GAO has found that there have been problems with the current process and the inconsistency between agencies on the activity level of their suspension and debarment programs, GAO would welcome any changes that would make improvements to that overall process and ensure consistency and transparency.

I think it is important to note that there are certain characteristics that agencies will still need to have in place in order to get the referrals to whoever is managing the suspension and debarment process, including having a very active referral process involving IGs and other officials at the agency level and be trained on that, so they know what cases should be referred for appropriate action.

Mr. CLAY. But having a central clearinghouse, so to say, with timeliness being one of the major factors here, do you think that would make this process more efficient and transparent?

Mr. NEUMANN. It certainly would build on some of the existing responsibilities of the current voluntary system under the Interagency Suspension and Debarment Committee. That committee has the charge to monitor and oversee this government-wide system. As we noted, it has been ineffective in the past. While there has been some improvements made, I think we still want to see some more improvement there overall.

Mr. CLAY. How likely is it that having a single point of authority for maintenance of the excluded parties data base would resolve the accuracy problems it has had over the years?

Mr. NEUMANN. Do you mean the accuracy of the data base?

Mr. CLAY. Yes.

Mr. NEUMANN. The problems with the data base I think are long-standing. So there would be, there needs to be some look at how to improve that particular data base. GAO has noted that as far back as 2005 and again in 2009, even when we did regional work, there are still problems with the data base.

So I think that any efforts to take a look at the problems and have someone take steps to improve it would be welcome.

Mr. CLAY. I thank you for your responses.

Mr. Chairman, that is all I have and I yield back.

Chairman ISSA. I thank the gentleman.

I will just follow up with a quick question round that came from the earlier questions. Ms. Styles, the process which is undocumented of show cause, our legislation currently does not formalize that nor address the reality that it is and likely will continue to be done unless we either formalize it or prohibit it. Would you suggest that as we are preparing a final bill, that we do just that, either formalize it or prohibit it?

Ms. STYLES. I think it should be formalized, absolutely. It is a very good process. In situations where an SDO wants more information, they just don't always have the facts. They want to make sure they are dealing with an ethical contractor, but they don't want to suspend them unnecessarily.

Chairman ISSA. Mr. Neumann?

Mr. NEUMANN. Yes, we saw that as the Department of Defense used those very efficiently to get more information, in some cases to either get the contractor to improve its ethics programs, or in other cases to get enough evidence to do a suspension or debarment. So those were very effective tools that they used.

Chairman ISSA. Mr. Amey?

Mr. AMEY. I believe the SDOs believe it is as well. The ISDC has been reporting it, on how many administrative agreements or how many settlements that they have entered into, non-prosecution agreements, different things that help them gather information about contractors. So I think the community finds it to be an important tool as well.

Chairman ISSA. So getting a three for three that would should formalize it. Let me just ask one question. Is this an appropriate place to tie in a specific, if you will, right of IGs to at a minimum create a mandated show cause? In other words, less than a direct authority to suspend or debar, the idea that IGs' findings in audits and other work would automatically empower a show cause so that they would have a direct part of this, their investigation would link directly to this process? Ms. Styles?

Ms. STYLES. I think at most of the effective agencies they already do. So they refer them and it automatically causes the show cause process to start. So it actually would be putting in the statute a process that already exists.

Chairman ISSA. And you had earlier said that the best part of our bill is that we take an executive order and put it in statute.

Ms. STYLES. That is correct.

Chairman ISSA. Okay. Unless I have any further thoughts from any of the three of you, I want to thank you for your generosity of time, and for helping us in what is likely to be a very shortly put forward piece of legislation. We stand adjourned.

[Whereupon, at 11:30 a.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Statement of Congressman Gerald E. Connolly (VA-11)
Committee on Oversight and Government Reform
Protecting Taxpayer Dollars: Is the Government Using Suspension and Debarment Effectively?
June 12, 2013

Chairman Issa and Ranking Member Cummings, thank you for holding today's important hearing to examine the Federal Government's use of suspensions and debarments, and reform proposals seeking to enhance the effectiveness of this procurement tool. I commend the Chairman for convening a substantive hearing that is focused on refining the processes and procedures that protect the Federal Government's interest in only awarding contracts and grants to responsible firms and individuals.

In recent years, serious concerns have been raised by the U.S. Government Accountability Office (GAO), Offices of Inspectors General (OIG), the Commission on Wartime Contracting, and relevant Congressional Committees, with respect to the effectiveness of agency policies and procedures that govern the suspension and debarment of contractors. At an October 2011 hearing held by this Committee's former Subcommittee on Technology, Procurement, and Intergovernmental Relations, GAO reported that 10 agencies accounting for more than $1 billion in annual contract spending failed to devote sufficient attention to their respective suspension and debarment programs.

Astonishingly, the Departments of Health and Human Services and Commerce awarded $94 billion in contracts and grants from fiscal year 2006 through 2010, yet together accounted for ***no*** suspension and debarment activity over that time period. In addition, the Federal Government continues to face challenges in coordinating suspension and debarment activities across Federal agencies, with the Interagency Suspension and Debarment Committee relying on voluntary agency participation, while the comprehensive contracting data base that every Federal contracting and grant officer relies on – the System for Award Management – continues to be plagued by bugs and unreliable data.

On a positive note, agencies have proactively instituted reforms to strengthen suspension and debarment programs, while the Council of Inspectors General on Integrity and Efficiency has stepped up its efforts to raise the visibility and utilization of the suspension and debarment tool as a key mechanism to protect the financial interests of a given agency. However as our witnesses will testify before us today, there is still much work to be done. I look forward to discussing their recommendations and how we can move forward to ensure that every agency is appropriately and fully utilizing suspension and debarment programs ***not*** to punish contractors, but rather to protect our Nation's financial interests.

I believe there is consensus that suspension and debarment activities must become more efficient, transparent, and accountable. However, I am also cognizant of the importance in proceeding in a considered manner that avoids unintended consequences, including undermining existing suspension and debarment activities that may be working well in certain agencies. Today's hearing is a constructive first step in this process, and I am committed to working with the Chairman and the Ranking Member to advance suspension and debarment reforms in a bipartisan and open manner, featuring extensive stakeholder input from agencies, industry, GAO, OIGs, and public interest groups.

