



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

“Protecting Taxpayers from Banned and Risky Contractors and Individuals”

February 26, 2009

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

Thank you for inviting me to testify today about the state of the federal contracting system. I am Scott Amey, General Counsel and Senior Investigator 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

Throughout its twenty-eight-year history, POGO has created a niche in investigating, exposing, and helping to remedy waste, fraud, and abuse in government spending. One of POGO’s most celebrated investigations uncovered outrageously overpriced military spare parts such as the \$7,600 coffee maker and the \$435 hammer.² Since that time, particularly in the 1990s, many acquisition reforms have been implemented. The reforms, however, were not all they were billed. The problems created by the reforms became starkly apparent after the beginning of the Afghanistan and Iraq wars, and after Hurricane Katrina devastated the Gulf Coast. Those events showed that contracting decisions were placing taxpayer dollars – and sometimes lives – at risk.

Those events also highlighted how drastically different the federal government’s contracting landscape is now from what it was in past decades. Contracting dollars have increased to over \$530 billion in fiscal year 2008, oversight has decreased, the acquisition workforce is stretched thin, and spending on services now outpaces spending on goods. (And because the return on services is more difficult to quantify than on goods, contracting is even more vulnerable to waste, fraud, and abuse.) Reforms have reduced contract oversight, making it difficult for government investigators and auditors to find waste, fraud, and abuse, and have created contracting vehicles that often place public funds at risk.³ Additionally, as evidenced by the

¹ For more information on POGO, please visit www.pogo.org.

² http://www.pogo.org/pogo-files/reports/national-security/defense-waste-fraud/ns-wds-19990901.html#The_435_Hammer_That_Wont_Go_Away.

³ The Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355), the Federal Acquisition Reform

Government Accountability Office's (GAO) report released today, contractor accountability has been lost.

Contractor Accountability Failures

Government contracts are predicated on a basic principle – taxpayer dollars should be awarded to responsible companies. The Federal Acquisition Regulation (FAR) Subpart 9.103 states that “[p]urchases shall be made from, and contracts shall be awarded to, **responsible prospective contractors only**” and that “[i]n the absence of information clearly indicating that the **prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.**”⁴ (Emphasis added)

Questions should be raised when contracts are awarded to risky contractors. Such contractors include those that have defrauded the government or violated laws or regulations, contractors that had poor work performance during a contract, or contractors that had their contracts terminated for default. Continuing to award contracts to such contractors undermines the public's confidence in the fair-play process and exacerbates distrust in our government. It also results in bad deals for the government and for taxpayers.

In addition, with the increase in outsourcing government work, contractors often have access to classified or sensitive government information. The government needs complete confidence that those contractors and their employees will protect this information. A contractor's responsibility record, including exclusions from government contracts, must be known and considered prior to awarding a contract.

To help ensure that excluded contractors do not receive new contracts during a period of exclusion, the FAR requires contracting officers to consult the Excluded Parties List System (EPLS), a list of contractors suspended or debarred from receiving future government contracts.⁵ Suspensions and debarments apply government-wide – one agency's suspension or debarment decision precludes all other agencies from doing business with an excluded party. These prohibitions also apply to subcontracts, but with little, to no, information about subcontractors, the problems highlighted today might be worse than expected.⁶

According to the Council of the Inspectors General on Integrity and Efficiency, there were only 4,296 suspensions or debarments of contractors and individuals in fiscal year 2007, which was down from the 7,300 in FY 2006 and the 9,900 in FY 2005. All federal agencies under-utilize suspension and debarment against large contractors that supply the majority of the \$530 billion worth of goods and services to the federal government each year. In fact, there have only been a handful of large contractors suspended since the 1990s – GE (for a period of five days), Worldcom, Enron, Arthur Anderson, Boeing (which received multiple waivers to receive new

Act of 1996 (FARA) (Public Law 104-106), and the Services Acquisition Reform Act of 2003 (SARA) (Public Law 108-136) have removed taxpayer protections.

⁴ Federal Acquisition Regulation, Subpart 9.103(a) and (b), http://www.arnet.gov/far/current/html/Subpart%209_1.html#wp1084058.

⁵ FAR Subparts 2.101, 9.404, and 52.209-6, <http://www.acquisition.gov/far/current/pdf/FAR.pdf>.

⁶ FAR Subpart 9.405-2.

contracts during its suspension),⁷ and most recently IBM (for a period of eight days in 2008). Overall, the government needs to re-emphasize the importance of preventing risky contractors from receiving future taxpayer dollars.

Since 2002, POGO has requested that Congress review the suspension and debarment system, especially as it has been applied to large contractors with repeated histories of misconduct. That year, POGO released a report titled *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, detailing large federal contractors that had been found to have repeatedly broken the law or engaged in misconduct but had not been suspended or debarred from doing business with the government.⁸ The report includes recommendations to improve the suspension and debarment system, including:

1. Creation of a centralized database of contractor responsibility information, including civil judgments, criminal convictions, administrative agreements, settlements, fines, and contracts terminated due to poor performance
2. Improved contractor disclosures to government officials so that contracting officers can make better contractor responsibility determinations
3. Fair and equal application of the federal acquisition regulations as to small, mid-sized, and large contractors
4. Amendments to the FAR to require that a suspension or debarment is mandatory for a contractor who is criminally convicted or has had civil judgments rendered against it more than once in a three year period
5. Empower the Interagency Suspension and Debarment Committee (ISDC)⁹ to coordinate which federal agency takes the leadership role in a suspension or debarment case and submit semiannual reports to Congress regarding the suspension and debarment system
6. Require the EPLS to archive past suspensions and debarments on its online database.

The good news is that some of those recommendations have been implemented (the EPLS archives) or are in the works (a government-wide responsibility database¹⁰ and improvements to

⁷ Waivers, also known as “compelling reason determinations,” allow the government to award a contract to a suspended or debarred contractor or individual. FAR Subparts 9.405 and 52.209-6 (permitting a prime contractor to enter into any subcontract in excess of \$30,000 with a suspended or debarred contractor if there is a “compelling reason”). Compelling reason determinations are also used in instances when an agency feels it must continue doing business with a suspended or debarred contractor. FAR Subparts 9.406 and 9.407.

⁸ POGO Report, *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, May 10, 2002, <http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html>.

⁹ The Interagency Suspension and Debarment Committee (ISDC) was created, as an Office of Management and Budget (OMB) committee, by Executive Order 12549 for the purpose of monitoring and overseeing the suspension and debarment system, <http://www.epa.gov/ogd/sdd/isdc.htm>.

¹⁰ Public Law 110-417, Sec. 872, October 14, 2008.

the ISDC¹¹). The bad news is that although a contractor responsibility database is being created, two major concerns still exist.¹² The scope of misconduct that must be included in the database was significantly narrowed, which might create an incentive to settle cases in an effort to keep them out of the database, and the government's database will not publicly accessible. POGO is a fervent believer in the aphorism "sunshine is the best disinfectant" – the public has a right to know the responsibility histories of the contractors and grantees that receive hundreds of billions of taxpayer dollars each year. Moreover, public review of the data might shine a light on contractors that are gaming the suspension and debarment system.

POGO's 2002 report was supported by the creation of the first publicly available Federal Contractor Misconduct Database.¹³ Since its release, POGO has compiled the track records of over 100 federal contractors – some of which have long rap sheets. POGO's database includes over 800 instances of contractor misconduct and documents over \$25 billion in financial settlements, penalties, fines, or restitution paid to federal, state, local, or foreign governments and private sector parties. Therefore it is essential to look at risky contractors that have long nonresponsibility track records in addition to those avoiding detection in the EPLS.

Improving the Suspension and Debarment Process

Despite some movement to improve contractor accountability processes, POGO is deeply troubled by today's GAO report that shows even the most basic task (consulting the EPLS) isn't being performed, or, due to flaws in the data and the search engine, isn't accurately reflecting which contractors have been excluded.

Today, the GAO details major problems with the EPLS, the government's first line of defense against risky contractors. It is outrageous to think that contractors know their way around the system and often reorganize under a different name so as to avoid detection. The result is that suspended and debarred contractors are receiving new contract awards.

To address these problems, the GAO recommended that the General Services Administration (GSA) take the following actions:

1. Issue guidance to procurement officials on the requirement to check EPLS prior to awarding contracts, and to suspension and debarment officials on the five-day entry and contractor identification number requirements
2. Ensure that the EPLS database requires unique contractor identification numbers for all actions entered into the system
3. Strengthen EPLS search capabilities to include common search operators, such as AND, NOT, and OR
4. Take steps to ensure that the EPLS point of contact list is updated

¹¹ Public Law 110-417, Sec. 873, October 14, 2008.

¹² <http://www.pogo.org/pogo-files/letters/contract-oversight/co-tic-20090129.html>.

¹³ <http://www.contractormisconduct.org/>.

5. Place a warning on the Federal Supply Schedule website indicating that prospective purchasers are required to check EPLS to determine whether vendors are excluded and explore the feasibility of removing or identifying excluded entities that are listed on the GSA Schedule.

Most troubling is that some of the recommendations in today's report are identical to those in previous GAO reports detailing problems with the suspension and debarment system. In 2005, GAO found that

about 99 percent of records in EPLS for the 6 agencies we reviewed in depth did not have contractor identification numbers—a unique identifier that enables agencies to conclude confidently whether a contractor has been excluded. In the absence of these numbers, agencies use the company's name to search EPLS, which may not identify an excluded contractor if the contractor's name has changed. Further, information on administrative agreements and compelling reason determinations is not routinely shared among agencies. Such information could help agencies in their exclusion decisions and promote greater transparency and accountability.¹⁴

That GAO report resulted in a White House memorandum directing agency suspension and debarment officials to share administrative agreements with the ISDC.¹⁵ This Committee and the ISDC should inquire as to the guidance that was to follow and the status of the administrative agreement sharing program.

In a January 12, 2007, report and briefing to the Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, the GAO stated that “[t]he contracting officer **should check** the EPLS to determine whether the contractor is prohibited (suspended, debarred, proposed for debarment, or otherwise ineligible) from receiving an award.”¹⁶ (Emphasis added) The report also stated, “Procedures vary among agencies, but contracting officers reported that **in general**, they check EPLS for debarments or suspensions.”¹⁷ (Emphasis added) These non-mandatory terms for using the EPLS might have been a precursor to the GAO's finding that contracting officers do not always check the EPLS.

¹⁴ GAO Report, *Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process*, GAO-05-479, July 2005, p. 3, <http://www.gao.gov/new.items/d05479.pdf>. According to the report, problems related to contractor names and identifiers date back to 1987. *Id.*, at p. 16.

¹⁵ Paul A. Denett, Administrator for Federal Procurement Policy, and Linda M. Combs, Controller, Office of Federal Financial Management, Memorandum to Heads of Departments and Agencies, Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations, M-06-26, August 31, 2006, <http://georgewbush-whitehouse.archives.gov/omb/memoranda/fy2006/m06-26.pdf>.

¹⁶ Cristina T. Chaplain, Acting Director, Acquisition and Sourcing Management letter to The Honorable Carl Levin and The Honorable Norm Coleman, Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, Selected Agencies Use of Criminal Background Checks for Determining Responsibility, Enclosure I, p. 8, January 12, 2007, <http://www.gao.gov/new.items/d07215r.pdf>.

¹⁷ *Id.*, at Enclosure I, p. 12.

Having reliable data on contractors is becoming more vital because of the growing reliance on them at all levels of government. The National Procurement Fraud Task Force has recommended establishing a National Procurement Fraud Database and requiring background checks for contractor principals.¹⁸ The database would be created with federal funds and be “utilized by federal, state, and local procurement officials prior to the authorization of contract actions.”¹⁹ The Task Force found that “[m]obility permits fraudulent contractors and service providers to move between levels of Government and across jurisdictions with little fear of detection since a national database does not exist.”²⁰

POGO’s Recommendations

POGO urges this Committee to further investigate the suspension and debarment system and make the necessary improvements to ensure that taxpayer dollars are not at risk.

1. Provide public access to the federal contractor responsibility and performance database. The database should become the one-stop shop to find all information about a contractor’s performance, responsibility, ethics, and integrity track record.
2. Increase the scope of civil and administrative cases included in the federal contractor responsibility and performance database. Cases should include civil, criminal, and administrative proceedings resulting in the payment of a monetary fine, penalty, reimbursement, restitution, damages, or settlement of \$5,000 or more to a government – even when there is no admission of guilt or liability.
3. Require that all administrative agreements are shared among agencies and are made publicly available.
4. Implement GAO’s past and recent recommendations, including training the acquisition workforce about entering information into and using the EPLS, or its successor; requiring unique identifiers; strengthening EPLS search capabilities; updating EPLS points of contacts; ensuring that government ordering websites are tied into the EPLS so that contracting officers are aware that suspended or debarred contracts should not be given new contracts; and sharing of administrative agreements.
5. Mandate that an offeror or bidder that falsifies a certification regarding responsibility matters be immediately debarred.²¹
6. Consider the use of background checks for companies and principals, especially for contracts involving classified or sensitive information.
7. Investigate the pilot program requiring contractors to report specific information about their subcontractors for suspension and debarment violations as a way to uphold the ban on contracting or subcontracting with suspended or debarred contractors or individuals.

¹⁸ National Procurement Fraud Task Force, Legislation Committee, *White Paper*, June 9, 2008, <http://pogoarchives.org/m/co/npftflc-white-paper-20080609.pdf>.

¹⁹ *Id.*, at p. 18.

²⁰ *Id.*

²¹ FAR Subpart 52.209-5.

POGO urges this Committee to think big when creating a new and improved suspension and debarment database – especially in light of the passage of the federal contractor performance and responsibility database that will include civil, criminal, and administrative cases, including contractors and individuals who have been suspended or debarred.²² The consolidation of information will not only assist contracting officers and suspension and debarment officials, it will also provide a public forum to further identify instances highlighted by the GAO today. Moreover, it will assist in weeding out risky or banned contractors and potentially increase competition in federal contracting.

Conclusion

POGO remains concerned with the award of taxpayer dollars to contractors with long rap sheets. Today's GAO report further erodes POGO's confidence in the current process to weed out risky contractors – especially those contractors who have been excluded from doing business with the federal government.

Thank you for inviting me to testify today. I look forward to working with Chairman Towns, Ranking Member Issa, and the entire Committee to further explore how the government can improve the suspension and debarment process and better protect taxpayers.

²² Public Law 110-417, Sec. 872(c)(3).