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**U.S. DEPARTMENT OF HOMELAND SECURITY**

**BEFORE THE**

**COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM**

**U.S. HOUSE OF REPRESENTATIVES**

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## **Introduction**

Good morning Chairman Towns, Ranking Member Issa, and members of the committee. Thank you for inviting me to testify today about the Department of Homeland Security's (DHS) Suspension and Debarment Program.

Acquisition management is not just a matter of awarding a contract, but an entire process that begins with identifying a mission need and developing a strategy to fulfill that need through a thoughtful, balanced approach that considers cost, schedule, and performance. The intent of the process is to ensure the government acquires goods and services that represent a best value for taxpayer dollars. Suspension and debarment are powerful tools that the government should use to protect itself and the taxpayers against contractors who commit fraud, behave unethically, or willfully fail to perform. The intent of the suspension and debarment process is to ensure that the government acquires goods and services that represent a best value for taxpayer dollars.

My testimony today will address four areas: the department's use of suspension and debarment, the department's efforts to record contractor performance information, and actions the department has taken as a result of our recommendations. Finally, I will address suspension and debarment in a government-wide context, as these issues are not unique to the DHS.

## **Federal Acquisition Regulations Regarding Suspension and Debarment**

Federal Acquisition Regulations (FAR) require agencies to solicit offers from, award contracts to, and consent to subcontracts only with responsible contractors. Suspensions and debarments are discretionary actions that agencies implement to protect the federal government. Suspensions and debarments exclude contractors who commit fraud, behave unethically, and willfully fail to perform, or have a history of failure to perform according to the terms of a contract from conducting business with the federal government.<sup>1</sup>

Suspensions are temporary in nature and are used to protect the federal government until investigations and any ensuing legal proceedings that could lead to debarment actions are completed. A suspension may not extend beyond 18 months unless legal proceedings have been initiated within that period. Causes for suspension actions include, among others, adequate evidence of the following:

- Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or state contract;

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<sup>1</sup> 48 C.F.R. 9.402(b), "The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the government's protection and not for the purposes of punishment."

- Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property;
- Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor; or
- Any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor.

Debarments, on the other hand, generally do not exceed three years but can be extended if it is determined that it is in the government's best interest. Causes for debarment actions include, among others, the following:

- Conviction of, or civil judgment for, fraud, violation of antitrust laws, embezzlement, theft, forgery, bribery, false statements, or other offenses indicating a lack of business integrity;
- Violation of the terms of a government contract or subcontract so serious as to justify debarment, such as a willful failure to perform in accordance with the terms of one or more contracts or a history of failure to perform, or of unsatisfactory performance of, one or more contracts;
- Noncompliance with *Immigration and Nationality Act* employment provisions;<sup>2</sup> or
- Any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.

Federal regulations require agencies to list all suspended or debarred contractors in the General Services Administration's Excluded Parties List System.

## **DHS Suspensions and Debarments**

The department has suspension and debarment policies and procedures in place in accordance with FAR. However, the department has been reluctant to apply these policies and procedures against poorly-performing contractors. We identified 23 instances where contracts were terminated for default or cause but were not reviewed to determine if a suspension and debarment referral was warranted. In fact, between FY 2004 and FY 2008 the department initiated only one debarment case for contractor performance, and this was done at the urging of the Defense Contract Management Agency.

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<sup>2</sup> See Executive Order 12989, as amended by Executive Order 13286.

When asked to explain the absence of performance-related suspension and debarment actions, senior department procurement officials said they were reluctant to initiate suspension and debarment action against poorly-performing contractors because such actions were: (1) too resource intensive; (2) too punitive in nature; and (3) having too negative an impact on the contractor pool. Instead, department procurement officials stated that they preferred to use other administrative remedies such as: cure notices, not exercising option years, and, in the most severe cases, terminations for convenience or default.

Reluctance to pursue suspension and debarment could put the department and the government at risk of continuing to conduct business with poorly performing contractors and may result in decreased productivity and increased cost. In our view, the department needs to take additional steps to ensure that poorly performing contractors, including those whose services are terminated or considered for termination for default or cause are reviewed to determine whether a referral to a suspension and debarment official is warranted.

## **Recording Contractor Performance Information**

The department's components are also not recording pertinent contract performance data for poorly performing contractors. As I mentioned earlier, we identified 23 instances of contract termination due to the contractor failure to perform. However, the department did not document the circumstances and conditions underlying the decisions to terminate 21 of the 23 contracts in either the Contractor Performance System or the Past Performance Information Retrieval System. As a result, critical contract performance information is not being disseminated to procurement specialists within the department or across government for use in making future source selection decisions.

The FAR requires agencies to prepare an evaluation of contractor performance for each contract that exceeds the simplified acquisition threshold (\$100,000 in most cases) when contract work is complete.<sup>3</sup> They also recommend that contractor performance information be documented on an annual basis when the contract period is for more than 1 year. Until recently, the Homeland Security Acquisition manual required that DHS record all contractor performance evaluations in the Contractor Performance System. Effective September 1, 2009, the Contractor Performance Assessment Reporting System replaced the Contractor Performance System as the central repository for DHS contractor performance evaluations. The Contractor Performance Assessment Reporting System feeds information regarding contractor performance into the Past Performance Information Retrieval System, a government-wide database mandated by the Office of Management and Budget. The Past Performance Information Retrieval System is a source of contractor performance information used by other government agencies when assessing a contractor's ability to perform a contract successfully.

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<sup>3</sup> See 48 C.F.R. § 42.1502 (b) (requirement to evaluate); 48 C.F.R. § 2.101 ("simplified acquisition threshold" defined).

With the exception of construction and architect-engineering service contracts, there is no government-wide requirement for agencies to document when a contractor has been terminated for cause or default, regardless of the circumstances or the dollar value of the contract. Despite the absence of such requirements, we believe that it is in the government's best interest to be aware of a contractor's failure to perform. Recording the identity of poorly performing contractors and the rationale underlying termination decisions in agency and government-wide databases would increase the knowledge base of government procurement professionals. It would also reduce the risk of entering into contractual relationships with individuals and corporate entities that have histories of not performing in according to contract requirements.

Amendments have been proposed to expand the requirement for federal agencies to record contract performance information for contracts that have been terminated for cause or default.<sup>4</sup>

### **DHS Taking Action To Address Problem**

The actions taken by the department since our report was issued in February are a positive first step. Policies, procedures, and internal controls intended to increase the department's awareness of poorly-performing contractors are being developed and implemented. For the first time, contracting officers are being required to notify the department's chief procurement officer of any termination notice for any order exceeding \$1 million. Contracting officers must also provide a copy of any determination of non-responsibility to the suspending and debarring official when a determination is based in whole or part on the prospective contractor's:

- Lack of satisfactory performance record under DHS contracts;
- Lack of satisfactory record of integrity and business ethics; and
- Inability to qualify under applicable laws and regulations.

The department has also agreed with our recommendation that all pertinent contractor performance information, as defined by statute or regulation, needs to be recorded in appropriate agency and government-wide data bases. DHS has conducted agency-wide training for contracting personnel, contracting officer's technical representatives, and has published updated guidance in the Homeland Security Acquisition manual.

Finally, the department has stated its intention to conduct an oversight review during the fourth quarter of FY 2010 to determine the extent to which its components are complying with Homeland Security Acquisition manual requirements. We will continue to monitor the department's progress in implementing a meaningful and transparent suspension and debarment program that truly protects the government's interest.

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<sup>4</sup> Federal Register, Volume 74, Number 169, September 2, 2009, Federal Acquisition Regulation; FAR case 2008-016, Termination for Default Reporting.”

## **Suspension and Debarment is Not Just a DHS Challenge**

The under-utilization of suspension and debarment actions is by no means just a DHS problem. For example, the National Procurement Fraud Task Force's Suspension and Debarment Subcommittee found that many federal agencies resist pursuing fact-based suspension and debarment cases because these types of cases are resource intensive. They noted that while conviction debarments are much easier to process, it can take 2-3 years to get a conviction, during which time the government risks continuing business with a bad business partner.

The subcommittee is working on developing a white paper that will identify best practices for suspension and debarment, but has identified the following elements for an effective suspension and debarment program:

- A dedicated person/group charged with proactively identifying potential suspension and debarment cases that need action
- Protocols establishing officials responsible for putting suspension and debarment referral packages together
- Legal support for the acquisition officials who pursue suspension or debarment actions against contractors
- Effective coordination and ongoing communication with the agency's Office of Inspector General
- Effective coordination with the Department of Justice

A robust and transparent suspension and debarment program is essential to effective acquisition management. Contractors who have failed to perform or who have willfully violated federal criminal and civil statutes should not be allowed to do "business as usual" with the federal government.

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Mr. Chairman, this concludes my prepared remarks. I would be happy to answer any questions that you or the Committee Members may have.