

**RESPONSIBILITY IN FEDERAL HOMELAND
SECURITY CONTRACTING**

FULL HEARING
OF THE
COMMITTEE ON HOMELAND SECURITY
HOUSE OF REPRESENTATIVES
ONE HUNDRED TENTH CONGRESS

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RESPONSIBILITY IN FEDERAL HOMELAND SECURITY CONTRACTING

Friday, April 20, 2007

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOMELAND SECURITY,
Washington, D.C.

The committee met, pursuant to call, at 10:12 a.m., in Room 311, Cannon House Office Building, Hon. Bennie G. Thompson [chairman of the committee] presiding.

Present: Representatives Thompson, Jackson Lee, Cuellar, Carney, Clarke, Green, Rogers, McCaul, Dent, and Bilirakis.

Chairman THOMPSON. I would like to call the hearing to order. We are scheduled to have a series of votes in the next 15 to 20 minutes. What we would like to do is get our first witness out of—comments out so we can begin the questioning. Ranking Member King is delayed a few minutes. But since it is a hearing, we can begin since we have, according to the rules, enough members to begin.

I want to thank our witnesses who are here today. Federal contracting is an important issue. Every year, the Federal Government spends billions of dollars in buying goods and services from the private sector. There is a necessary relationship between the government and the private sector. In 2006 alone, DHS spent about 40 percent of its \$31 billion budget on contracts for goods and services, making DHS the third-largest purchaser in the Federal sector.

I have been told their responsibility in contracting is a government-wide issue and shouldn't be the concern for this committee. I have also been told that strengthening responsibility rules must be a government-wide undertaking. Yes, I agree that responsibility should permeate every procurement shop in the Federal Government. But that will never happen unless one agency steps forward and decides to reach for a higher standard. Increasing contract accountability at DHS will help transform the 6 slip shot contracting methods that pervade the Federal Government.

As Members of Congress, we have a duty to ensure that before the taxpayers' money is spent, DHS knows the company receiving it will exercise sound business practices ethics and integrity. Yet, I am told that responsibility in contracting is a controversial topic. How could anyone be opposed to increase standards of accountability? Assuring accountability before contracts are awarded would reduce fraud, waste and abuse later on down the line. Experience has proven that there is a direct connection between an agency failing to adequately compete a contract and poor performance on that contract.

The billions wasted in no-bid sole source contracts awarded after Katrina stand as a testament to that fact. Traditionally, full and open competition has been a government-wide standard. However, in recent years, there has been a troubling shift toward non-competitive sole source contract.

In fiscal year 2005 alone, nearly 50 percent of DHS contract awards was sole source, no-bid contracts. This committee has established a robust record and a demonstrated commitment to increased responsibility in contracting at the Department of Homeland Security. In our authorization bill for fiscal year 2008, we require each contractor to disclose any role its company may have had in creating any part of the contract vehicle that it is bidding on. We also require a statement from each contractor that it is not in default or delinquent on Federal tax obligations. This is a good start and does not stop there. If a company wants a DHS contract, should we expect at the very least that there is no conflict of interest and they have paid their taxes?

Contractor responsibility is just this simple. Federal tax dollars should not be used to support companies that are not willing to comply with Federal law. I want to thank all our witnesses who are here today and I look forward to our testimony.

I understand Mr. Bilirakis will do the opening statement for our Ranking Member, Mr. King. I yield to Mr. Bilirakis.

Mr. BILIRAKIS. Thank you, Mr. Chairman. I appreciate it very much. It is an honor to be able to present the opening statement on behalf of Mr. King. It is imperative that DHS work with responsible contractors in procuring goods and services from the private sector. Awarding contracts to responsible bidders means decreasing the potential for waste, fraud and abuse in the system. This is critical, given the limited number of dollars DHS has to counter the many threats to the security of the homeland. There already exists clear standards for responsible bidders in government contracting. We must remember that there already exists a substantive and well-founded regulatory framework that pertains to government procurement, the Federal Acquisition Regulations or FAR.

It is important to note that no agency, including the Department of Homeland Security, can opt out or exempt itself from the FAR. In all, DHS contractors are faced with nearly 1,500 pages of government procurement standards. Complying with this voluminous and oftentimes burdensome set of regulations is a challenge for many businesses. It has the potential to discourage would-be government contractors, and the burden of these complicated regulations often falls disproportionately on small businesses which do not have the government procurement expertise to navigate the rules of this complicated acquisition system.

The Department of Homeland Security, due to its mission of protecting the homeland, certainly has a high volume of procurement contracts. However, the Department is only 4 years old. While the Department has seen its share of procurement problems and issues with Federal contractors, many of the DHS procurement problems have more to do with the lack of experience and training on the part of DHS acquisition workforce than a lack of standards for contracts.

Additional or new procurement regulations are not the answer. The answer lies with the Department in properly following and complying with existing procurement standards, vetting prospective contractors and conducting substantive due diligence to the best of its ability. This committee also has a responsibility in this process in carrying out our highly important oversight responsibilities.

I thank the witnesses for appearing before the committee today. And I look forward to your testimony. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much. Ms. Duke, we are going to try to get through your testimony, and we will come back after that for questions. But in the interest of time, please begin your testimony.

**STATEMENT OF ELAINE DUKE, CHIEF PROCUREMENT
OFFICER, DEPARTMENT OF HOMELAND SECURITY**

Ms. DUKE. Thank you. Thank you, Mr. Chairman, members of the committee for the opportunity to appear with you to discuss the DHS contracting procedures on responsibility. In my written testimony, I outlined the detail of the processes and systems we rely on to ensure that we do business only with responsible contractors. For today's purposes, let me very briefly touch on the processes and systems and address your question, are the current standards for responsibility sufficient? In accordance with the regulations, contracting officers are required to obtain acceptable evidence of the prospective contractor's ability to obtain required resources and must be provided with a satisfactory performance record.

At DHS, our acquisition regulations supplements make it very clear that contracting officers are to perform responsibility determinations before awarding a contract. Their assessments are based on a number of inputs ranging from information collected in response to a specific procurement to centrally available information.

For example, contracting officers evaluate a company's financial statements, consider how long it has been in business or may review its bond rating. Prior to making an award, contracting officers check the excluded parties list system to determine if a contractor is debarred or suspended from government contracting. A single agency's suspension or debarment decision with limited exceptions precludes all other agencies from doing business with that excluded party. Another critical step in determining responsibility is considering past performance. DHS contracting officers use the government-wide Past Performance Information Retrieval System known as PPIRS to obtain information Federalwide on contractor past performance.

Overall responsibility determinations are also dependent on the contractor representations and certifications as they are known. The contractor certifies, for instance, to the best of its knowledge and belief, whether within 3 years of its offer, the company or any of its principals have been convicted of or had civil judgment rendered against them for a wide range of offenses.

Now, in response to the central question of the hearing, are the standards for determining responsibility sufficient? Let me start by saying that people frequently use responsibility and suspension and debarment almost interchangeably. Yet, responsibility determinations and suspension debarment are both for the purposes of

protecting the government's interest, the scopes and consequences of those actions differ considerably. A responsibility determination is made by the contracting officer and pertains to the specific contact action.

Of course, in conducting responsibility determination, the contracting officer may become aware of a series of problems that may force them to recommend a contractor for suspension and debarment. But generally the responsibility determination is confined to a single award and focuses on answering the question, does the contractor have the integrity past performance and resources to meet the government's requirement?

Contracting officers use their discretion when evaluating the information for responsibility determination. What I mean by this is, acquisition professionals must make the decisions based on the information available to them and the situation before them so that in applying the rules there may be different outcomes in different situations. On the other hand, suspension and debarment are made by the head of the agency and generally relate to patterns of behavior and violations of law regulations.

Current regulations regarding responsibility and suspension debarment reflect a philosophy that emphasizes that the intended purpose of the action is to prevent poor performance, waste, fraud and abuse in Federal procurement. The motivation behind an action to suspend or debar a contractor or for the contracting officer to make a negative responsibility determination is not punitive in nature, but rather a measure designated to protect the government's interests.

We strive to be fair and reasonable, to be aware of privacy concerns and to ensure due process is afforded where appropriate and to craft regulations that allow for those that may not have been model citizens in the past to be rehabilitated so that they are eligible for government contracts.

Mr. Chairman, I know the committee is concerned with the contracts that are being awarded to unethical contractors. The civilian agency acquisition council recently published two FAR cases related to responsibility. One rule entitled Contractor Code of Ethics and Business Conduct was initiated by members of my staff and proposes as establishing clear and consistent policy on contractor code of ethics and business conduct. The second rule, Representations and Certifications on Tax Delinquency, proposes to specifically address delinquent Federal or State tax obligations within 3 years of an offer and contractors' representations and certifications.

I appreciate the opportunity to testify before this committee about DHS contracting and I would be happy to answer questions of the committee after your vote.

[The statement of Ms. Duke follows:]

PREPARED STATEMENT OF ELAINE DUKE

Chairman Thompson, Congressman King, and Members of the Committee, thank you for this opportunity to appear before you to discuss the Department of Homeland Security (DHS) acquisition program and our contracting procedures as they relate to responsibility determinations. I am the Chief Procurement Officer (OCPO) for the Department of Homeland Security (DHS). I am a career executive and I have spent most of my 23 years of public service in the procurement profession.

Before addressing responsibility determinations, I'd like to convey my top three priorities, which are essential elements to enhancing our ability to procure from responsible contractors.

- First, to build the DHS acquisition workforce.
- Second, to make good business deals.
- Third, to do effective contract administration.

As the CPO, I provide oversight and support to eight procurement offices within DHS—Customs and Border Protection (CBP), Federal Emergency Management Agency (FEMA), Immigration and Customs Enforcement (ICE), Transportation Security Administration (TSA), United States Coast Guard (USCG), United States Secret Service (USSS), Federal Law Enforcement Training Center (FLETC), and the Office of Procurement Operations (OPO). As the CPO, my primary responsibility is to manage and oversee the DHS acquisition program. I provide the acquisition infrastructure by instituting acquisition policies and procedure that allow DHS contracting offices to operate in a uniform and consistent manner.

Mr. Chairman, I know that you are very concerned about ensuring that DHS and its Components procure goods and services on behalf of the American taxpayer from responsible contractors. I can assure you that we share your interest.

Not just at DHS, but throughout Federal agencies, there is an emphasis on conducting business with responsible contractors. The Federal Acquisition Regulation (FAR) requires all Federal agencies to procure goods and services only from responsible contractors. Prior to entering into a contract, the Contracting Officer is required to obtain acceptable evidence of the prospective contractor's ability to obtain required resources, and also must be provided with a satisfactory performance record. When a Contracting Officer awards a Federal contract, he or she is making an affirmative determination that the recipient of the contract is a responsible contractor with respect to that contract. If there are concerns about the responsibility of responsive small businesses, the Small Business Administration is the sole authority for these determinations.

The FAR provides the guiding principles and the processes and procedures the acquisition community uses to ensure that the Government does business only with responsible contractors. The process for reaching a conclusion that a contractor is responsible is governed by FAR Subsection 9.104-1(a), which requires that in order to be deemed responsible, a prospective contractor must

- Have adequate financial resources;
- Be able to comply with the delivery or performance schedule;
- Have a satisfactory performance record;
- Possess a satisfactory record on integrity and business ethics;
- Possess the necessary organization, experience, technical skills, accounting and operations oversight;
- Have the production, construction and/or technical equipment and facilities to perform the work required; and
- Otherwise be qualified and eligible.

At DHS, our Homeland Security Acquisition Regulation, the HSAR, and our Homeland Security Acquisition Manual, the HSAM, supplement the FAR guidance and make it very clear that our Contracting Officers are to perform responsibility determinations prior to making a new contract award. In fact, DHS has even developed a form, DHS Form 700-12, to guide the responsibility determination process. The list of factors required by the form expands upon those required by FAR 9.104 and includes drug free workplace, small business subcontracting compliance, equal employment opportunity, and environmental/energy considerations.

Our Contracting Officer's assessments with respect to a contractor's responsibility are based on a number of inputs, ranging from information collected in response to a specific procurement to centrally available information. For example, when assessing financial responsibility, a DHS Contracting Officer may review and evaluate the latest company financial statements. Other considerations may include how long the company has been in business, any bankruptcies declared by the company, bond rating by Moody's or Standard and Poor's, etc. Additionally, since April of 2003, DHS has had a memorandum of understanding in place with the Defense Contract Audit Agency (DCAA) that makes available their expertise in determining financial responsibility of prospective contractors.

Prior to making an award, the Contracting Officer reviews the web-based Excluded Parties List System (EPLS) operated by the General Services Administration to ascertain whether the contractor is debarred or suspended from Government contracting; those on the list are excluded from doing business with the Government. The focus of debarment and suspension is to exclude companies that are not presently deemed responsible. A contractor may be suspended or debarred for broad range of conduct—commission of fraud or a criminal offense in connection with ob-

taining, attempting to obtain, or performing a public contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false statements, tax evasion, or receiving stolen property. However, it should be noted that convictions or civil judgments are not required; a debarment may use a preponderance of evidence standard when making decisions. The standard for suspension is adequate evidence and often is imposed when there is an indictment, but not a current conviction or judgment. Additionally, suspension and debarment may occur as a result of any other offense indicating a lack of integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor. But, that said, it is important to note the existence of a cause for suspension or debarment does not necessarily require that the contractor be suspended or debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors are considered.

The Excluded Parties List System (EPLS) and the Government's debarment and suspension procedures are well-established and well-understood within the Government and by companies who do business with the Government. EPLS is a tool integral to the way we do business. It provides the single comprehensive list of individuals and firms excluded by Federal Government agencies from receiving Federal contracts or federally approved subcontracts. A single agency's suspension or debarment decision, with limited exceptions, precludes all other agencies from doing business with an excluded party.

Another critical step in determining contractor responsibility is consideration of contractor Past Performance. DHS Contracting Officers are also required to use the Past Performance Information Retrieval System, known as "PPIRS", to obtain information on contractor past performance to assist with source selections. PPIRS is a government-wide data warehouse which contains information on past performance of contractors with whom the Government does business. DHS Contracting Officers and Contracting Officer Representatives (CORs) use a feeder system to input information on DHS contractor performance into PPIRS. The Contractor Performance System (CPS) managed by NIH allows us to input performance information on our DHS contract actions. This data then feeds into the PPIRS data warehouse.

An overall responsibility determination also is dependent on contractor representations and certifications—"reps & certs" as they are known. Contractors provide these FAR-required statements by using the Online Representations and Certifications (ORCA) system. As part of the submission, the contractor certifies, to the best of its knowledge and belief, whether it and/or any of its principals, within a three-year period preceding the offer, have been convicted of or had a civil judgment rendered against them for the following: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, State or local Government contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property. The Contracting Officer is responsible for reviewing the "reps and certs" prior to award to ensure that the company does not present information that would prevent an affirmative finding of contractor responsibility.

A more expanded pre-award survey may be conducted if the Contracting Officer has reason to believe that one or more of the responsibility standards I mentioned earlier is in doubt, or if information is not readily available.

In response to the central question of this hearing is—Are the standards for determining responsibility sufficient?—Let me start by saying that people frequently use the terms "responsibility" and "suspension and debarment" almost interchangeably. Yes, responsibility determination and suspension and debarment are both for the purpose of protecting the interests of the Government, but the scope, the consequences of an action, as well as the decision makers involved, differ considerably. A responsibility determination is made by the Contracting Officer and pertains to a specific contract action. Of course, there are instances where during the course of a responsibility determination, the Contracting Officer becomes aware of serious systemic problems or a single serious breach that warrants suspension and debarment based on actions under a single contract; but, generally, responsibility determinations are confined to a single award scenario and focus on answering the question: Does the contractor have the integrity, past performance and resources to meet the Government's requirement? Very importantly, the consequences of that determination are limited to that contract action. On the other hand, suspension and debarment actions are made by the Head of the Agency, or designee, and frequently relate to patterns of behavior and violations of law. Once the offending contractor is entered into the EPLS, the government-wide suspension and debarment system,

Contracting Officers are, almost without exception, precluded from making any contract award to that contractor.

To get back to your central question, are standards for determining responsibility sufficient? I am among those across the Government who believe that problems surrounding contractor responsibility assessment are a training and implementation issue, not a policy issue. Concerns about DHS doing business with contractors that may not be complying with laws or regulations should be handled by agency suspension and debarment officials in accordance with FAR government-wide suspension and debarment procedures at FAR Subpart 9.4, not handled by Contracting Officers under FAR contracting responsibility determination procedures leading to award of individual contracts.

Let me expand on a point I made earlier. It is important to recognize that the current regulations regarding responsibility, suspension and debarment reflect a philosophy that emphasizes that the intended purpose is to prevent poor performance, waste, fraud and abuse in Federal procurement. The motivation behind an action to suspend or debar a contractor from Federal Government contracts or for a Contracting Officer to make a negative responsibility determination is not punitive in nature. These actions are not intended as punishment, but rather a measure designed to protect the Government's interests.

A responsibility determination is required for each contract award; however, Contracting Officers use their discretion when evaluating the information before them. What I mean by this is, our acquisition professionals must make decisions based on the information available to them and the situation before them so that when applying the rules, there may be a different outcome in different situations. I believe that as you consider whether additional guidance, tools and government-wide processes should be added to our existing approach to determining responsibility, it is important to maintain this discretion. Our contracting professionals are able to make appropriate business decisions based on the particular facts of a given situation.

I would also like to address certain important presumptions and considerations that are built into our current processes and procedures for responsibility. We strive to be fair, to be reasonable, to be aware of privacy concerns, to ensure due process is afforded where appropriate, and to craft regulations that allow for those that may not have been model citizens in the past to be rehabilitated such that they are eligible for Government contracts. To be sure there are competing interests at play when we are making our determinations, but in the end, we should be mindful that we have a very real responsibility to balance these competing interests. After all, the consequences of our actions with regard to responsibility determinations ultimately may mean that we are depriving an individual of their livelihood.

Mr. Chairman, I know that you and the Members of the Committee are concerned that contracts are being awarded to non-responsible and unethical contractors. To that end, the Civilian Agency Acquisition Council (CAAC) has initiated several FAR cases related to responsibility.

In the past two months, the FAR Secretariat published two proposed rules dealing with contractor responsibility matters. A proposed FAR rule, entitled *Contractor Code of Ethics and Business Conduct*, was published in the Federal Register on February 16, 2007. The rule, initiated by members of my OCPO staff, establishes a clear and consistent policy regarding contractor code of ethics and business conduct, and responsibility to avoid improper business practices. Additionally, the proposed rule requires contractors to provide their employees with information on contacting the appropriate Inspector General to report potential wrongdoing to include posting this information on company internal websites and prominently displaying hotline posters. The second proposed FAR rule, *Representations and Certifications-Tax Delinquency*, published in the Federal Register for public comment on March 30, 2007, proposes to amend the FAR clause governing offerors' representations and certifications to specifically address delinquent Federal or State tax obligations within a three year period.

Another new FAR case, currently under consideration and not yet published, would amend Federal regulations to address updates to Past Performance procedures. The Office of Federal Procurement Policy's (OFPP) Best Practices Guide, last published in May of 2000, is also presently being updated as directed by OFPP through the Chief Acquisition Officers' Acquisition Committee for E-Gov (ACE), which has established an interagency working group to review regulations, policies, and guidance associated with contractor performance information.

In keeping with my top three objectives I iterated earlier in my testimony, I have been growing both the size and capability of my staff, both in operations and in my policy, training, and oversight cadre. This is allowing us to approach our oversight responsibilities both on the front end of the procurement cycle and the post-award back end. We are developing a robust training program for acquisition professional.

Our Excellence in Contracting Training Series for DHS Headquarters and Component personnel is designed to enhance the acquisition workforce's understanding of contracting regulations and policies. Recent topics have included Contracting by Negotiations, Contract Financing, the SAFETY Act, and Strategic Sourcing. We are also planning additional in-depth training in targeted areas such as Buy American Act procedures and Performance-Based Acquisition. The growth in the number of talented and experienced acquisition professionals in OCPO to serve as Desk Officers enhances our ability to work closely with the Components on their specific acquisition issues, and the growth in the size of my Oversight group will enable OCPO to perform more structured procurement management reviews of the Components' acquisition programs.

Ethical behavior is a core DHS value. OCPO has developed additional on-line ethics training, beyond what is required, which highlights ethical acquisition practices for our Government acquisition professionals department-wide. The training is expected to be launched by the end of the month to our contracting personnel and all within the Department who participate in DHS acquisitions.

Mr. Chairman, thank you for the opportunity to testify before the Committee about DHS contracting procedures. I am glad to answer any questions you or the Members of the Committee may have for me.

Chairman THOMPSON. Thank you very much. As previously announced, we will recess the hearing. It appears that it might be about 45 minutes before we reconvene. We have about nine votes to take. And shortly after taking those votes, we will reconvene.

Ms. DUKE. Thank you, Mr. Chairman.

Chairman THOMPSON. The committee is recessed.

[Recess.]

Chairman THOMPSON. We will start the questioning since I have the first opportunity.

Ms. Duke, relative to procurement, I am not certain—I know you were not here when the Shirlington contract was authorized. But as you know, we held some hearings on that procurement. We shared a lot of concern from this committee on that contract. And we have subsequently requested an Inspector General's report on that entire procurement, and I am told that it will be publicly available next week.

For the record, I was briefed on it earlier this morning. And many items that we raised in those hearings based on that briefing I think will be found to be true. But since you have been on board, what have you done to assure us that procurements like Shirlington will not occur on your watch.

Ms. DUKE. I think the biggest thing we have done is public policy on how responsibility determinations are to be done. So we have a directive on responsibility determinations and policy. It has a checklist with it. And we, by our DHS policy, have the form in each contract file that shows that the contractor made an affirmative determination of responsibility before awarding the contract. And when we do our oversight from my office, we check to see if that determination of responsibility has been done.

Chairman THOMPSON. For the record, can you provide this committee with information on how many procurements have been denied because contractors did not meet the nonresponsible contractor clause?

Ms. DUKE. I will gather that information for you.

Chairman THOMPSON. One of the things we are trying to do is just establish those situations. Apart from that, one of the issues I think you are aware of, also, is the number of the private contractors and consultants that are used in procurement. Have you been

able to employ full-time procurement personnel since your tenure at the Department and less a reliance on contractor consultant expertise?

Ms. DUKE. Within the contracting offices, we have increased the number of people that we have, Federal employees in the contracting offices.

We have gone up actually about 42 percent in the number of people over the last year and a half. We still need to hire more people in the contracting offices. Our workload is growing, in addition. So we were behind, when we started a number of people and then our workload is growing. So we still are working on the hiring efforts. But we are being able to attract people to the Department.

Chairman THOMPSON. How do you go about attracting people to your department?

Ms. DUKE. What we are trying to do is market the mission that we have in the Department. We are trying to get existing Federal employees. We are trying to get people from industry to come in to work with the Federal workforce, and we are building an intern program. As you know, in the President's budget, we have enough funding to have about 70 interns, which we will centrally manage out of my office, rotate them through the components of the Department, and they will gradually be placed permanently. That is a growth revitalization effort.

In terms of current, we are trying to—we put an add in The Washington Post to attract people. We are trying to make the human resource process a little more streamlined so that people will come and not be deterred by the bureaucracy of getting a Federal job. And we are working with the Federal capital officer with that to get people more quickly from the time they apply to the time they can be put in a Federal position, and I think that is going to be key to our success.

Chairman THOMPSON. Well, a good point. We had the human capital person before us yesterday. Can you tell me how many positions you have authorized in your department versus how many are out in the field to date?

Ms. DUKE. We have about 1,100 positions authorized, and we have a little under 900 filled. So we have a 24 percent vacancy rate in the contracting field.

Chairman THOMPSON. Have you put together a time line where you would like to have all 1,100 filled?

Ms. DUKE. We would like to have them all filled by the end of fiscal year 2007. But that is—we have an attrition rate that is making it very difficult to reach that.

Chairman THOMPSON. If I told you that Members of Congress are bombarded quite a bit by people who are pursuing employment opportunities, but they very rarely hear of situations like yours, and I am from Mississippi, and a constituent from Mississippi probably is not reading The Washington Post, I would like to see enhanced recruitment on your part working with the Human Capital Operation to not only expand it, but they are very good people who, I think, if we can touch, who would look at Federal service as a career, and I would just offer that as a suggestion for you to fill that void that you have now in a faster period of time.

I will at this point yield my—any other time and I will now call on the gentlelady from New York, Ms. Clarke.

Ms. CLARKE. Thank you very much, Mr. Chairman. And thank you for pursuing this area of expertise for oversight.

There is no doubt, Mr. Chairman, that DHS is the newest department in our government, it is one of the government's largest purchasers. This is why Congress must be extra vigilant in its oversight of the department's procurement process. As DHS continues to develop, the next few years will be vital in determining DHS will have a legacy of wasteful spending or makes good use of the nation's resources and protection of our country.

I wanted to just ask you, Ms. Duke, you know, while every agency occasionally needs to farm out certain operations that the private sector can better handle, when it comes to the protection of American people, our government cannot really rely too heavily on private contractors over whom we have less control. I am very concerned about that.

Could you tell me what DHS is doing to try to reduce the amount of outside contractors and increase the amount of work performed by DHS employees?

Ms. DUKE. I think what we are doing is we are in the key areas, the program offices, the offices that run the program, we are doing our recruiting efforts to fill the majority of those positions with Federal employees. And the recruiting effort, I mentioned earlier, is not just for contracting people. It is for testing, evaluation systems engineering, program managers. And that is critical.

We feel that what happened was DHS's mission grew more quickly than its workforce grew, and so we do have a proportionally large reliance on contractors in key positions.

So we are systematically working through our major programs, our major acquisition programs and making sure that we have Federal employees running those offices.

Ms. CLARKE. Can I ask you how—whether you have a plan to really balance that out and a time frame in which, you know, you would begin to, you know, transfer that type of responsibility from private contractors to Federal employees? And, you know, are we building out a situation where the private sector becomes more pre-eminent in certain sensitive areas that, indeed, the American public really needs to see us having more control over.

Can you speak to that?

Ms. DUKE. Sure.

In terms of the private sector's involvement, I think relying on the private sector for the solution for delivering it is acceptable as long as it is clear to both the contractor, to the American people, that the government is the decision making role. I think when we partner with contractors to have good relations is a good, a good position, but we are accountable, the funds of—that were appropriated to DHS, and we are accountable to the expenditure of those funds. It is not a partnership in the accountability of how we spend those funds.

So that is a mindset and a culture that we believe in in DHS.

In terms of the time frame for building this acquisition office, our first step is by the end of this year, we want to have a properly certified and qualified program manager running each of our major

programs. And that is our first step, and that is our first level of recruiting in the Department. We have about 25 of those major programs.

Ms. CLARKE. I would like to sort of add my voice to that of Mr. Chair in terms of your outreach around recruitment.

Again, I come from New York City, The Washington Post is not necessarily the paper of the day there. And I know that the talent and expertise that you are looking for has already been cultivated around this nation. To the extent that we can look at some more creative ways of casting a net for the talent that DHS really requires, I think we should look at those areas around the nation where procurement has become a way of life and an expertise.

In New York City, for instance, we are constantly reaching out for those within—to do contracting through our governmental agencies. So we have a lot of folks there who are already familiar with that process. So I would encourage you to look at more of a creative means of casting a wider net to drawing the expertise that is required for the Agency.

I wanted to refer to your testimony in which you state that the problem surrounding contractor responsibility assessments are a training and implementation issue and not a policy issue.

Since there are clearly problems with responsibility assessments, has DHS management dropped the ball on implementation, and how are you addressing this?

Ms. DUKE. I think that we have done a lot to make sure that contracting officers know what needs to be done on the responsibility determination. We have had workshop-type training on it. And we have the checklist that helps guide them through it and the policy. And we do have, in our supplement to the Federal Acquisition Regulation, discussion on it.

We have specifically addressed some unique positions with DHS that deal with our provisions on foreign entities and domestic inverted companies, and we also make sure that that determination is done.

I think that with some of the implementation, it is an issue of what should be done in a responsibility determination versus what should be done in terms of debarment and access to the information. Federal-wide, we have done a lot to make access better in terms of how does a contracting officer know if a contractor is performing well.

So there is a lot of Federal initiatives we work on to make sure that the contracting officer has access to the good information.

Ms. CLARKE. And is there sort of an assessment tool that looks at the standard by which, you know, that implementation is regarded, you know. You want to make sure that the consistencies are of a mega agency. But it becomes subjective at a certain point. Is there an assessment tool that you all are utilizing to make sure the implementation is of the highest standard and it is somewhat uniform across the agency?

Ms. DUKE. In terms of the process, we look at that in oversight. But in terms of the actual determination, that is, by regulation, by practice, the discretion of the contracting officer.

So some of the indicators we can handle, whether that is working well, was it done or not for oversight. Another thing we look at is

we look at our protests to the General Accountability Office and whether we are prevailing on most protests, which is an indicator that we are doing our pre-award work well.

So we do have some indicators, but we do not go back and look at—we do have the IG looking at and judging whether or not they think the contracting officer used their discretion effectively. But we are looking to see if it is done.

Ms. CLARKE. Thank you very much, Mr. Chair.

Chairman THOMPSON. Thank you.

Thank you very much for your questions.

We now recognize the gentlelady from Texas for 5 minutes for questions.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. And thank you for holding this hearing.

And thank you, Ms. Duke. Can you hear me?

Ms. DUKE. Yes, I can.

Ms. JACKSON LEE. Thank you very much for your testimony and some of the work that we have begun together anew on focusing on a more far reaching effort in procurement by the United States Government, and in this instance, the Department of Homeland Security.

I think it is important to make the point that these contracts are funded by tax dollars. And many times, taxpayers who are lacking in their individual lobbyist's connectedness really get a back seat to doing work with the Federal government. They do so because it is sometimes complex, it is sometimes, unfortunately, about connection or bigness. And even sometimes it is partisan. And I hope this hearing can help to move us in a direction that we focus on good services, good servants, public servants, and delivering the services to those who are most in need.

So my interest is—interest is going to focus on the most serious debacle, and that is Katrina, from the Federal Government's perspective. And I would argue that we saw one of the largest abuses, and I cite an opening paragraph of a letter dated August 24th, 2006, the government awarded 70 percent of its contracts for Hurricane Katrina work without full competition, wasting hundreds of millions of dollars—of taxpayer dollars in the process. A Houston—a House study that we did just about a year ago.

They report a comprehensive overview of government audits on Katrina contracting that out found that out of 10.6 billion in contracts awarded after the storm last year, more than 7.4 billion were handed out with limited or no competitive bidding. Nineteen contracts worth 8.75 billion were found to have wasted taxpayer money at least in part costing taxpayers hundreds of millions of dollars according to the report.

The other problem, of course, is when we have that happen, those who are victims and who are supposed to get the money really don't. And spending a lot of time in New Orleans and working with Katrina survivors in Houston, one of the major components of their complaints was the inability to pick themselves up by their bootstraps and get back to work based upon doing the work that was needed in New Orleans.

Let me add one other point before I start my questions.

The existing program that is now called the Road Home contract, another article from The Times Picayune, talks about critics, a consortium of churches on Monday called for a Federal investigation of the contract between the State and ICF International. The company earned up to 756 million to parcel out billions in Federal recovery, but the bad news is that the Ninth Ward still looks the way it looks and nobody has anything and the Road Home office that is in my Congressional district, is like a ghost town because most people say it doesn't work.

Let me cite one other. "A Screw on Blue Tarp Contract," another article. Now months later NOLA has looked into this, specifically the ACE angle, the Army Corps of Engineers say they did not over-pay for the tens of thousands of blue roofs. Of course we think otherwise.

So let me ask the question as to why these big contracts were given, why we couldn't find small businesses, and I know that the SBA is partly, greatly to blame in many instances. You had to look for section 8(a). It would have been smart to waive some of those. But what kind of outreach or collaboration was with the SBA to say let us find some small businesses that can haul trash, that could cut trees, that could help with power lines, that would allow people to get more effectively back into their homes.

But I specifically want to know about ICF. I would like to know about SHAW. What we utilized there. Everywhere I went, it was SHAW being ineffective.

And I yield for a moment to Ms. Duke.

Ms. DUKE. In terms of SHAW and the other three large contractors who did a lot of the work after Hurricane Katrina, that was a result of not having the contingency contracts in place when Katrina hit. So when the disaster hit, we immediately entered into contracts. The cure to that is to have the contracts in place before the disaster hits. And that is what we have been working on with my office with FEMA. And we have awarded over 70 contracts, just contingency planning-type contracts, that are in place. Many of them have been set aside for local businesses, small businesses.

So that in the gulf area, so that both the work and continuing recovery in Katrina and from new disasters, the contracts would be in place so we are not searching for those small businesses in the midst of the chaos post disaster. And I think that is the key to effectively having competition and making sure that we use local businesses.

The second thing we are trying to do is work more effectively with the States and planning to make sure that they are ready to receive grant money so that we don't have as many direct Federal contracts, and we can let the State and the local governments receive Federal disaster grant money and effectively spend it within their districts, and that is something that we have been doing a lot with the State and locals.

Your specific question about ICF, that sounds like it would have been via a grant to the State of Louisiana, and I do not have a specific information on ICF and can get back to that for the record for you.

Ms. JACKSON LEE. Let me make this point.

I see that we are preplanning, and I would really like the percentages out of the 70 that are local, small minority and women-owned businesses because I can assure you, they are very much still up in arms. The sadness of it is that they had such great experience, and they could have been enormously effective, and I hate that we lost their expertise because of the frustration in not knowing how to reach the power points of procurement.

But was there any collaboration beforehand or as the crisis was proceeding to get with SBA? We know they have been dysfunctional. But was there any cross-pollination to say what section 8(a)s do you have already certified that we can utilize? Even in the crisis, did anyone pick up the phone and try to collaborate with them?

Ms. DUKE. There was a lot of work with SBA early on. We did a lot of conferences and outreach in the entire gulf region, both DHS alone, we continue to do that. There is another one in partnership with the local government next week.

The feedback we got from the local businesses was that it didn't yield the results they were looking for. They had the opportunity to meet with us and small business but weren't satisfied that enough resulted from that contract.

One other program that will really be helpful in future disasters is the GSA Federal supply schedules. By direction of the Secretary, as part of our last year's appropriations bill, was able to say what Federal supply schedules should be opened up to State and local governments to be able to order from. And there are many, many small disadvantaged businesses on the supply schedules. The Secretary decided they should all be opened up to State and—to State loan governments in a priority order.

So GSA is in the process of doing that.

So in future disasters, State and local governments will have the ability, if they choose, to look to Federal supply schedules and target small minority businesses directly in those prepriced, prenegotiated statutes, and I think that is a huge step forward. And we are beginning an education program so they understand how to use those.

Ms. JACKSON LEE. Let me close by—

Chairman THOMPSON. Excuse me. The gentlelady's time has expired.

Ms. JACKSON LEE. May I say the final sentence?

Chairman THOMPSON. Final sentence.

Ms. JACKSON LEE. Chairman, if I could, and I thank him, I would like a full investigation of ICF, I guess it is ICF and SHAW, and I do think the State process of distributing funds is broken and we need legislation to fix it. It should go to local governments.

And I thank the chairman for his indulgence.

I yield back.

Chairman THOMPSON. Thank you very much.

We now recognize the gentleman from Texas, Mr. Green from Texas, for 5 minutes.

Mr. GREEN. Thank you.

Thank you for hosting this important meeting.

I, too, have had a number of persons from my district call to my attention some concerns that they have. And many of these con-

cerns center around the inability to secure opportunities notwithstanding a belief that they have met all of the requirements necessary.

So my initial question to you is do you have an evaluation program that allows you to review your process such that you may make some decision based upon empirical data as to how well you are doing?

Ms. DUKE. We track our performance in terms of how many of our dollars and contract actions went to the different socioeconomic categories, and that is the primary tool we use to see if we are meeting the Federal and DHS goals.

Mr. GREEN. I think that is a great way to do business, but permit me to ask this, please. Do you have a means by which those persons who would do business with you can have input such that you will know what they think about the process?

Ms. DUKE. We have conferences, those type of ad hoc. But nothing systemic that I know of where they feed back to either Small Business Administration or DHS.

Mr. GREEN. Would a tool of this type be helpful to you in evaluating how efficacious you are?

Ms. DUKE. I think feedback from industry is always good. It is a good cross-check, and we need that information and we do solicit it through our contacts. So I would have to say yes.

Mr. GREEN. Next question. With reference to your contracting, assuming that you do have a business, doesn't matter what size, that has, in the opinion of the persons who work with the business, done everything appropriately but is still not receiving any opportunities, what is then the next step?

Ms. DUKE. Generally, if they come to our attention, I have a small business office within my office. And generally someone from the contracting side of my office, someone from the small business would meet with them and try—if it is a specific problem where they think—where or if it is a general problem, just meet with them one on one and try to find out why it is they are not getting business, and we do that regularly. We take some people—some people contact us directly. We get referrals from different bodies. And even with the small business offices, even if they are not a small business, we meet with them and try to understand what their specific issue was, whether they got a contract and it is not going well or whether they are not getting contracts.

Mr. GREEN. And for my edification, what percentage of the business is going to minority contractors, please. And if you would, define "minority contractors" for me.

Ms. DUKE. In terms of minority contractors, we track small businesses and—small disadvantaged businesses and 8(a) businesses. And small disadvantaged businesses are businesses owned and controlled by a minority owner, and that is defined by the small businesses. Those aren't the exact words. I can get them for you.

And then 8(a) is another level of certification that a small disadvantaged business can get. Once you are certified as 8(a), you can get direct award sole source up to \$3million, and that is a way to allow the small disadvantaged minority businesses to get the first opportunities. Those two combined, we did—the Federal

goal is 5 percent. I believe we did about 9 percent, and I can check that for you. But we track both those.

Mr. GREEN. And in the small business arena, and because time is short, let me ask as concisely as I possibly can, can we also have persons who are not minorities included in the number?

Ms. DUKE. Yes. We have a goal for small businesses in general. The Federal goal is 23 percent.

Mr. GREEN. Excuse me, because my time is short. Would this 9 percent include persons who were not minorities?

Ms. DUKE. Those would not.

Mr. GREEN. So this is an absolute in terms of minority small business persons?

Ms. DUKE. Yes. The goal was 5 percent Federalwide.

Mr. GREEN. Mr. Chairman, you have been very generous with the time. Thank you very much. I yield back.

Chairman THOMPSON. Thank you very much.

If any Member would submit any additional questions they might want Ms. Duke to answer, please feel free to do so, and I am sure she will be very accommodating.

Ms. Duke, you have been most gracious and patient with the Members because of the vote. We thank you, and we thank you for the work we do. It is a hard job. And we appreciate your outreach. And I speak for both sides. You have done a good job with that. Please continue. Thank you very much.

We will now call our next panel of witnesses.

We would like to welcome our second panel of witnesses. Mr. Scott Amey, general counsel and senior investigative officer of Project on Governmental Oversight. Mr. Alan Chvotkin is senior vice president and counsel for the Professional Services Council. And professor Charles Tiefer is professor of contracting law at the University of Baltimore School of Law.

Chairman THOMPSON. We would like to welcome the three of you to this panel. And we will give each one of you 5 minutes to give your presentation to the committee. And we will follow with questions after. Mr. Amey.

STATEMENT OF SCOTT AMEY, GENERAL COUNSEL AND SENIOR INVESTIGATIVE OFFICER, PROJECT ON GOVERNMENTAL OVERSIGHT

Mr. AMEY. Good afternoon, Chairman Thompson, Ranking Member King, and members of the committee. Thank you for inviting me to testify today about the state of DHS contracting.

I am Scott Amey, the general counsel of the Public Governmental Oversight, a nonpartisan public interest group. We were founded in 1981 and we investigate and expose corruption and other misconduct in order to achieve a more accountable Federal Government.

I usually get this question, so I will just say that we take no government money. We take no union money and no corporate money to keep our independence.

POGO has created a niche in investigating and exposing and remedying waste, fraud and abuse in government spending. In the 1990s, many acquisition forms were implemented. The problems created by those reforms became startlingly apparent at the begin-

ning of the Afghan and Iraq wars and after Hurricane Katrina devastated the gulf coast. The event showed that contracting decisions were placing taxpayer dollars and sometimes lives at risk. If the problems with the contracting process are not corrected, POGO believes that the next consulting or IT contract will mirror the misspending miss characterized by the \$436 hammer and the \$7,600 coffee makers that were procured in the 1980s.

As just a general reference point that we have seen so much change in government contracting, I just want to present a few numbers to the committee and Mr. Chairman.

The government currently spends \$417 billion, and that was from fiscal year 2006. No-bid contracts, a rarity in the private sector, have become commonplace for the government. One-bid offers account for now 20 percent of all competed contracts spending. Bid protests sustain rates have increased to nearly 30 percent.

DHS spending has increased from 3.4 billion in fiscal year 2003 to 15.8 billion in fiscal year 2006. That makes DHS, as Mr. Chairman noted, the largest or the third largest agency behind DOD and DOE.

DHS sole source spending is also fastly rising. It has increased from 23 percent from fiscal year 2004 to 37 percent in fiscal year 2005. There are a few encouraging trends with DHS contracting. The use of fixed-price contracts has risen. The use of risky contracting vehicles has decreased and DHS awarded over 45 percent of contracting dollars to small businesses.

Unfortunately, the questions you asked the last panel don't reflect that, but these are regarding DHS's own numbers in the Federal Procurement Data System. And that number greatly exceeds the 23 percent goal for normal, general Federal agencies.

Nevertheless, POGO has concerns about the state of DHS contracting. This committee just recently put out a report that graded procurement and emergency preparedness slash FEMA as C minus. Those two grades indicate that DHS is experiencing contracting problems and it is becoming—it needs to become more responsible in spending taxpayer dollars. This committee highlighted missteps in the Deep Water Program. Just this week, we have seen that the Coast Guard has taken the lead as going to be the lead systems integrator. We applaud that step, and we also applaud the DOJ's investigation that they have started into the program.

But there was a question yesterday on whether these companies should be debarred. And I think it is a little too early to take that step but it should be something that DHS is seriously considering to protect future government contracts and future taxpayer dollars that are going to those companies.

The GAO and the DHS IG have provided extensive documents and reports to this committee on the lack of internal controls within DHS, the financial systems, human capital and contracting system, and all of those must be improved to prevent future waste, fraud and abuse.

The most concerning thing that I see is DHS is kind of hidden behind the fact that it is a new agency for 4 years. I think its baby steps are kind of long over, and that it really needs to improve its process. Some of the same problems we have seen from Hurricane Katrina were problems that we originally witnessed after Hurri-

cane Andrew back in 1992. These aren't new problems, but they need to be corrected.

There is one problem that I would like to document here. It was discussed earlier about GSA schedules. But when DHS had the opportunity and FEMA had the opportunity to use the schedule to lease vehicles during Hurricane Katrina, it went off the schedule. It didn't use it. It ended up using Enterprise Car Rental to lease 18 vehicles at a price of \$11,000 per vehicle. That ends up being \$936 a month. The vehicles on the schedule were \$600 a month. So even when they had systems in place, that they could have utilized, they didn't use them.

I want to cut to a few different recommendations that POGO has.

POGO hopes this committee will investigate the following contracting problems: Cozy negotiations, inadequate competition, lack of accountability, little transparency and risky contracting vehicles.

Specifically, POGO respectfully requests that the committee consider the following recommendations to improve DHS contracting: Ensure full and open competition is the rule rather than the exception, and ensure that the definition of competitive bidding requires at least two bidders. Require that risky contracting vehicles are used in limited circumstances, and only when supported by proper justifications and oversight protections, review DHS commercial item and service acquisitions to ensure that genuine commercial market place exists. Examine the use of IDIQ and GWAC contracts to ensure that contractors are not receiving improper fees, and investigate how prime contractors bill the government at their own labor rates rather than at the rates they pay their sub-contractors on time and material, labor hour contracts.

In addition, I recommend—I have other recommendations that are in our written testimony that I hope the committee will take a look at.

I do have one final comment. The fact that President Bush just last week in talking about the No Child Left Behind Act made the statement, It is important for all of us to make clear that accountability is not a way to punish anyone. Accountability to taxpayers isn't punishment. It is a way to improve the way the government works.

Thank you again for this opportunity to share POGO's view on the DHS contracting. It will be a pleasure to answer any questions that you have.

Chairman THOMPSON. Thank you very much for your summarized testimony.

[The statement of Scott Amey follows:]

PREPARED STATEMENT OF SCOTT AMEY

Good morning, Mr. Chairman Thompson, Ranking Member King, and Members of the Committee.

Thank you for inviting me to testify today about the state of the federal and DHS contracting systems. 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-six-year history, POGO has created a niche in investigating, exposing, and helping to remedy waste, fraud, and abuse in government

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

spending. One of POGO's most celebrated investigations uncovered outrageously overpriced military spare parts such as the \$7,600 coffee maker and the \$436 hammer. Since that time, particularly in the 1990s, many acquisition reforms have been implemented. The reforms, however, were not all they were cracked up to be. 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. These events showed that contracting decisions were placing taxpayer dollars—and sometimes lives—at risk.

The war on terror and the post-hurricane recovery and reconstruction effort also highlighted how drastically different the federal government's contracting landscape is now from what it was in past decades. Contracting dollars have increased, oversight has decreased, the acquisition workforce is stretched thin, and spending on services now outpaces spending on goods. (Because the return on services is more difficult to quantify than on goods, contracting is even more vulnerable to waste, fraud, and abuse.) If the problems with the contracting process are not corrected now, POGO believes the next consulting or information technology contract will mirror the misspending characterized by the hammers and coffee makers in the mid-1980s. We provide the following procurement history and recommendations as a roadmap to assist Congress in better overseeing the use of taxpayer dollars.

Contracting Past

The 1980s witnessed some of the strongest pro-taxpayer contracting reforms implemented to date. During the decade, the Competition in Contracting Act (CICA) was passed,² the Cost Accounting Standards (CAS) Board was reestablished,³ the False Claims Act was strengthened,⁴ and there was a greater emphasis placed on the Truth in Negotiations Act (TINA).⁵ Those actions increased competition in contracting, provided uniformity in contractor accounting practices, prevented fraud, and allowed the government to review contractor cost or pricing data to ensure taxpayer dollars were being spent wisely.

In the 1990s the Clinton–Gore Administration's effort to reinvent government so that it operated more like the private sector and decreased contracting red-tape succeeded to a point. But acquisition reform—which was part of reinventing government—resulted in several laws that made government contracts more susceptible to misconduct, cost more, and get results contractors care about rather than making the government (work better, cost less, and get results Americans care about),⁶ as was its intent. Those laws reduced contract oversight, making it difficult for government investigators and auditors to find waste, fraud, and abuse,⁷ and created risky contracting vehicles that often place public funds at risk.

Finally, “best value contracting”⁸ further swung the pendulum away from protecting taxpayers and allowed contracts to be steered to well-connected, influential, and sometimes undeserving contractors.

Contracting Present

Simply stated, the contracting landscape has drastically changed in recent years and the government must do a better job to ensure that taxpayer dollars get spent wisely. Federal contract spending has dramatically increased while government control, competition, and oversight has been reduced. This bodes ill for taxpayers, as can be seen by the problems below.

² 10 U.S.C. § 2304(a) (1) (applicable to DOD); 41 U.S.C. § 253(a) (1) (applicable to other executive agencies); 41 U.S.C. § 403(6) “definition of “full and open competition”).

³ The Board's regulations are codified at 48 CFR, Chapter 99. See FAR Part 30 (Cost Accounting Standards Administration).

⁴ The False Claims Act (31 U.S.C. §§ 3729–3733) was originally passed in 1863 at the urging of President Abraham Lincoln, who was attempting to halt the Civil War profiteering that was crippling the Union Army. Amendments to the Act in 1986, championed by Senator Charles Grassley (R-IA), increased the penalties for fraud and encouraged private citizens to come forward if they were aware of corporations defrauding the government.

⁵ 10 U.S.C. § 2306a, 41 U.S.C. § 254b.

⁶ The Clinton-Gore initiative was known as the “National Performance Review” and the “National Partnership For Reinventing Government.” Available at <http://govinfo.library.unt.edu/npr/index.htm>.

⁷ 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).

⁸ “Best value” contracting had been used in certain instances, but was added to the Federal Acquisition Regulation (FAR) in August 1997. A policy debate continues pitting “low price” against “best value” as the preferred method for buying goods and services. Buying goods and services at the “lowest practical cost” would allow for some buying flexibility and provide a more objective criteria that would prevent the unjustified steering of contracts to non-responsible, questionable, or politically-connected companies.

The Big Picture

- Contract spending for goods and services has nearly doubled in recent years, increasing from \$219 billion in fiscal year 2000 to nearly \$417 billion in fiscal year 2006.⁹
- The federal government is spending more on services than goods.¹⁰
- No-bid contracts, a rarity in the private sector,¹¹ have become commonplace in the government. Nearly 40 percent of all contract spending is awarded without competition.¹²
- In addition, one-bid offers account for 20 percent of “competed” contract spending.¹³
- The government is relying on contractors to execute jobs once performed by civil servants, including policy-making and budgetary decisions.¹⁴ The federal contracting workforce, depending on the definition that you use, has leveled-off since the mid-1990s.¹⁵
- The vastly expanded definition of “commercial item” has resulted in decreased oversight of and accountability for contractors because they no longer have to provide certified cost or pricing data for the “commercial” goods or services.
- Interagency contracting continues to increase—GSA schedule sales totaled \$35.1 billion in fiscal year 2006.¹⁶ Although interagency contracts provide agencies flexibility to purchase commonly required goods and services, which can save taxpayers money, they are also risky and prone to abuse. Monitoring and oversight have been very poor and competition has been lacking.¹⁷
- The government recovered a record \$3.1 billion in settlements and judgments in cases involving allegations of fraud against the government in fiscal year 2006 and has recovered \$18 billion since 1986.¹⁸
- Bid protest sustain rates (when GAO agrees that a contract was awarded improperly) have increased to nearly 30 percent,¹⁹ which illustrates that flawed contract award decisions—both honest and egregious—are being made at a higher rate than in the past.

Homeland Security

- DHS contract spending has increased from \$3.4 billion in fiscal year 2003 to \$15.8 billion in fiscal year 2006.²⁰ That total makes DHS the third largest agency, after DOD (\$296 billion) and DOE (\$22 billion).

⁹Federal Procurement Data Service—Next Generation, “Trending Analysis Report for the Last 5 Years,” and “List of Agencies Submitting,” as of April 17, 2007. Available at http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls and http://www.fpdsng.com/downloads/agency_data_submit_list.htm.

¹⁰Acquisition Advisory Panel, “Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress,” December 2006, p. 2–3. Available at <http://www.acqnet.gov/comp/aap/documents/DraftFinalReport.pdf>. Hereinafter “1423 Panel Report.”

¹¹1423 Panel Report, p. 2.

¹²1423 Panel, “Findings and Recommendations on Data,” August 10, 2006, p. 3–4. Hereinafter “1423 Panel Data.” Available at <http://www.acqnet.gov/comp/aap/documents/Data%20Findings%20and%20Recommendations%20Charts%2008%2010%2006.pdf>.

¹³1423 Panel Data, at p. 7.

¹⁴See FAR Subpart 7.503.

¹⁵1423 Panel Report, p. 3.

¹⁶GAO Report (GAO–07–310), High–Risk Series: An Update, January 2007, p. 77. Available at <http://www.gao.gov/new.items/d07310.pdf>.

¹⁷*Id.*

¹⁸DOJ Press Release (06–783), “Justice Department Recovers Record \$3.1 Billion in Fraud and False Claims in Fiscal Year 2006,” November, 21, 2006. Available at http://www.usdoj.gov/opa/pr/2006/November/06_civ_783.html.

¹⁹GAO Report (GAO–07–155R), Letter to The Honorable J. Dennis Hastert, Speaker of the House of Representatives, November 15, 2006, p. 2. Available at <http://www.gao.gov/special.pubs/bidpro06.pdf>.

²⁰Federal Procurement Data Service—Next Generation, “FY 2003, Section III, Agency Views,” p. 90 and “List of Agencies Submitting,” as of April 12, 2007, p. 1. Available at http://www.fpdsng.com/downloads/FPR_Reports/FPR2003c.pdf and http://www.fpdsng.com/downloads/agency_data_submit_list.htm.

- Nearly \$5.2 billion of the \$10.3 billion—or 50 percent—in contract awards during fiscal year 2005 were non-competitive.²¹ The use of no-bid contracts increased from 23 percent in fiscal year 2004 to 37 percent in fiscal year 2005.²²
- Approximately 65 percent (\$6.8 billion) of DHS contract dollars were awarded in fixed-price contracts in fiscal year 2005.²³
- Commercial item acquisitions accounted for \$467 million in fiscal year 2005—down 13 percent from fiscal year 2004.²⁴
- Performance-based service acquisitions accounted for nearly \$1.5 billion in fiscal year 2005—down 6 percent from fiscal year 2004.²⁵
- DHS awarded 46.6 percent of its contract dollars to small businesses—greatly exceeding the general 23 percent small business goal.²⁶

As the above information shows, DHS is doing some things well. For instance, DHS's use of risky contract vehicles decreased in fiscal year 2005 and the agency contracted with a large percentage of small businesses. Additionally, DHS's use of fixed-price contracts helps DHS eliminate some contracting problems. That stated, however, POGO has a number of concerns about the state of DHS contracting.

DHS Responsibility

DHS's mission is to prevent terrorist attacks in the U.S., reduce America's vulnerability to terrorism, and minimize damage from terrorism and natural disasters. To fulfill this mission, DHS has a vast organizational mandate that ranges from protecting the President (U.S. Secret Service), to protecting our oceans (U.S. Coast Guard), to protecting our borders (Customs & Border Protection and Immigration & Customs Enforcement), to protecting our airports (Transportation Security Administration), and to helping every town, city, county, and state in relief, recovery, and reconstruction efforts (Federal Emergency Management Agency). As a result, DHS has to be on the cutting edge of innovation, technology, and service to stay at least one step ahead of threats to our nation. Yet, it still must protect the U.S. taxpayers.

It is difficult to tell if DHS is succeeding in contracting to meet its mission—especially considering the emergency contracting environment in which the agency often works. Last week, however, this Committee released a report on “The State of Homeland Security,” which rated DHS in light of how it performed on seventeen homeland security issue areas.²⁷ POGO was disappointed to learn that no DHS component received a grade higher than a “B,” and that four components received a “C–” or lower. The two functions at the heart of today's hearing—“Emergency Preparedness/FEMA” and “Procurement”—each received a “C–.” The fact that DHS received a C– is indicative of the large problems that DHS is experiencing in contracting and that it must become more responsible when spending taxpayer dollars.

While the Committee's report card stated that DHS succeeded in awarding some contracts, it also found for the most part that the agency failed in three key procurement measures—“cost, performance/meeting requirements, and schedule. Unfortunately, the Department's [DHS's] track record in all three is poor.”²⁸ The Committee further stated that “oversight and management of basic procurement processes [have] been weak.”²⁹ The report highlighted procurement missteps in the

²¹ POGO's estimate combines contracts designated as “Not Competed,” “Not Available for Competition,” “Not Competed under SAT,” “Follow On to Competed Action,” and “non-Competitive Delivery Order.” Federal Procurement Data Service—Next Generation, “FPDS-NG Federal Procurement Reportfiscal year 2005, Section III, Agency Views,” as of April 17, 2007, p. 86. Available at http://www.fpdsng.com/downloads/FPR_Reports/2005_fpr_section_III_agency_views.pdf.

²² Fiscal year 2005 listed \$3.8 billion out of \$10.3 billion as (Not competed.) Available at <http://www.fpdsng.com/downloads/FPR-Reports/2005-fpr-section-III-agency-views.pdf>. Fiscal year 2004 listed \$1.4 billion out of \$6.1 billion as (Not competed.) Available at http://www.fpdsng.com/downloads/FPR_Reports/fpr_section_III_agency_views.pdf.

²³ *Id.*, at p. 87.

²⁴ *Id.*, at p. 88.

²⁵ *Id.*

²⁶ Federal Procurement Data System—Next Generation, “Small Business Goaling Report Actions Reported Between Fiscal Year 2005 (Q1) and Fiscal Year 2005 (Q4).” As of April 17, 2007. Available at http://www.sba.gov/GC/goals/SmallBusinessGoalingReport_2005.pdf.

²⁷ U.S. House of Representatives Committee on Homeland Security, “The State of Homeland Security: The 2007 Annual Report Card on the Department of Homeland Security,” April 13, 2007, p. 5. Hereinafter “DHS Report Card.” Available at <http://homeland.house.gov/SiteDocuments/20070413143439-12273.pdf>.

²⁸ DHS Report Card, at p. 66.

²⁹ *Id.*

Deepwater program,³⁰ the Integrated Surveillance Intelligence System (ISIS), and eMerge2. Those contracting missteps compound the many mistakes made prior to and after Hurricane Katrina—some of the same contracting problems that occurred in the “aftermath of Hurricane Andrew in 1992, which leveled much of South Florida.”³¹

This Committee’s findings confirmed those of a 2007 GAO investigation into the problems facing DHS. The GAO stated:

The auditors continue to report 10 material internal control weaknesses and that DHS’s financial systems do not substantially comply with federal requirements. These weaknesses highlight the concern that DHS, the second-largest government agency, may not be able to account for all of its funding and resources or have reliable financial information for management and budget purposes.

DHS has not institutionalized an effective strategic framework for information management to, among other things, guide technology investments, and despite some progress, DHS’s human capital—the centerpiece of its transformation efforts—and acquisition systems will require continued attention to help prevent waste and to ensure that DHS can allocate its resources efficiently and effectively.

* * *

To help ensure its missions are achieved, DHS must overcome continued challenges related to . . . clearly defining leadership roles and responsibilities, developing necessary disaster response capabilities, and establishing accountability systems to provide effective services while protecting against waste, fraud, and abuse at the Federal Emergency Management Agency (FEMA).³²

Many of the Committee’s and the GAO’s concerns were confirmed in Inspector General Richard Skinner’s testimony before this Committee on February 7, 2007. Inspector General Skinner testified that DHS “identified significant risks and vulnerabilities that might threaten the integrity of DHS’ acquisition management program. In general, DHS needs to improve its major acquisitions planning, operational requirements definition, and implementation oversight.”³³ Unfortunately, Mr. Skinner places too much blame on acquisition workforce shortages and doesn’t look hard enough at DHS’s overall contracting system to determine if that system is working in the best interests of both DHS and taxpayers.

For example, DHS was in a position to use pre-negotiated contracts for the Hurricane Katrina response, but failed to do so. GSA Schedules offer government buyers goods and services at pre-negotiated rates from approved vendors. Even though one vehicle leasing company on the GSA Schedule could have provided FEMA with vehicles for under \$600 per month,³⁴ the agency instead leased 18 vehicles from Enterprise Rent-A-Car at the annual price of \$11,232 a vehicle (\$936 per month).³⁵

At the same time that DHS is struggling with its contracting procedures, its contractors are lining up to learn the tricks to receiving more contract dollars. Fedmarket.com held a seminar on May 26, 2006, with topics including: (The advantage and disadvantages of selling to DHS,” “Ways to keep your investment in the DHS market reasonable and your sales costs down,” “Locating DHS sales opportunities,” “Identifying DHS procurement decisions makers,” and “Simplified Acquisition Procedures.”³⁶ Although this is common in and around the Beltway, it emphasizes the fact that contractors are jumping at the opportunity to learn how to maximize some, if not all, of the agency’s contracting vulnerabilities.

Although many Members of Congress, media outlets, and public interest groups point fingers at the contractors, the problem is much deeper. DHS is in a vulnerable

³⁰ POGO applauds the Coast Guard’s recent decision to take over the role of lead systems integrator for the \$24 billion Deepwater acquisition program. That shift in management and control of the program should enhance oversight of and accountability in the Deepwater program.

³¹ GAO Report (GAO-06-442T), “Hurricane Katrina: GAO’s Preliminary Observations Regarding Preparedness, Response, and Recovery,” March 8, 2006, p. 2. Available at <http://www.gao.gov/new.items/d06442t.pdf>.

³² GAO Report (GAO-07-452T), “Homeland Security: Management and Programmatic Challenges Facing the Department of Homeland Security,” February 7, 2007, p. 2-3. Available at <http://fwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:d07452t.pdf>.

³³ Statement of Richard L. Skinner, Inspector General, U.S. Department of Homeland Security, Before The Committee on Homeland Security, U.S. House of Representatives, (An Overview of Issues and Challenges Facing the Department of Homeland Security, February 7, 2007, p. 7. Available at http://www.dhs.gov/xoig/assets/testimony/OIGtm_RLS_020707.pdf.

³⁴ GSA, “GSA Schedule e-Library Schedule Details.” Available at <http://www.gsaelibrary.gsa.gov/ElibMain/SinDetails.jsessionid=www.gsaelibrary.gsa.gov-50c9%3A43f09ea8%3A34ac18eed43496?executeQuery=YES&scheduleNumber=751&flag=&filter=&specialItemNumber=751+1>.

³⁵ Chris Joyner, Clarion Ledger, “FEMA car rentals draw criticism,” February 10, 2006.

³⁶ Fedmarket.com, “Selling to the Department of Homeland Security Seminar,” May 26, 2006.

position: the agency has poor contract management policies and procedures, while at the same time it is buying infant technologies, and buying under emergency circumstances where competition is, by necessity, limited or non-existent. As a result, DHS is frequently placing all of its contracting eggs in one basket. In cases when competition is limited or non-existent, Congress, DHS contract and program officers, and agency oversight officials must place a greater emphasis on pre-award decisions and on post-award monitoring and administration. DHS must establish integrity in its buying system: its current system is plagued with improperly awarded, out-of-scope, overpriced contracts, and with contracts that produce little or no results.

Awards to Responsible Contractors

Government contracts are predicated on a basic principle—taxpayer dollars should be awarded to responsible contractors only. FAR Subpart 9.103 states:

(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.** (Emphasis added.)

To be determined responsible, a prospective contractor must:

(a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104–3(a));

(b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;

(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.

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104–3(a).)

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104–3(a)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.³⁷

Questions should be raised within DHS, and the government in general, when contracts are awarded to risky contractors. These include contractors that have defrauded the government or violated laws or regulations,³⁸ 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 agency and for the taxpayer.

In an effort to prevent contracting with the “usual suspects” that have long rap sheets of misconduct, DHS should look for responsible vendors during its planning and contingency contracting phase. Some of the largest contractors hired to respond to the hurricanes in 2005 have checkered histories of misconduct: CH2M Hill (5 instances); Bechtel (12 instances); Halliburton/KBR (11 instances); and Fluor (20 instances). Instances of misconduct include: false claims against the government, violations of the Anti-Kickback Act, fraud, conspiracy to launder money, retaliation against workers' complaints, and environmental violations.³⁹ DHS is shirking its responsibility to vet contractors and determine whether they are truly responsible. POGO is concerned that pre-award contractor responsibility determinations have fallen to the wayside. DHS and other federal agencies seem more concerned with awarding contracts quickly rather than ensuring the government gets the best goods or services at the best practical price.

Another problem that faces DHS is the under-utilization of the suspension and debarment system as a tool to weed out risky contractors. To be fair, the problem

³⁷ FAR Subpart 9.104–1 (“General standards”).

³⁸ POGO published a Federal Contractor Misconduct Database in 2002. Available at <http://www.pogo.org/db/>. A new and improved version of that database, including misconduct involving the Top 100 federal contractors will be released in 2007.

³⁹ *Id.*

is not limited to DHS—all federal agencies under-use suspension and debarment against large contractors that supply the majority of the \$417 billion worth of goods and services to the federal government each year. Overall, the government needs to reemphasize the importance of preventing risky contractors from receiving future taxpayer dollars.

Contracting Future

While examining on systemic contracting issues, I request that the Committee look at the report produced by the Acquisition Advisory Panel (also known as the 1423 or the Services Acquisition Reform Act (SARA) Panel).⁴⁰ During the nearly two years after its initial meeting in February 2005, the Panel held over 30 public meetings, interviewed scores of government and private sector witnesses, reviewed thousands of pages of testimony, studied numerous government reports, and formulated hundreds of findings and recommendations that, if considered and passed by Congress, could improve the government's system for buying goods and services. Although some of the Panel's recommendations do not go as far as POGO would like, the majority would still improve competition, negotiations, oversight, transparency, and spending decision-making.

Conclusion

Acquisition reform and the changed contracting landscape have placed taxpayer dollars at risk. POGO has witnessed the weakening or bypassing of taxpayer protections, and the unraveling of free market forces that protect government agencies. For years, IG and GAO reports have exposed specific contracting missteps in individual cases of waste, fraud, and abuse. But the findings and recommendations from the individual cases are applicable to the larger systemic problems with DHS's, and the rest of the federal government's, contracting laws and regulations.

Recommendations

POGO has highlighted the following government-wide contracting problems, which we hope will be considered by the Committee:

1. **Cozy Negotiations**—To make every effort to get the best value for the taxpayer, the government must promote aggressive arm's-length negotiations with contractors.
2. **Inadequate Competition**—To better evaluate goods and services and get the best value, the government must encourage genuine competition so that it can correct the current trend of entering into non-competitive contracts in over 40 percent of government purchases.
3. **Lack of Accountability**—To ensure that taxpayer dollars are being spent responsibly, the government must regularly monitor and audit contracts after they are awarded.
4. **Little Transparency**—To regain public faith in the contracting system, the government must ensure that the contracting process is open to the public, including contractor data and contracting officers' decisions and justifications.
5. **Risky Contracting Vehicles**—To prevent abuse, the government must ensure that risky contract types that have been abused in the past (including performance-based contracts, interagency contracts, "task and delivery orders" also known as Indefinite Delivery/Indefinite Quantity (ID/IQ) contracts under multiple award and government-wide acquisition contracts (GWACs), time & material contracts, purchase card transactions, commercial item purchases, and other transaction authority) are only used in limited circumstances and are accompanied by audit and oversight controls.

Specifically, POGO respectfully requests that this Committee consider the following recommendations to improve DHS contracting:

1. Ensure that full and open competition is the rule rather than the exception and restore the definition of "competitive bidding" to require at least two bidders.
2. Require that risky contract vehicles are used in limited circumstances and only when supported by proper justifications and oversight protections.
3. Review DHS commercial item and service acquisitions to ensure that a commercial marketplace exists.
4. Examine the use of ID/IQ and GWAC contracts to ensure that contractors are not receiving improper fees.
5. Investigate how prime contractors bill the government at their own labor rate(s) rather than the rate that they pay their subcontractors on Time and Material or Labor Hour (T&M/LH) contracts.

⁴⁰ 1423 Panel Report. Available at <http://www.acqnet.gov/comp/aap/documents/DraftFinalReport.pdf>.

6. Confirm that contractors are not performing inherently governmental functions, which must be performed by civil servants.
7. Reaffirm Congress's commitment to fund contract oversight responsibilities.
8. Reestablish the taxpayer-protection checks and balances that have been removed from the contracting system.
9. Review DHS's use of the suspension and debarment system, especially as it has been applied to large contractors with repeated histories of misconduct.
10. Provide a fair playing field for all DHS contractors by requiring public posting of all task and delivery order opportunities on FedBizOpps website, and require copies of contracts and task and delivery orders awards be made publicly available on the Federal Procurement Data System (FPDS) website.

Chairman THOMPSON. The next witness is Mr. Chvotkin.

**STATEMENT OF ALAN CHVOTKIN, SENIOR VICE PRESIDENT
AND COUNSEL, PROFESSIONAL SERVICES COUNCIL**

Mr. CHVOTKIN. Thank you very much for the invitation to be here today. I am the senior vice president counsel of the Professional Services Council.

PSC is the leading national trade association representing companies that provide services of almost every kind to virtually every Federal agency of the Federal Government. We believe that the taxpayer and the government are best served by a vibrant partnership between the public and private sectors through which the government is able to access the best solutions and capabilities.

By any measure, the Federal Government has the largest and most complex procurement system in the world, and since public dollars are involved, it is imperative that the Federal procurement system be underpinned by credibility, trust, and competency. We share your commitment and that of the committee to ensuring that the Federal Government generally, and the Department of Homeland Security specifically, only does business with responsible, ethical parties. After all, contracting with the Federal Government is a privilege. It is not a right.

Despite much of the current rhetoric however, it is heartening and important to note that even with the size and complexity, the bottom line is that this system as a whole does serve the public well.

Clearly, it is also a system that faces many challenges and areas where improvements are needed.

Real fraud and abuse. While deeply troubling wherever it is uncovered is actually relatively rare, and the government has in place a wide variety of statutes and standards to apply to entities who are seeking to do business with it.

As you know, any organization wishing to do business with the government must comply with all applicable laws whether they be tax, environmental, or labor laws.

Each area of law or regulation is enforced and adjudicated through its own experience and knowledgeable entities at the Federal, State and local levels. This layering of statutes and regulations across the government at all levels provides a construct in which businesses in the nation must operate.

But for Federal Government contractors, there is much more. There are numerous laws and regulations that only apply to firms that want to do business with the Federal Government. Most Federal agencies follow the uniform Federal Acquisition Regulation

that is maintained by DOD, GSA and NASA and policy provided by the office of Federal Procurement Policy.

Mr. Chairman, this is the Federal Acquisition Regulation, 2000 pages, that govern the behaviors in Federal contracts.

Beyond these government-wide rules, there are also specialized regulations.

I brought with me a copy of the Cost Accounting Standards that companies must comply with when seeking to do business with the Federal Government. And for the Department of Homeland Security, this is the Department of Homeland Security acquisition regulation laid on top. So we have roughly 2,000 pages of acquisition regulation, roughly another 500 pages of standard regulations and an additional 150 pages, single-sided, I might add, of the Department of Homeland Security. A complex regime important to understand the complexity of doing business in the Federal marketplace.

Beyond those government-wide rules, there are noted specialized rules dealing with the Department of Homeland Security. For example, as you have noted, DHS has a limitation on the types of companies with which it can do business.

In addition, a myriad of other laws and regulations provide authority and responsibility for government officials, primarily contracting offices and grants officials to ask the right questions and take the right action against those who fail to follow the laws.

But there are important and appropriate constraints on the government's flexibility. For instance, the government may not act arbitrarily, and it must adhere to its own regulations. There must be respect for due process. There are also long-standing procedures to protect small business from arbitrary agency decisions about the competency of these businesses to perform Federal contracts.

I mention all of this because it is important to recognize the many layers that do exist to protect the government's interests. It is equally important to recognize that the rules and regulations have evolved to strike a proper balance between protecting the government's interest and maintaining an effective and vibrant marketplace that can support the government's complex missions.

Overly punitive measures unnecessarily increase costs for the government or its suppliers all in the name of seeking to achieve the unachievable. Nor is this a new debate. This dates back to the Clinton administration so-called blacklisting initiative, ostensibly to ensure the government did not award contracts to unethical companies. At that time, many of the government's own senior career contracting leaders opposed that initiative. Then, as now, any such rule was both unnecessary and unexecutable.

Mr. Chairman, as I said at the outset, we are strong supporters of the government business compliance rules, and routinely encourage our member companies to ensure that their business conduct compliance programs are current and complete. We recognize that, regrettably, individuals and organizations violate the law and we have little sympathy for those that do. But it would be a costly travesty if we were to impose new and unnecessary rules, let alone ineffective and unexecutable ones, based on a mistaken impression that the current system has failed us.

We are ready and willing to work with you in ways to make the system stronger even as we seek to maintain that critical balance

that I mentioned, but I would urge you to reject precipitous proposals based on limited information and dangerous assumptions.

Thank you again for the opportunity to be here. I look forward to responding to any questions the committee may have.

Chairman THOMPSON. Thank you very much.

[The statement of Mr. Chvotkin follows:]

PREPARED STATEMENT OF ALAN CHVOTKIN

Introduction

Mr. Chairman and Members of the Committee, thank you for the invitation to testify at today's hearing. I am Alan Chvotkin, the senior vice president and counsel of the Professional Services Council (PSC). PSC is the leading national trade association representing companies that provide services of almost every kind to virtually every agency of the federal government.

We believe that the taxpayer and the government are best served by a vibrant partnership between the public and private sectors through which the government is able to access the best solutions and capabilities. By any measure, the federal government has the largest and most complex procurement system in the world, and the Department of Homeland Security is one of its many components. Since public dollars are involved, it is imperative that the federal procurement system be underpinned by credibility, trust, and competency. As such, we share your commitment to ensuring that the Federal government generally, and the Department of Homeland Security specifically, only does business with responsible, ethical parties. After all, contracting with the federal government is a privilege—not a right.

DHS Procurement Spending is Significant

In Fiscal Year 2006, the Federal government spent more than \$400 billion on the purchase of goods and services, through over 30 million individual contract transactions, with nearly two-thirds of the dollars spent on services. The Department of Homeland Security spent more than \$14 billion through contracts, awarding business to almost 16,000 contractors through close to 67,000 individual contract transactions. The vast majority of this DHS spending also was for the procurement of services. To its credit, more than \$4.5 billion of the DHS prime contracting dollars went to small business.

Despite much of the current rhetoric, it is heartening and important to note that, even with its size and complexity, the federal acquisition system actually work quite well. Clearly, it is also a system that faces many challenges and areas where improvements are needed. But the bottom line is that this system, on the whole, serves the public well. Real fraud and abuse, while deeply troubling whenever it is uncovered, is actually relatively rare and the government has in place a wide array of generally effective statutes and standards that apply to entities seeking to do business with it.

Regulating Businesses

As you know, any organization wishing to do business with the government must comply with all generally applicable laws and regulations for maintaining a business, including all relevant tax, environmental, and labor provisions. Each area of law or regulation is enforced and adjudicated through its own experienced and knowledgeable entities at the federal, state, and local levels. For example, Congress has given responsibility to the Internal Revenue Service to write regulations to implement tax laws. The Environmental Protection Agency has similar primary responsibility for environmental laws, the Labor Department for labor matters, and so on. Many of these agencies also have internal administrative enforcement authority, while the Justice Department is generally charged with civil and criminal enforcement at the Federal level.

Taken together, this layering of statutes and regulations across the government, at all levels, provides a construct under which all businesses in the nation must operate. But for government contractors, there is much more.

Regulating Government Contractors

There are numerous laws and regulations that only apply to firms that want to do business with any agency of the federal government—such as registering in the government's central contractor registration (CCR) system, agreeing to unique audit and/or competition rules, meeting the government's unique accounting and billing standards, or agreeing to utilize small business for a certain percentage of subcontracting opportunities. For these government-wide procurement requirements, most federal agencies follow the uniform Federal Acquisition Regulation (FAR) require-

ments. The FAR is maintained by three lead agencies—DoD, GSA and NASA—and policy is provided by those agencies under the leadership of the Administrator of the Office of Federal Procurement Policy in the Office of Management and Budget.

Beyond those general rules, frequently there are also specialized laws and regulations that apply when doing business with specific agencies of the federal government or for specific types of activities. For example, DHS has a restriction on the types of companies with which it can do business. The Defense Department has an entirely separate set of specialized rules to guide its procurements for major weapons systems. In those specialized areas, each federal agency is responsible for developing, publishing and maintaining separate acquisition regulations that supplement the government-wide regulations. For the Department of Homeland Security, this supplemental regulation is called the Homeland Security Acquisition Regulation (HSAR). Each agency is also responsible for writing its own contracts and monitoring compliance with agency-specific requirements.

In addition, a myriad of laws and regulations provide the authority and responsibility for government officials—primarily contracting officers and grants officers—to ask the right questions and take the right action against those who fail to follow the laws and regulations. If a contracting officer is concerned about putting the federal government at risk by doing business with inappropriate entities—whether it is an individual, a company, a university or a non-profit organization—he or she has wide latitude with regard to information that can be sought from that concern. These procedures apply to both contracts and grants.

But there are appropriate and important constraints on the government's flexibility. For instance, the government may not act arbitrarily and it must adhere to its own regulations and procedures. One of these is respect for due process before denying work to an individual or a contractor, unless the government has an urgent need to protect its interest. There are also long-standing procedures to protect small business from arbitrary agency decisions about the competency of these businesses to perform federal contracts.

On February 16, 2007, the FAR agencies issued a proposed rule to require all government contractors receiving awards in excess of \$5 million to have a formal ethics and compliance program. The vast majority, if not all, of PSC's more than 210 member companies have formal ethics and compliance programs and place a high premium on corporate and individual responsibility. We support the direction taken in this proposed rule, although in our April 17 detailed comments we raised a number of concerns with its operational aspects.*

I mention all of this because it is important to recognize the many layers that exist to protect the government's interests and equities. It is equally important to recognize that this extensive regime of rules and regulations has evolved over many years in an effort to strike the proper balance between protecting the government's interests and maintaining a vibrant and effective marketplace that can support the government's diverse and increasingly complex missions. The government marketplace is vastly different and far more regulated than the commercial marketplace and we would not suggest that the two can be or should be identical. However, a balance is vital to ensure that the government has access to the widest possible array of suppliers and solutions.

Unfortunately, no matter what laws or regulations are in place, a system this large and complex will have problems. With so many dollars spent, unethical government and contractor employees will seek to enrich themselves at the expense of the taxpayer and the mission. Just a few weeks ago, five individuals were arrested for conspiring to embezzle funds intended for Iraq reconstruction—the five included two Army reservists, a government civilian, and a contractor. While the arrest is not an indicator of final guilt or innocence, such activities are never acceptable and those responsible should be dealt with aggressively.

But because these cases are a distinct minority, policymakers should focus on how to appropriately punish such behavior while still guarding against imposing new and often untenable burdens on the entire federal procurement system. Overly punitive measures unnecessarily increase costs for the government or its suppliers, all in the name of achieving the unachievable. In the end, this is a delicate balancing act. This hearing offers an important opportunity to make progress toward that balance.

POGO Hysteria

I have reviewed the POGO "Federal Contractor Misconduct Database" as well as its 2002 "Pick-pocketing" report. Taken at face value, without understanding how

* The full PSC comments are available <http://www.pscounsel.org/pdfs/PSCFARCodeOfConduct104-17-07.pdf>.

the federal acquisition system works or even digging just a little bit beneath the surface, it is easy to mistakenly conclude that the acquisition system has failed.

Yet none of that information really tells us what we need to know and thus, what, if anything, we need to change. For example, the POGO website cites only 639 cases for the past nineteen plus years (from 1/8/88 through 4/17/07); of those, scores involve settlements of civil actions—with no indication of any admission of guilt. Under our system of laws, a settlement, particularly one without any finding or admission of guilt, cannot be equated with a guilty verdict. Yet the POGO database makes no such distinctions. Nor does the information separate out scores of relatively common legal actions, such as disputes between employees and employers which were settled, again, without any specific findings. Instead, the list simply presumes guilt. Each of these cases are fact-specific but the report fails to account for critical differences in the activities, such as whether the company identified the problem, whether any senior officials were involved, and whether and when corrective action was taken. Even the 2002 POGO report is fraught with a remarkable number of mistakes and misstatements.

If we are to remain a government of laws under which due process is a sacrosanct privilege afforded all citizens and entities, then we must look at their “Federal Contractor Misconduct Database” through a very different lens. To understand the real implications of the report and the degree to which the rhetoric surrounding the database matches the realities, real scrutiny is needed. That scrutiny must assess the degrees to which violations of any kind have been proven to have occurred, whether restitution was paid, how old the allegation is, and, of course, how serious the violation is. These are essential elements but, unfortunately, the database is of little help.

Similar rhetoric surrounds allegations that government contractors have reputedly violated tax laws but continue to receive contracts. However, if one carefully reads the Government Accountability Office (GAO) and other objective reports on the subject, very few contractors are actually accused of, let alone proven to have committed, tax fraud. In fact, the main point of the GAO report was that the systems to link IRS tax collection procedures with agency payment processes were not working as planned. Since those reports were prepared, regulatory and corrective administrative actions have already been taken and more are in process.

Indeed, each of these topical area assertions raises complex and difficult questions of compliance with highly regulated areas, yet none of them have been adequately answered. Nor is this a new debate; it dates back to the Clinton Administration’s so-called “blacklisting” initiative, ostensibly developed to ensure that the government did not award contracts to unethical companies or individuals. At that time, many of the government’s own senior career contracting leaders opposed that initiative. Then, as now, any such rule is both unnecessary and unexecutable.

Role of the Government Contracting Officer

Some have suggested that contracting officers be required to deny federal contracts to companies that have demonstrated a “consistent pattern” of abusing federal laws and/or regulations. How is a GS-9 or GS-11 contracting officer supposed to make these determinations? On what information, advice, counsel, or assurances is the determination certified to be objective and fair? This proposal neither includes nor contemplates any guidelines or definitions as to what constitutes a consistent pattern or what types of violations are considered serious enough to merit the exclusion of a company from government contracting and these would be difficult to draft comprehensively and fairly.

The proposal places on the government’s contracting officers the entire burden of making complex legal determinations about a company’s compliance with tax, environmental, labor, and other federal statutes that would warrant being denied the opportunity to compete for government work. These are fields for which entire legal communities are created and mastery can take years of training and practice.

Moreover, are we now going to change the fundamental construct of our federal procurement system so that, with no guidelines relating to the severity of a charge and its ultimate impact on the government, and even after a company or individual pays restitution, an individual or company continues to be punished through the denial of access to government contracts? Do we simply ignore the overlay of the numerous statutes and adjudicative processes?

Answers to these questions are central in determining how this issue should be addressed. In short, in too many of these discussions, the concept of due process appears to be largely ignored!

Conclusion

In our view, the current mix of laws and regulations does a very good job of enabling the government to ensure it only does business with responsible parties, and

provides numerous, appropriate means that enable the government to fully and adequately "protect its interests."

Mr. Chairman, as I said at the outset, we are strong supporters of the government's business compliance rules and routinely encourage our member companies to ensure that their business conduct and compliance programs are current and complete. We recognize that, regrettably, individuals and organizations violate the law and we have little sympathy for those that do. But it would be a costly travesty if we were to impose new and unnecessary rules, let alone ineffective and unexecutable ones, based on the mistaken impression that the current system has failed us. By and large, it hasn't.

We are always ready and willing to work with you on ways to make the system stronger even as we seek to maintain that critical balance I mentioned earlier. But I would urge you to reject precipitous proposals based on limited information and dangerous assumptions.

Mr. Chairman, thank you again for the opportunity to testify here today. I look forward to answering any questions you might have.

Chairman THOMPSON. We will now listen to Professor Tiefer's testimony.

Welcome.

STATEMENT OF PROFESSOR CHARLES TIEFER, PROFESSOR OF CONTRACTING LAW, UNIVERSITY OF BALTIMORE SCHOOL OF LAW.

Mr. TIEFER. Thank you, Chairman Thompson and Representatives Clarke and Green. Your presence here shows the importance of the issues we are talking about.

I am a professor of government contractor law at the University of Baltimore Law School and the author of a case book on government contracting law.

Responsibility is a key criterion for perspective government contractors which DHS should be considering much more broadly and carefully.

Under current law and procedures, which Ms. Duke described earlier when she was saying what the checklist was that the contracting officers go through at DHS, they do a pre-award survey and in the course of it, they look at who has been debarred and they look at a very narrow form of past performance information. The information that is kept on what she called PPIRS, the past performance information retrieval system.

To take an example so one understands just how narrow this look is, a large juicy contract was given to Halliburton KBR to build emergency detention facilities. One would think if one looked at the past performance of Halliburton, one would get a great big pile of information about allegations of waste, fraud and abuse in Iraq. But I will wager that if you look at it, you will find a very benign record, and for that matter, I think a good thing to do would be to task the GAO to look at how little there is in the PPIR system for Halliburton.

Why is that? Well, as the GAO has said in a January 2007 report called Select Agencies Use of Criminal Background Checks For Determining Responsibility, which explains they looked at the DHS system and other departments, that their routine does not include looking at past criminal records. What else don't they look at? Well, information from inspectors general and from auditors and from the General Accounting Office is typically not to be found in these databases because it is, as the GAO says in that report, narrative in nature. It is not sort of machine readable, and the contracting

officers who put information in that database aren't interested in going through IG reports, auditors reports, whose questioning they may not have accepted.

So in the case of Halliburton, which had a billion dollars in questioned costs, but which the high command in the DOD contracting offices decided to let Halliburton walk away with, that billion dollars is not going to be in the database as it is simply things that the auditors questioned.

What are other examples of contractors who have a more broad survey of their past performance would lead to questioning about their ability to contract with DHS? Well, we have SAIC, which has a history of having badly botched a contract to buy cargo screening equipment so the Department had to say we don't want to buy any more from SAIC and which in the past month or two had a full-length article, magazine article, which I summarize in my testimony, showing how it has obtained DHS contracts by—and contracts throughout the government—by having high level lobbying partners who have great influence in the government while it has a history of, as I describe in my testimony, the GAO, the DOD IG, and the press, showing that its performance has been highly questionable.

We have the Bearing Point KPMG which bungled the eMerge2, a financial software system at DHS. This committee held hearings about this very subject. Those hearings aren't going to be found in the past performance system. So that when each of these come up for new contract, is the responsibility questioned? No.

Now it has been suggested well, we have the general government-wide regulations. What would we need anything stronger at DHS for. Ms. Duke pointed out the example that we already know we need more at DHS. She said their checklist includes their own provisions concerning what she called inverted entities. These are the companies that have gone and switched their headquarters to Bermuda so they can cheat the U.S. government out of the taxes that it should be paid.

The Congress decided that that was not to happen at DHS, and so DHS, in its own regulation, has a strong provision that it is checked. You could reach out further and say that companies like Halliburton, where the CEO is going to go to Dubai, that kind of thing ought to be checked for responsibility. It won't be under the government-wide regulation. It should be under the HSAR.

Thank you, Mr. Chairman.

[The statement of Mr. Tiefer follows:]

HEARING ON

RESPONSIBILITY IN FEDERAL HOMELAND SECURITY CONTRACTING

APRIL 20, 2007

BY PROFESSOR CHARLES TIEFER

NON-RESPONSIBILITY IN DHS CONTRACTORS:

WHO'S RESPONSIBLE? WHAT CAN BE DONE?

Thank you for the opportunity to testify on the subject of responsibility among contractors at the Department of Homeland Security (DHS). I am Professor of Law

at the University of Baltimore Law School since 1995, and the author of a book, and of pertinent law review and journal studies, on federal procurement policy.¹

- I. Executive Summary
- II. The Narrow Current DHS Approach to Contractor Responsibility.
- III. Broader Consideration of Past Contracting Waste, Fraud and Abuse
- IV. Broader Contractor Responsibility—Civil Rights, Expatriates, and Other Issues

I. Executive Summary

“Responsibility” is a key criterion for prospective government contractors, which DHS should consider more broadly, in several respects. Under current law, after DHS selects a contractor for award, it conducts a pre-award survey to determine responsibility. This existing “responsibility” determination consists mostly just of checking that the awardee is not on the list of suspended or debarred contractors (“excluded persons”); has adequate finances (from Dun & Bradstreet); and has satisfactory “past performance” in a narrow sense.

Whether and how DHS should consider “responsibility” more broadly involves several issues.

For one issue—upon which this testimony focuses—DHS’s methods examine only a narrow version of the “past performance” record of the contractor. DHS makes little effort to gather up broadly the whole of the government contractor’s record of fraud, waste, abuse, and other violations, which may not get into the narrow “past performance” database. The revelations by Inspectors General, auditors, qui tam False Claims Act plaintiffs, and the press often do not go into the databases primarily maintained by contracting officers of solely their own experiences with the contractor.

To make this concrete, this testimony looks at the past record of some of DHS’s biggest and best-known contractors with irregularities in their past performance, drawn from those public record sources sometimes not included in the DHS past performance review. It starts with SAIC, which has botched DHS work, and has a full-length recent article in *Vanity Fair* about its many questionable episodes. This part continues with Boeing, for which a 20-month partial debarment can, and did, work. It discusses BearingPoint (KPMG), which bungled eMerge2.

For another issue, responsibility could be expanded to include significant federal law deviations or transgressions besides poor past performance. American contractors that move abroad—technical “expatriates” or those like Halliburton that move their CEO to Dubai—raise a potential responsibility subject. More generally, the “contractor responsibility” rule, promulgated during that Clinton Administration and rescinded in the Bush Administration, raised subjects such as compliance with civil rights, tax, environmental, and labor laws. DHS may be the right department for a version of the contractor responsibility rule.

II. The Narrow Current DHS Approach to Contractor Responsibility.

Agencies may award contracts only to “responsible” offerors—in other words, only after their contractor officers determine that the potential awardee is “responsible.” The law about contractor responsibility for all government departments, including DHS, comes from Federal Acquisition Regulation (FAR) 9.104 (emphasis added and details omitted):

Subpart 9.1 Responsible Prospective Contractors

9.104 Standards

9.104-1 General standards.

To be determined responsible, a prospective contractor must—

- (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));
- (b) Be able to comply with the required or proposed delivery or performance schedule
- (c) Have a *satisfactory performance record*. . . .
- (d) Have a *satisfactory record of integrity and business ethics*;
- (e) Have the necessary organization, experience, accounting and operational controls, and technical skills. . . .;
- (f) Have the necessary production, construction, and technical equipment and facilities. . . .; and

¹These include GOVERNMENT CONTRACT LAW: CASES AND MATERIALS (Carolina Academic Press 2d edition 2004)(co-authored with William A. Shook). In 1984–1995 I was Solicitor and General Counsel (Acting) of the U.S. House of Representatives, and participated in numerous oversight investigations of federal procurement policy.

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

Government contracting law has long-standing and elaborate provisions for finding contractor responsibility—discussed in our book, and written about by others in detail.²

These criteria have great potential for flexibility—in particular, the notion that a contractor must have a “satisfactory record of integrity and business ethics” and a “satisfactory performance record” have wide potential. Under current law, after DHS selects a contractor for a large award, it conducts a “pre-award” survey to determine responsibility. But, this is relatively narrow. This existing “responsibility” determination consists mostly just of checking that it is not on the list of suspended or debarred contractors (“excluded persons”); is financially responsible (from Dun & Bradstreet); and has acceptable “past performance” in a narrow sense.

Two GAO reports, one of them a quite recent and relatively overlooked study released in January 2007, investigated just how narrow the pre-award survey of contractor responsibility can be. GAO, *Selected Agencies Use of Criminal Background Checks for Determining Responsibility*, GAO-07-215R (Jan. 12, 2007); GAO, *Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process*, GAO-05-479 (July 2005). The January 2007 GAO study disclosed that contracting officers these days often depend upon rather narrow pre-award surveys (conducted for them by, e.g., the Defense Contract Management Agency). The surveys use two important tools, tracked by a contractor’s Data Universal Numbering System (DUNS) number: the data in the Excluded Parties List System (EPLS) about suspensions or debarments; and, the data in the Central Contractor Registration System (CCR) about contract awards.

The government has a standard arrangement to obtain Dun & Bradstreet data on potential awardees to check their financial resources.

What is left out by surveys of suspensions or debarments, financial solvency, and past performance? A striking example is that the GAO found that there is no particular reason that the ordinary pre-award survey would turn up whether the principals on an awarded contract had prior criminal records. In general, criminal background checks are not required and may well not have occurred.³

Presumably the survey also picks up, if the contracting office has not already tapped this in evaluating the offer, the relevant past performance database. For the Defense Department, NASA, and NIH, that is the Past Performance Information Retrieval System (PPIRS). Many expect a trend toward a single federal database on past performance information for all agencies.

To step back, the agency systems for past performance derive from one of the most highly regarded procurement initiatives of the 1990s—the expanded importance of past performance as a source selection factor.⁴ This works by a process starting when agency contracting officers do evaluations of the contractors’ performance of contracts at the time of performance. (The contractor’s awareness of this evaluation and its importance is expected to “motivate” the contractor to perform well.) This evaluation goes into the aforementioned databases. Then, when contractors compete for subsequent awards, the agency source selection personnel consider each offeror’s past performance as a factor in selecting the awardee.⁵

One DHS example, among countless others, reflects how big a factor past performance can be. When DHS awarded a task order to Security Consultants Group Inc for security guard services, it weighted past performance 60% of the technical factors—an impressively decisive weight.⁶

However, there is no particular reason that the ordinary pre-award survey would turn up the allegations of prior fraud or other irregularities, that an agency may

²David Z. Bodenheimer, *Responsibility of Prospective Contractors*, 97-09 Briefing Papers 1 (available in Westlaw); Steven W. Feldman, *2 Government Contract Awards: Negotiation and Sealed Bidding*, ch. 18, sec. I, “Performance Responsibility” (2006 ed.) (available in Westlaw).

³Criminal records might come out if there has been the kind of criminal investigation of the awardee in which part of the standard procedure is to run a criminal record check.

⁴Nathanael Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora’s Box*, 29 Pub. Cont. L.J. 637 (2000).

⁵Steven W. Feldman, *supra*, sec. 6:12 (“Past Performance”) and 10:28 (“Organizational experience/past performance”); Richard White, *Overall Government Contract Evaluation process—Past Performances*, FedMarket.com, May 19, 2005.

⁶Government Contractor, April 14, 2004, p.166, discussing Comp. Gen. Dec. B-293344.2. The 60%, although impressive, is not so surprising. DHS is much more involved in purchasing of services, than of commodities, and for these services, past performance is a uniquely indicative factor in a way that mechanical tests on the physical characteristics of the “product” cannot be.

receive from many sources apart from contracting officers. In its section, “*Data on Instances of Previous Fraud by Contractor Principals Not Readily Available*,” the January 2007 GAO report noted that “investigations of fraud” are assigned to investigative units “such as the office of Inspector General.” Those units keep their case files in “narrative” form—not entered in the aforementioned databases—so there is no particular reason a pre-award survey must pull up what Inspector Generals have found out about the contractor.

Besides the Inspector General, there are other sources of information about contractor fraud, waste, and abuse. The Project on Government Oversight website on contractors provides a survey of such sources. For example, private relators may bring qui tam False Claims Act lawsuits against contractors. Such qui tam cases may win in court, or, the contractor may settle them. The success of a suit reveals a false claim, that is, statutory fraud.

Yet, contracting officers may very well, for a number of reasons, put nothing about such a successful suit in their database. The suit, and especially its eventual outcome, may post-date the contract; the contracting officer may not agree with the suit, regardless of the outcome, from partiality to the contractor or a desire to minimize what might seem a blemish on the C.O.’s own record; or, the contracting officer may just decide against taking on the argument with the contractor ensuing from penalizing it by making a big record of the false claim suit’s allegations and outcome. The example of SAIC below draws on a False Claims Act case settled by SAIC, that reflects negatively on SAIC, yet may not be found in the kinds of records checked when SAIC is a potential awardee.

III. Broader Consideration of Past Contracting Involving Waste, Fraud and Abuse

As discussed above, the current DHS approach to responsibility draws too narrowly on what contractors have done on past contracts, in assessing “past performance.” Specifically, it does not even draw on the investigations of the Inspector General of DHS, let alone the auditing agencies of other departments (such as DCAA). And, it does not draw on private suits—qui tam False Claims Act cases. All this results from a narrow approach to past performance which uses databases filled out by contracting officers—not inspectors general, not auditors, and not information from qui tam lawsuits about government contract fraud.

DHS could remedy this by tasking its Inspector General, or, its central procurement office, with two steps as to its records for past performance. (Any excess burden from these could be handled by restricting this, at least at first, to matters and contracts with some high minimum, such as \$1 million.)

First, the IG (or procurement office) should enter, in the past performance records, its conclusions from its investigative work. This should not be left to contracting officers, particularly when they may not be familiar with, or may not want to follow up, the investigation. Moreover, the IG could enter information from matters that fall naturally to it, such as private qui tam False Claims Act suits, as to which the IG office is routinely tasked to become familiar when the government is deciding on joining the suit.

Second, the IG (or procurement office) should consult certain kinds of public databases for a larger sweep of information about important offerors or awardees. These include criminal record databases; the press databases of Lexis-Nexis; and those public databases (notably, that of the Project on Government Oversight) that systematically collect government contractor information.

Of course, as with other past performance information, the government contractor should have the opportunity to enter its own response to correct or to clarify anything with which it takes issue.

Example: SAIC

To see what is not put together by current DHS responsibility practice, let us take as an example of a very important DHS contractor with negative episodes in its background: SAIC. Helpfully, a comprehensive investigative treatment of SAIC’s contracting has appeared recently—Donald L. Barlett, *Washington’s \$8 Billion Shadow*, Vanity Fair, March 2007, at 342—supplementing similar prior accounts.⁷

SAIC has sold a great deal to departments such as the Defense Department and intelligence agencies. With DHS as well it has a particular important contract. In 2003, TSA awarded it a contract with a billion-dollar potential, pursuant to which SAIC provided about 400 cargo-screening monitors for border crossings and ports. As *U.S. News & World Report* reported in 2005, “[T]he government awarded a con-

⁷ A prior description of SAIC is in “Windfalls of War—The Center for Public Integrity,” <http://www.publicintegrity.org>.

tract to San Diego-based Science Applications International Corp. . . . The machines were plagued by performance problems.”⁸

This committee is familiar with the problem, having held hearings on that failure,⁹ but, it warrants noting, “What’s the problem? Well, for starters, the monitors can’t distinguish between a nuclear bomb and radiation that occurs naturally in a variety of materials, including ceramic tiles, quarry tile, cat litter, fertilizer, and bananas” *Id.*¹⁰

Suppose DHS’s experience with that large, sensitive contract with SAIC caused it to look broadly at questions of SAIC’s past negative performance, as part of SAIC’s responsibility. It would find these specific legal and ethical controversies:

—SAIC is organized primarily for a revolving-door approach to Washington lobbying. It rotates, on and off its payroll, officials at the very top level, which includes former Secretaries of Defense and heads of the CIA and NSA. It has a pattern of obtaining highly profitable contracts from such officials while they are in office, and providing them lucrative rewards, particularly stock options, when they are on its payroll.¹¹

—SAIC had to settle a federal fraud (False Claims Act) case in April 2005. Those widely reported allegations might involve gross understatement of excess profits on extensive national SAIC contracting. I discussed this in the NBC-TV segment, “The Fleecing of America,” on May 5, 2005. As *Vanity Fair* says about SAIC’s formula for understating its excess profits uncovered in that case, “the principle involved was large, and it had potentially national implications. Was SAIC using the same formula in thousands upon thousands of other contracts it had with the government?” Yet, it does not appear that current DHS methods for checking “past performance” would even put this on the table in front of a contracting officer.

—SAIC had a major contract terminated after revelations of a spectacular conflict of interest. It had the NRC’s contract to formulate safety guidelines for radiation-contaminated waste. Then, it became a subcontractor on a major DOE contract for recycling radioactive scrap metal. When the SAIC conflict of interest came out, the NRC not only terminated its contract with SAIC, it filed suit against SAIC alleging false representations.¹²

—SAIC was involved in several of the most questionable contracts by which Defense Department funds have been paid for untoward “support” in Iraq. SAIC was the contractor for paying the “Iraqi Reconstruction and Development Council” exiles including Ahmed Chalabi. As the *Vanity Fair* article comments, a typical exile on this SAIC payroll was “a onetime atomic-energy official in Iraq, who insisted that Saddam posed an imminent nuclear danger to the United States. . . .” SAIC’s obtaining this contract has been criticized by the GAO on pure contracting grounds,¹³ the DoD IG also criticized SAIC on it,¹⁴ and I have discussed it critically in the *Washington Post*.¹⁵ From what the GAO, the DoD IG, and the *Washington Post* laid out, this was not some small matter. At the most critical of all times, SAIC was doing a very wrong thing.¹⁶

Also, this includes hiring SAIC for establishing the Iraq Media Network, which the press found initially to be a disseminator of DoD disinformation contrary to the official United States policy (particularly for a department, such as DoD, and its contractors, which are not part of the intelligence agencies tasked with such covert

⁸ “A Radioactive Contract,” USNews.com, May 22, 2005.

⁹ *Hearings on Detecting Nuclear Weapons and Radiological Materials*, House Homeland Security Committee (June 21, 2005).

¹⁰ A similar story is Eric Lipton, “U.S. to Spend Billions More to Alter Security Systems,” *New York Times*, May 7, 2005.

¹¹ As the *Vanity Fair* article commented, “Civilians at SAIC used to joke that the company had so many admirals and generals in its ranks it could start its own war. Some might argue that, in the case of Iraq, it did.” The existence of SAIC’s company-wide pattern of obtaining contracts by revolving-door methods puts each individual controversy into a larger framework.

¹² This is discussed in the *Vanity Fair* article.

¹³ The Government Account Office received and upheld a protest against the award of that contract, from commercial companies that wished to compete to provide such services legitimately. *Matter of Worldwide Language Resources, Inc.*, B-296693.2 (Nov. 14, 2005).

¹⁴ Demetri Sevastopulo, *US Military “Cut Corners” on Iraq Contracts*, *FIN. TIMES*, March 26, 2004, at 4; Bruce V. Bigelow, *Report Rips SAIC Over Iraq Contracts*, *SAN DIEGO UNION-TRIBUNE*, March 25, 2004, at C-1.

¹⁵ Renae Merle, *Air Force Erred with No-Bid Iraq Contract*, *GAO Says*, *WASH. POST*, Nov. 29, 2005, at A17.

¹⁶ The GAO and DoD-IG criticisms are important. This is not just some reporters’ lack of appreciation of a contractor with whom the reporters disagree. Rather, SAIC was found to be acting to obtain greater profit, without competition, but in ways—such as sole-source providing of personnel services that were being manipulated to pay off specific Iraqi exiles providing false intelligence.

actions); SAIC's network has since become, with painful irony, an Iraqi government disseminator of virulent anti-American messages.¹⁷

Lessons from SAIC

SAIC illustrates a number of points about the need for greater attention to contractor responsibility.

First, it would help if, at the time contractors engage, and are caught, in waste, fraud, and abuse, the agencies made a strenuous effort to create a "past performance" record of this—not just have it occur only if a contracting officer would ordinarily mention the matter in filling out the performance paperwork. Without pushing, low-ranking DHS officials may not be expected to stand up to contractors with the demonstrated clout and connections of SAIC. But, if the prospect of a record that would block future awards forced it, SAIC may be obliged to either clean up its act or cease to drain DHS's funds.

Second, a good way for DHS to address and to change a company-wide pattern like this with an important vendor (like SAIC) is via the issue of responsibility. A company which faces a broad loss of contracts may change its culture to rein in the abuses. Without that prospect, a company like SAIC will simply settle the consequences of each individual abuse that is caught, and continue its pattern with the expectation that what it does that is not caught, will more than make up in revenues for what it does that is caught.

Third, DHS must stand ready to impose formal sanctions, like terminations for default, upon the particular contracts of a contractor like SAIC when its performance of a contract involves waste, fraud, or abuse meeting the standards for formal sanctions. DHS may have been able to terminate for default SAIC's contract for radiation monitors on the ground that the monitors materially failed to perform as promised (there is insufficient information available on the public record to tell this for certain), rather than simply not continuing to order more units. Doing so lays the groundwork to consider findings of poor past performance the next time around.

Responsibility is a Properly Tough Criterion Even for (Perhaps, Especially for) the Biggest DHS Contractors

Boeing at DHS and Boeing's Billion-Dollar Suspension

Boeing is by no means the worst DHS contractor, but, reviewing Boeing provides important lessons about responsibility. The TSA awarded Boeing a contract that included the delivery and installation of 1100 explosive detection (baggage screening) systems. A 2004 IG report found wasteful spending and mismanagement.¹⁸ Boeing's bid was the highest. Boeing insisted on a "cost plus a percentage of cost" arrangement, which is about as close to per se abuse as procurement can get. Then, Boeing turned around and subcontracted 92 percent of the work to L-3 and another company—which is the way to most abuse such a contract. And so it proved: Boeing received a 210 percent return on investment, and the IG deemed more than half of that profit to be "excessive."¹⁹

Boeing is, of course, one of the biggest government contractors, but it is not alone in abuses both at DHS and elsewhere. Just two months ago, DHS's Inspector General criticized a multibillion-dollar program run by Lockheed Martin and Northrop Grumman, which, together with Boeing, make up the "Big 3" of defense contracting. The Coast Guard awarded its Deepwater contract to a joint venture of Lockheed and Northrop. The DHS IG found design flaws for the Coast Guard cutters that led to spiraling maintenance costs and, without a fix, could reduce the ships' longevity. Deepwater is a \$24 billion, 25-year program. So this could be a waste problem on a gargantuan scale—as a hearing by the House Oversight and Government Reform Committee on February 13, 2007, discussed.²⁰

It need hardly be said that a check of the background of Boeing or Lockheed would readily display a very large set of prior matters reflecting adversely on responsibility. Boeing has been responsible for the Darleen Druyun scandal, with high-level criminal convictions (Druyun and former Boeing CFO Michael Sears) and the resignation of Boeing's CEO²¹—the single most dramatic criminal procurement scandal (leaving aside the Iraq and post-Katrina scandals) of this Administration.

¹⁷ Barlett, *supra*.

¹⁸ DHS IG, *Evaluation of TSA's Contract for the Installation and Maintenance of Explosive Detection Equipment at United States Airports* (Sept. 2004).

¹⁹ *Contracting Rush for Security Led to Waste, Abuse*, WashingtonPost.com., May 21, 2005.

²⁰ Deborah Billings, *DHS: Waxman Blasts DHS for Outsourcing Too Much Authority Under Major Contracts*, BNA Fed. Cont. Rep., Feb. 13, 2007, at 160.

²¹ *Druyun Scandal Prompts DOD-wide Review of Procurements*, Wynne Says, BNA-FCR, Nov. 23, 2004, at 549.

Lockheed has the highest number by far (92) of issues on the POGO website for any government contractor.²²

What lessons can be learned about responsibility from the abuses in the contracts of Boeing (or, for that matter, Lockheed)? Most important: DHS can, as a viable and practical matter, treat even the very biggest contracts and contractors with toughness on responsibility.

On many grounds, the contracting industry, and even this Administration, might dispute this. They might say that DHS nonresponsibility determinations cannot occur against giant companies because the government needs them too much both when they are the sole source, and when they are among the few competitors, for important contracts. And, they might say that DHS nonresponsibility determinations are unfair or ineffective as to the very biggest contracts and contractors, because such contractors operate on so large a scale, with so many units and such decentralization, that it is unfair or ineffective to sanction the whole company for the faults of “the one rotten apple in the whole barrel.” After all, they are the biggest government contractors, and some of the extent of their record simply owes to their contracts’ scale.

There is a very concrete example that supports DHS treating even the very biggest contractors like Boeing with toughness: the Defense Department did treat Boeing that way as recently as 2003–2005. The Air Force awarded Boeing 19 of 28 contracts for upcoming launching satellites, a multi-billion dollar contract. Then, the government investigated Boeing’s having improperly and obtained Lockheed proprietary information to compete for those contracts, with criminal charges against Boeing officials on the satellite proposal team. From 2003–2005, the Air Force suspended three Boeing units from eligibility for future government contracts, for twenty months; and, it reallocated Boeing’s number of launches from 19 to 12—\$1 billion in work.²³

The 20 month Boeing suspension also illustrated the doubly effective lesson of such a sanction, even in (indeed, especially in) spheres of contracting where there are only a few sufficiently large or specialized contractors available to perform major specialized contracts.²⁴ By reallocating \$1 billion in work from Boeing to its “victim” (Lockheed), the suspension taught the whole industry two lessons. One was that “crime doesn’t pay.” The other is that “honesty DOES pay.” The lesson is taught by giving the work that would otherwise go to the nonresponsible contractor to other, responsible contractors. And, contractors are not being held to impossibly high standards—Lockheed is itself no angel, as just explained above—just to the workable standard that those who go beyond the pale see a large quantity of their work go to those who stay within the pale.

Moreover, limited exceptions, by waiver, can occur in the course of a suspension.²⁵ Similarly, DHS could make nonresponsibility determinations about particular contractors, and reserve the right to make limited exceptions by waiver.

Bearing Point / KPMG and eMerge2

A detailed press article in 2006 entitled “*Security for Sale*,” had the subheading: “The Department of Homeland Security has a Section on Its Web Site Labeled ‘Open for Business.’ It Certainly Is.”²⁶ The article assembled many examples, some well-known within the procurement community, of contractor exploitation, often facilitated by lobbyists, of lax standards at DHS. *Security for Sale* develops usefully one particular example about which this Committee has recently held important hearings.

It describes how the company BearingPoint, formerly known as KPMG Consulting, obtained the eMerge2 contract. “In 2004, after signing on with Blank Rome,

²² Lockheed’s reputation goes back to when Lockheed’s worldwide payoff scandals dominated the inquiries of an entire Senate special committee’s existence (the Church Subcommittee on Multinationals) and led to the enactment of the Foreign Corrupt Practices Act.

²³ *Air Force Lifts Suspension of Boeing From Eligibility for Federal Contracts*, BNA–FCR, March 8, 2005, at 226.

²⁴ As much as any other suspension or nonresponsibility determination, the 20 month suspension of Boeing involved the issues that the industry raises to argue against nonresponsibility determinations by DHS or other agencies. The government had very few choices, but must reallocate work to Lockheed, and must forego needed competition in the field. And, it could be argued that the suspension harshly penalized a substantial contingent in the Boeing workforce, who suffered loss of work for the misconduct of a few officials.

²⁵ The Air Force twice waived the suspension, letting Boeing launch one rocket in 2003 for “compelling need” and another in 2004 for “national security.” These amounted together to about a \$100 million in work—nothing to sneeze at, but a small fraction of what Boeing lost overall. *Air Force Lifts Suspension of Boeing From Eligibility for Federal Contracts*, BNA–FCR, March 8, 2005, at 226.

²⁶ By Sarah Posner, in *The American Prospect* (Jan. 2006).

the company won three major DHS deals: a \$229 million contract for its 'eMerge2' software, designed to integrate the financial management of the department's 22 component agencies [and 2 other contracts]."²⁷ Blank Rome was a Philadelphia lawyer-lobbyist firm extremely well connected to the DHS Secretary, Tom Ridge of Pennsylvania.²⁸

There was reason from the beginning to be skeptical of the BearingPoint contract. At the very moment that DHS awarded the eMerge2 contract to BearingPoint, another federal agency, the Department of Veterans Affairs, was canceling a computer systems integration contract with BearingPoint for a Florida VA medical center after paying BearingPoint \$117 million, and the State of Florida was canceling a similar \$173 million with BearingPoint and Accenture.²⁹ More broadly, the technical procurement world grouped BearingPoint's eMerge2, as an enterprise resource project (ERP), as one of the "well-known ERP implosions" as to which "the history of failed ERP projects [are] dotting the federal landscape."³⁰

It seems rather blithe for DHS just to walk away from that failure without asking some hard questions of BearingPoint and of its own project workforce. DHS has a painful history of material weaknesses in its component financial statements and financial management systems precisely in the context that the BearingPoint contract was to fix, as GAO reported to this Committee at its March 29, 2006 hearing.³¹ DHS depended on that contract for a solution, having chosen the BearingPoint proposal over a rival proposal by established solution-provider IBM—and over simply implementing the internal solution of the Coast Guard's much-praised system. It seems BearingPoint's failure was apparent "within weeks,"³² yet DHS, having stayed several years with BearingPoint, now finds itself having lost years in this key effort.

There are important lessons for "past performance" and responsibility of contractors at DHS. The contracting officers of the department evidently face pressure to go lightly upon contractors who engage in waste or abuse or simply fail badly. Moreover, the contracting officers seem insensitive to organizational conflicts of interest (OCI)—using a company during an early phase of a project, then awarding a lucrative deal to the same company during a later phase. That is why it would be beneficial for the IG or some other separate office to make sure that contractor abuses at DHS were entered in databases in appropriately serious terms, and, that contractor abuses elsewhere were also entered so as not to be overlooked during "past performance" and responsibility determinations. eMerge2 might have been avoided. In any event, its recurrence might be prevented. To paraphrase an old saying,³³ "history repeats itself—because people didn't put a record of it, the first time, in the 'past performance' database."

IV. Broader Contractor Responsibility—Civil Rights, Expatriates and Other Issues

For another set of issues, subject matters for contractor responsibility are suggested besides past performance involving waste, fraud and abuse.

A. Expatriates and Other Contractors Making a Foreign Shift

One issue concerns American contractors that make moves abroad. These may include business that are, technically, "expatriates"—American companies that re-incorporate in foreign tax havens. A 2002 GAO report found out the following about such expatriates, notably including Accenture, which is a well-known contractor for DHS (notably in relation to the \$10 billion U.S.-VISIT contract)

On October 1 [2002], the General Accounting Office reported that \$2.7 billion in Government contracts were awarded to expatriate companies during Fiscal Year 2001. Although only four companies were named as being incorporated in international "tax haven" countries, the total awarded to them was about 2.6% of the \$102 billion awarded to the top 100 federal contractors, according to GAO's report. GAO also reported that the Department of Treasury has found a "marked increase" in the frequency, size, and profile of "inversion" transactions, which occur when a U.S.-based multinational company "restructures its corporate group so that after the transaction the ultimate parent of the cor-

²⁷ *Id.*

²⁸ *Id.*

²⁹ Paul de law Garza, *Critics Question Federal Contract*, St. Petersburg Times, Oct. 7, 2004

³⁰ Wilson P. Dizard III & Mary Mosquera, *ERP's Learning Curve*, TechNews (Feb. 16, 2006).

³¹ Statement of McCoy Williams Before the Jt. Hearing of the Subcomm. On Government Management, Finance and Accountability of the House Government Reform Comm. and the Subcomm. On Management, Integration, and Oversight of the House Homeland Security Comm. (March 29, 2006).

³² U.P.I., *DHS Financial Management Plan Collapses* (April 3, 2006).

³³ It is usually stated as: "history repeats itself because people weren't watching the first time."

porate group is a foreign corporation.” The four companies incorporated overseas were: (1) McDermott International, Inc., incorporated in Panama; (2) Foster Wheeler, Ltd., incorporated in Bermuda; (3) Accenture, Ltd., incorporated in Bermuda; and (4) Tyco International, Ltd., also incorporated in Bermuda. All of these contractors were on the top 100 publicly traded federal contractors list. See 44 GC ¶ 61. McDermott International was number 11 on the list, Foster Wheeler ranked 57, Accenture ranked 58, and Tyco International ranked 68, according to the report.

GAO Finds \$2.7 Billion Awarded to Expatriate Companies in fiscal year 2001, Gov't Cont., Oct. 9, 2002, at 387.

Of course, a series of enacted provisions, followed up by provisions in DHS regulations (the HSAR), have dealt with expatriate companies. As an article about DHS's regulations laid out:

Prohibition Against Contracts with Corporate Expatriates—Section 835 of the Homeland Security Act of 2002 (the Act) prohibits DHS from contracting with “a foreign incorporated entity which is treated as an inverted domestic corporation.” In short, the bar renders certain otherwise “domestic” entities that incorporated overseas after the Act's effective date (November 25, 2002) ineligible to receive DHS contracts.

Treated as a matter of contractor responsibility, HSAR 3009.104–70 implements the prohibition and requires the clause at HSAR 3052.209–70 to be inserted in all DHS solicitations and contracts; however, the exclusion is not mandatory. Requests for waivers submitted to DHS' Chief Procurement Officer (CPO) may be granted by the Secretary of DHS on a contract-by-contract basis if doing so would be “required in the interest of homeland security, or to prevent the loss of any jobs in the United States or prevent the Government from incurring additional costs that otherwise would not occur.” See HSAR 3009.104–74(a). As part of the Homeland Security Act Amendments of 2003, however, this waiver authority was restricted so that the Secretary can only waive the prohibition upon making a determination that the waiver is required in the interest of homeland security (and for no other purpose). See *Pub. L. No. 108–7, § 101(2)*, 117 Stat. 528 (2003). DHS will modify the waiver authority to be consistent with this amendment.

The exclusion applies only to a narrow group of entities. To fall within the exclusion, the entity must be incorporated overseas and treated as a “domestic inverted corporation” as that term is defined by the regulations (i.e., certain otherwise domestic entities whose place of incorporation was transferred off-shore after November 25, 2002). The exclusion is entirely unique in Government procurement. There is no analogous requirement in the FAR or any other agency-unique acquisition regulations applicable to such “corporate expatriates.”

Richard P. Rector & William J. Crowley, *Homeland Security—The New Acquisition Regulations and Guidelines*, Gov't Cont., Feb. 25, 2004, p.80 (emphasis added). Not that the mechanism by which the expatriate provision works, is a DHS regulation (in the HSAR) as to contractor responsibility.

Even so, such companies that are technically expatriates are only one part of this issue. Without technically becoming expatriates by reincorporating overseas, companies raise diverse issues by other kinds of what might be called “foreign shifts”—foreign takeovers, such as the Dubai Ports issue; or, moving their headquarters or their CEO abroad, such as Halliburton moving its CEO to Dubai. This testimony need not delve into the concerns raised in this way. The foreign shift suggests a diminished and even potentially conflicted commitment to American security concerns, which may become attenuated as the Halliburton CEO, for example, relocates away from America and learns to identify less with his former country and more with his chosen locus in Dubai (and close-at-hand customers there) and its regional perspective.

Moreover, in many ways, a foreign shift can lead to a changed, and possibly diminished, commitment to the laws that contractors are expected to carry out. For example, Title VII, and the related proscriptions of sex and race discrimination, envisage a strong effort by contractors to hire women and minorities at all levels, especially at the top. It is not at all clear that Halliburton's new CEO headquarters in Dubai is in a vicinity where he will vigorously recruit American (or any) women for top posts. More likely, the Dubai-based CEO may develop a version of the corporate glass ceiling.

B. The “Contractor Responsibility” Rule

The government-wide “contractor responsibility” rule, promulgated during the Clinton Administration and rescinded in the Bush Administration, cited noncompliance with civil rights, tax, environmental, and labor laws as a basis for finding an awardee nonresponsible. As for whether to have such a rule on a government-wide

basis, it is unnecessary to go back through all the arguments made in the period of the late 1990s and early 2000s. Before the rule was promulgated, the Administration made a strong record in its favor. Moreover, while this was not so noticed in the din of debate, as the consideration of the rule went along, a sound conception developed about how best to draft and implement it, so that lawyers were able to advise their contractor clients how the vast majority of them could live quite easily with the rule:

The commentary emphasizes that the government is not so much concerned by contractors who may have individual violations at some point in their histories as it is by contractors who have a *recent history of "repeated, pervasive and significant violations."* Moreover, the regulations encourage contractors to institute ameliorative actions when violations are found, instructing contracting officers to consider as positive evidence of responsibility efforts by companies to comply with administrative settlement agreements that reflect an effort to ameliorate past violations.

Anthony H. Anikeeff, *Avoiding the "Blacklisting" Minefield*, Fed. Law., April 2001, at 42 (emphasis added). In other words, a big company which lost some limited number of race and sex discrimination cases by individuals, some not even recent, would point out that this did not show a recent history of "repeated, pervasive and significant" violations. Even if the company had resolved some large-scale issue with the EEOC or other administrative body, it could point out its successful effort to comply afterward, as positive evidence of responsibility. In contrast, the systematic and hardened discriminator, with a pattern of extensive recent discrimination and no sign of effort at amelioration or improvement, would be challenged to explain its responsibility.

Putting aside the issue not present here of a government-wide rule, it is worth considering whether there is some greater reason to having some version of a "contractor responsibility" rule just for the Homeland Security Department. As just discussed, there is no government-wide expatriate rule, but there is such a rule for DHS, in the department's acquisition regulation, the HSAR. Among other factors, the spirit of homeland security suggests a particular type of idealistic patriotism, with which the notion of dropping American corporate citizenship and reincorporating in a foreign tax haven seems peculiarly at odds. Moreover, Americans are asked to undertake the effort of creating a new department, and funding its large and growing programs, to meet potentially great perils. Furthermore, DHS contracts may well prove more lucrative than other contracts; they tend to be less commercial in nature, less competitive in allocation, and lack the longstanding cost controls of more established fields. All that seems to warrant asking something of the contractors who received that large-scale and especially lucrative funding, namely, to maintain an identification with this country.

Similarly, the spirit of homeland security, and the demand upon Americans to fund its large and growing programs, is at odds with a business mentality that would consistently violate the laws embodying national ideals—like civil rights, environmental, and labor laws. Contractors ought not take, with one hand, DHS's especially lucrative contracts, and, with the other hand, refuse to invest the relatively modest sums needed to comply with federal laws. It is understandable that the Congress more willingly enacts large and growing appropriations for DHS if it provides that the money will not go into the pockets of those systematically violating the civil rights laws and similar laws.

Moreover, there may be some value in having one department—DHS—serve as a test site for a version of the contractor responsibility rule in its departmental regulations (the HSAR), rather than either having no such rule or going to a government-wide rule. There has been dispute over just how extensively any such rule would affect contractors. Proponents have argued that a large majority of businesses do, in fact, obey these federal laws and need have no concerns, and that it is only a rather small handful of corporate "outlaws" with exceptional records of scorning compliance with federal laws. Only because that handful has taken over a disproportionate role, on this issue, in the business lobby, is a corporate responsibility rule made to seem problematic. By having a DHS rule, this debate would be resolved by concrete experience. If the large majority of DHS contractors do not experience particular difficulties with such a rule, as the rule's proponents suggest, then that could be taken into consideration as to expansion to other departments. On the other hand, the expatriate rule did not immediately expand to other departments, showing that a contractor responsibility rule may last, applying just to DHS.

Chairman THOMPSON. Thank you very much, Professor.
I yield myself 5 minutes for questions.

Each one of you have talked about responsible contracting. And you have heard the testimony of the representative from DHS earlier.

In your own words, what steps should a contracting officer take to ensure that a prospective contractor is a responsible bidder? As you know, there are some questions about the Shirlington contract, that was a limousine contract that was questionable. The professor talked about some other contracts. And I am aware of the Professional Services Council representative talking about existing regulations. And I guess the question is are the existing regulations tight enough to do it? Is it just that they are not being followed in some instances, or do you think there are some other measures that could be put in to get us to that point. And I will start with Mr. Amey.

Mr. AMEY. Thank you, Mr. Chairman.

The regulations are on the books, but I do think they could be tightened up. The examples that Professor Tiefer just walked you through are the perfect examples of the government's narrow interpretation of them that they are not going to step out of that box. And, obviously, you know, the Professional Service Council will say they shouldn't step outside of that box. They are following the regulations and that is the argument at POGO that we have with the contracting associations all the time is that, you know, well they are following the rules but are they following it as intended.

Ms. Duke testified that they have the policies and procedures that they need, but I don't think they are working as intended. When you have examples and POGO has a contractor misconduct database for the specific examples of what Professor Tiefer was testifying about. We have examples of false claims against the government, violations of the Anti-Kick-Back Act, outright fraud, conspiracy to launder money and retaliation against workers and environmental violations. None of those are being used in responsibility determination. So it really does fall on DHS to do a better job in spending taxpayer money wisely.

Chairman THOMPSON. Thank you very much.

Mr. CHVOTKIN. I am in the uncomfortable position of being on Mr. Amey's left. I am really there. And I couldn't disagree more with either of the two other colleagues on this panel.

The tools, the checklist that Ms. Duke talked about, the standards that exist in the regulations are quite comprehensive yet quite flexible. They are flexible because they address individual circumstances. They address compliance, the capability to execute an existing contract. That is what the responsibility determinations are all about.

These are not about second-guessing auditors or Government Accountability Office reports. They are trying to make the best determination whether the contractor is likely to perform work.

Past performance is an indicator of future success. It is unquestionable. We strongly support a robust past performance information reporting system. The PPIR system is relatively new, not as robust as it should be. It is not as comprehensive as it needs to be. We have endorsed strongly on the executive branch that they enhance that system. We have encouraged agencies to make sure the contracting officers respond and submit information to that past

performance information reporting system and other databases that track that information.

We have endorsed strengthening the excluded parties list that the General Services Administration maintains as executive agent on a government-wide basis. To make sure that that data is more readily available, we have now got that on line along with other activities that are now coming on line.

So I think there are steps that are being taken. Much of it is enforcement. Much of it goes to the workforce challenges who, in addition to having the need to get the work out the door, have a responsibility to go through the—this determination as well as other determinations.

So a combination of workforce training and experience, systems tools in place, and compliance with existing regulations, I think will get to most of the circumstances that have been raised.

Now are there bad actors? There are. Will they slip through the cracks? They will. And that is where oversight and responsibility on the government contracting officer and the performance is designed to check.

And here again, the government has a lot of tools available to them where they find that mistake to correct it through terminations for convenience, through prosecutions.

So there is certainly no lack of capability of executing.

Chairman THOMPSON. Thank you.

Professor.

Mr. TIEFER. Well, there couldn't be a more important question than what more should those contracting officers do and whether the existing regulations need to be strengthened.

The first thing is that given the systematic inadequacy of the database that is kept in that it is kept only by contracting officers and it doesn't have all of these items we mentioned previously, Inspector Generals and auditors and so forth, that one should contracting officer should go to public databases, which, for example, the one at POGO is one. Databases that will inform them about key false claims action cases which are very important, which develop a great deal of information, which are otherwise are going to go right past the contracting officer, won't be aware.

SAIC is an example of a company that settled a very important False Claims Act case, in effect, though not technically, in effect, admitting that it had jacked up its cost and its prices.

Mr. CHVOTKIN. Not technically?

Chairman THOMPSON. Excuse me, sir. You have had your chance.

Professor, continue.

Mr. TIEFER. The point is taken. They don't admit or deny, but for purposes of checking their past performance, it should be checked. It should be checked. It is like if you had someone who had been charged with drunk driving and they pleaded no lo contendere, that should be checked if one is deciding if they should be out there behind the wheel again, especially if you see further examples of them drinking and driving.

Anyway, we have—there are false claims—there are databases that are kept, records that are kept about False Claims Act things.

A specific example which is brought up of the instance of Shirlington Limousine is of criminal records. When the GAO asked

these various departments do your people look at criminal records, other departments said as a matter of fact—the Department of Justice, GSA said as a matter of fact, we do. Our procedures do lead us to know. DHS's answer was no. Could they check it? Yes. They would simply have their contracting officers ask the IG and the IG check to see whether the principals on the contract had a criminal record.

I will say that the DHS does check if it is fallen on Homeland Security directives and things are involved like badges for admittance to sensitive facilities, so there is some checking at DHS, but there is not a department-wide procedure the way there is apparently at other places.

Last, there are things which under the current regulations there is no push at all at contracting offices to look at. These are the violations of Federal law apart from waste, fraud and abuse. Violations like civil rights employment discrimination violation, which the government has turned its back on checking.

I think that regulation changes could be made and should be made so that people—firms that have a record of systematic discrimination which has been exposed by class action lawsuits, this should be put in front of the contracting office.

Chairman THOMPSON. Thank you very much.

We now recognize the gentlelady from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. I am not sure if this mike is working but am I heard. Thank you very much. Thank you.

I know that Ms. Duke is not at the witness table, but I want to make the point that as we are learning today, the procurement office is really moving with a breath of fresh air in the right direction. And I think we can all learn today in how we can make it better.

And so Mr. Amey, I am going to raise with you a forward thinking question, because the government needs to learn and Congress needs to write laws in the right manner.

And I note that you probably covered some areas, and I thank you for your indulgence. There are two hearings that we are attending to.

But this is a crucial hearing, because we are really speaking of billions of taxpayer dollars. I mean, I think that is—you know, that is what you call throw your hands up in frustration, and then we add to it the insult to the burden of victims who are already victimized and simply want something to work.

And so I just have to go back again, and I know that you, as I understand it, have mentioned some other debacles, and I will mention them as well.

Ms. JACKSON LEE. You know, I don't know why the government feels that only huge conglomerates—and Halliburton is a constituent, but there is not a crisis that occurs in America that Halliburton is not there. Now this is the Department of Defense I would imagine. We have to find a way to expand. I will use the term "fix that." But we have to find a way to become more opportunity generating with competition. So I wanted you to speak to this comfort level that we get with large entities.

Then the next point is that, you know, as we do that, we certainly shortchange procurement officers or staff, and maybe that may be a question. It is much easier to go with what we perceive to be comfort level but I think when we get comfort level, then we get reckless spending by the entity that feels that we are working hand in glove. That was certainly a point I think that is evident with Halliburton in places like Afghanistan, Iraq and also Haiti.

The second question is, with respect to I think a necessary change in the law or administratively, and that is these large contracts on crises going to the State government, not getting to local entities. And when we went into New Orleans in the parishes and we talked to the local officials, they said, you know what, I am barred from hiring a local guy because there is a big major contract generated because we have sent money to the State. And therefore, the State goes into this either noncompetitive, hand in glove situation. That is why, although I know ICF and the Road Home Program is State, I believe there should be a Federal investigation because billions of moneys are still stymied.

So what about the idea—now, if you take that one first, of restructuring how we send moneys in time of crisis, and so that St. Bernard Parish, making it an argument or putting the structure in place, would get the money directly. You send it to the State, the State sits there for a period of time. There may be—and I am not indicting any state-elected officials, meaning the legislature, the Governor's office, but they sit and boil for a long period of time in time of crisis and the local dollars, they never give them.

Mr. Amey.

Mr. AMEY. Well, I will handle your second question first. But to me they all merge together, and it ends up being a very connected answer. And that is the first thing that we need to look at is the number of tiers we have. By using lead system integrators, the system that we currently have with these large prime contractors, we are really taking away business from small and medium-sized businesses.

Ms. JACKSON LEE. And minority, minority and women.

Mr. AMEY. And minority and women as well. And the problem is, you hit it on the head, and I think Mr. Chvotkin started out his testimony with that in saying this is subpartnership. Through the years, we have gotten away from arm's length negotiations. I always use the example, when I buy a car, I am not hand in hand with the person selling me the car. Somewhere here the government has turned to this approach where we are in the same business with these contractors, so at that point we are working for the same goals. And I don't always see it that way. I know Mr. Chvotkin is going to criticize that comment. But that is where that comfort level with large contractors comes from. At POGO, we call it the usual suspects. It is a lot easier to turn to the usual suspects than going out and doing it—trying to find another contractor, turning to somewhere else where they are doing the same work. One of the terms that they bat around is "bundling." We need to start debundling contracts. There is no reason Halliburton had to get laundry services, food services, construction services. Why not break those apart? But it was a lot more convenient. It was a lot more efficient for the government to get that contract awarded as

a larger contract. So let's not break it apart. Let's get it awarded and then we will allow Halliburton to then subcontract out all the work to other people. And you end up with multiple tiers.

So that gets to your second question you asked, was at one point we end up with up with one, two, three—I have heard four, five levels of subcontractors where everyone is taking their piece of pie at that point. We have seen where—and this is where I have talked about prime and material contracts, where the prime contractor will bill out the government \$100 an hour to pay their contractor at \$50 an hour, and then the worker is actually only getting \$15 an hour. There is risk involved there, there is allocations of expenses I know in Economics 101. But at the same time you have a prime contractor getting \$50 to do little or no work because the contractor is already doing it. And that needs to end. That is where there is a need for new regulations, there is a need to look at the system and say, it isn't working as intended because there has been so many changes with the War in Iraq, with Hurricane Katrina.

Have we caught up to the system? I think it is the tail wagging the dog at this point.

Thank you for your question.

Ms. JACKSON LEE. Professor, did you want to—the gentleman in the middle. I am sorry. Professor Teifer.

Mr. CHVOTKIN. I am Alan Chvotkin.

Ms. JACKSON LEE. Where is the professor there? Yes. Sorry we have you listed second but you are over here. Yes. Did you want to comment?

Mr. TIEFER. Very much so. You are quite right that there is a syndrome of large entities, of a greater comfort level with contracting with large entities and as a result, reckless spending. An example in DHS, which I discuss in my testimony, is the famous Deepwater contract that the Coast Guard handles, which is a \$24 billion contract, which has received a lot of critical attention from the oversight people and which is a joint contract between Lockheed Martin and Northrop Grumman. When one goes and looks at the Project on Government Oversight database, Lockheed is the winner of the prize. But it is the prize that people try not to win, it is the prize of the largest number of past abuses recorded for any firm. Lockheed wins the prize coming in by far the largest at 92. Is there a better way to contract? You asked a good question. Is there a way to contract so that we are dealing, for example, sometimes directly with local governments rather than only through State governments? And the same question can be asked, is there a time where we are going not just to the Lockheeds but directly to its subcontractors and eliminating? And the answer is, if one has the requisite number of contracting officers, if one hasn't purged the staff of the experienced contracting officers, they will go more directly to the local governments, to the subcontractors, to the small businesses, to the minority-owned businesses.

Well, should DHS be doing this? I testified a year ago about DHS personnel. DHS I think has one of the highest ratios of amounts of money spent per contracting officer. This is again a prize one tries not to win. This means there is the smallest oversight, the least direct. Is this the history there? No. The Federal Emergency

Management Agency had an excellent record on the disasters of the 1990s, the hurricanes of the 1990s. It had more people ready to go directly to the scene and directly to provide what is needed and that would take the place of—depending upon large entities and only States.

Ms. JACKSON LEE. Thank you very much. Thank you, Mr. Chairman.

Chairman THOMPSON. Thank you very much for your questions. We now recognize the gentlelady from New York for 5 minutes for her questions.

Ms. CLARKE. Thank you very much, Mr. Chairman. I wanted to direct my questions to Mr. Amey and to Professor Tiefer. I wanted to get a sense of, you know, your opinions. Mr. Amey, in your testimony you note that the government is relying on contractors to perform jobs previously performed by civil servants, including policy and budget decisions that impact the direction of the Department. I want to ask whether you feel that this goes to the ability of the agency to retain personnel, the ability to establish an agency culture and what impact you feel it has on the overall performance of the Department.

Mr. AMEY. Unfortunately, the first panel isn't here. But that would be a perfect question for them because I am not within DHS. But I will say that there is a syndrome that goes along here that you have with outsourcing. Outsourcing isn't new. Let's not make this up as something that just started. This has been going on for 50, 60 years, even longer. The question is, are we outsourcing jobs that should be performed by government employees? The FAR, you know, as people are talking about regulations and whether we need to add things or not, there is a section in the FAR on inherently governmental functions. And in section, I think, C of that provision, it has 18 or 19 things that are listed that says this is inherently governmental, it should be or shall be performed by government employees. Then you get to subsection D and it says these things are closely related to inherently governmental functions but they can be performed by contractors. Well, there are 20 things listed there. Some of them overlap. You have FOIA, for example, is one where you have FOIA in both categories. The question is, where is the bright line between the two? When does the contractor cross that line and start performing inherently governmental function? You need to look at this from two different perspectives. In POGO my next investigation is going to be on this issue, it is taking a look at it financially.

And then second is a control issue, is the government losing control of itself? Lead system integrators, there has been just two great reports that have come out on lead system integrators, and at that point they are really calling into question, is the government giving too much control over contractors to run the government? And their answer is yes. But we don't have anyone inside the government to do that. And that is a question Mr. Chvotkin may want to weigh in on this as well. There is a morale issue. The revolving door creates a morale issue as well. But I think that is something that you want to pose to DHS and try to get a feel for what their employees think about outsourcing and about the revolving door and control of the government.

Mr. TIEFER. Thank you, Ms. Clark. DHS is unfortunately a strong example of a place in which things that should be done in house by civil servants, by the government are being outsourced and being done by people whose firms, whose interest itself of course is for them to make the most money. The example of course of the extreme outsourcing that is going on there is the current thing called the Secure Border Initiative, which is a multi-multi-billion dollar throwing of money at the border under the notion that this can solve our problems. And it is famous in the procurement observing community that DHS said when it was putting this out we are not going to tell you firms what to do. You come to us with ideas about what we should do, and we will be glad to take your ideas and thank you for them, which is not letting the fox into the hen house, but giving the deed to the hen house to the fox and saying it is your house, what would you like to do here? There is a general problem in DHS that it was built on give it to the contractor notions and not extend the civil service notions. You have in many of the subdivisions of DHS dedicated people who have been doing the work of customs, the work of immigration, the work of the Coast Guard all these years. And instead of being given the tools, they are being told stand aside and let the contractors do it.

Ms. CLARKE. Mr. Chvotkin, did you want to comment on that?

Mr. CHVOTKIN. Yes, I would. I appreciate the opportunity to do that. Last time I checked, and I believe from the committee's standpoint there are no government employees who have the ship build yard. There are no government employees who are doing the debris removal. So the reliance on the contracting community is absolutely appropriate. I agree completely with Mr. Amey that the oversight responsibility, the engineering capability, the design capability must be resident in the government, and they simply don't have that talent today. So it is not in the question of what we would like to do. It is a question of what we are actually able to do.

The regulation is very clear. The agencies have the desire. Ms. Duke talked about having 200 vacancies for the government contracting job. We are strong supporters of the well-trained, well-compensated Federal acquisition workforce. I use the expression that you may have heard in another commercial, an educated consumer is our best customer. That is how many of our members feel. A smart buyer is the better customer for us. We need to take steps, and this committee has already started down that path in the authorization bill, to address some of these workforce issues. We are a day late. We shouldn't be 2 days late in getting that work done. But that is still work ahead of us, and that doesn't mean that the responsibility, relying on contractors for appropriate work should go out the door.

Ms. CLARKE. My time is up. Thank you very much, Mr. Chair.

Mr. GREEN. [presiding.] Thank you very much. And the Chair will now allocate 5 minutes of time. And I would like to start with Mr. Amey. Mr. Amey, sir, will you kindly explain what percentage of the no-bid contracts are sole source and what percentage would be cost plus?

Mr. AMEY. For DHS, their total number of—and what I consider no-bid contracts, you know, and this get into what definition are

you going to use. I can provide pie charts that come from the SRA panel, the acquisition advisory panel that recently concluded its 18-month investigation on where the government currently is with competition levels. There is three or four different parts of that pie, competition and then contracts that were not competed. But then there is also follow-on contracts that weren't competed, task and delivery orders that weren't competed. As far as POGO is concerned, we add all those basic ideas of noncompetition together and get an estimate. It is probably closer to 40 or 50 percent. And again, those numbers are somewhat flawed because the government does not have the best, most reliable data out there. So I will say, take it with a grain of salt. That is not my problem. But it is the way contracting officers are entering into the system.

Mr. GREEN. Let me intercede if I may. Do you have any indication as to what percentage of the contracts are MBE, WBE or SBE?

Mr. AMEY. Not—I can provide that to the panel. But I don't have that information with me.

Mr. GREEN. And I am talking about now your no-bid—the 40 percent that you say are going to no-bid contractors.

Mr. AMEY. Right. I can provide that.

Mr. GREEN. Mr. Amey, you are with POGO.

Mr. AMEY. Yes.

Mr. GREEN. Sir, you indicate that prime contractors—this is in your testimony—are using their own labor rates as opposed to subcontractor rates.

Mr. AMEY. Yes.

Mr. GREEN. Could you kindly explain this, please?

Mr. AMEY. Well, we have recently seen an example in which—it is a Katrina example in which a prime contractor is billing the State of Louisiana, but it is with FEMA grant money so it ends up being Federal Government, ultimately \$100 per hour for work. That work they have subbed out to a contractor at \$50 per hour. So the invoices are coming in from the subcontractor. They are going through the State. They are then going to FEMA. They are then approving them. But the subcontract or the prime is getting paid \$50 an hour. So that means you have \$50 of every \$100 that is going to the prime for work that the subcontractor is doing. So the prime is doing nothing other than—and they are even billing on top of that their own administrative costs of running that subcontract. So it is not even like those costs are included. So you have \$50 for every dollar being spend going to a prime contractor for little or no work. That is purely wasteful as the questions to previous panels indicated, that is money that is not going to the people that need it. It is not just that the prime contractor is making that money, but that is not trickling down to the people in the parishes, in the States that need it, into the local governments. So that is less money that they have for relief, that is less money for reconstruction.

Mr. GREEN. Mr. Chvotkin, would you give a comment on this, please? Is your experience similar?

Mr. CHVOTKIN. No, sir. But they are clearly examples. I don't know Mr. Amey's specific example and I challenge that. There are different kinds, types of contracts. The government frequently enters into fixed price contracts where they negotiate the rate, happy

with the rate, and expect the contractor to perform at that rate. If the contractor is disclosing the use of subcontractors, there may be a great differential. If it is a cost type contract, the answer may be very different; that is, the costs are passed through to the government, to the rate billed by the subcontractor. So contract type is separate and apart from the execution issue.

The key for us—and we have been a strong proponent of transparency. As long as the government knows the environment in which that is going to take place, they should be able to negotiate that responsibility.

Mr. GREEN. Let me intercede and ask this, if the example given is correct, if it is correct, accepting this as a premise, would you condone the example that was given?

Mr. CHVOTKIN. No.

Mr. GREEN. Why would you not condone it?

Mr. CHVOTKIN. If there was—if the agency was aware—if the agency negotiated a cost type contract and the prime contractor was subcontracting out and missed billing the government, those billing errors we would not condone.

Mr. GREEN. Would you consider this fraud?

Mr. CHVOTKIN. If the government was not aware of it—fraud is a legal term, and I don't want—it might be fraud.

Mr. GREEN. My time is about to expire. Let me ask Mr. Amey to give us his opinion on it.

Mr. AMEY. It is funny because this has been hotly debated in the contracting circles for a few years here on these time and material and labor hour contracts where this is occurring. There was a proposal on the table in legislation, I think it was about a year ago, in which they said as long as you disclose what your billable rate will be for the subcontractor then it will be allowed. And I agree with Mr. Chvotkin, there anything that prevents this right now. So this is a step that Congress really needs to take to make this change and improve this. The real problem is even if you disclose it—

Mr. GREEN. I am going to have to ask you to summarize quickly because my time is up.

Mr. AMEY. It is just like putting us on notice that you are taking \$50 out of every \$100. Even if you disclose it, it doesn't make it right. That is not good government to me. That is what needs to be corrected. Disclosure doesn't fix it, transparency doesn't fix it. It is a matter of you should only be allowed to bill out at a rate that is what you are actually paying your subcontractors out. Why have that increased cost—higher cost, you know, as part of the government's equation? That is not good government.

Mr. GREEN. Thank you very much. The Chair appreciates the testimony of all of the witnesses, and would like to announce that the hearing record will be open for 10 days. There being no further business, we are adjourned. Thank you.

[Whereupon, at 1:35 p.m. the committee was adjourned.]

APPENDIX

QUESTIONS AND RESPONSES

Government Oversight
Exploring Solutions www.POGO.org



May 25, 2007

The Honorable **Bennie G. Thompson**
U.S. House of Representatives
Committee on Homeland Security
Attn: Mr. Michael Twinchek, Chief Clerk
H2-176 Ford House Office Building
Washington, DC 20515

06-20-07A11:38 RCVD

Dear Chairman Thompson:

Thank you for the opportunity for the Project On Government Oversight (POGO) to **further** explain the challenges and problems with DHS contracting. For more than twenty-five years POGO has investigated, exposed, and helped remedy waste, fraud, and abuse in government spending. It is **from** this perspective that POGO has taken a keen interest in government contracting. To that end, POGO has created the Federal Contractor Misconduct database, which would be of use to procurement officials in DHS and other government agencies.

This letter is our response to your May 10, 2007, letter presenting "Questions for the Record from the Honorable Mike Rogers."

Question 1

In your written testimony you indicate that DHS is the third largest agency in contract spending behind the Department of Defense and the Department of Energy. Last year, DHS awarded more than \$14 billion in contracts.

- Is it your opinion that DHS has a greater percentage of procurement system failures such as fraud, abuse, and wasteful spending than other government agencies? If so, why do you think this is the case?

POGO Response

DHS's contract spending total is well over \$15 billion, ranking it third behind

DOD and DOE.¹ It is difficult to determine which agency has the greater percentage of waste, fraud, and abuse. Emergency contracting, however, creates situations that are more prone to misspending. For example, one of the lessons learned from Hurricane Katrina was that DHS, and specifically FEMA, did not have sufficient emergency planning or pre-established contingency contracts to meet its missions. With the 2007 hurricane season fast approaching, POGO hopes that reported improvements in those areas have been made.

In addition, buying infant technologies also places DHS in a vulnerable procurement situation. DHS has to focus more on pre-award decision-making processes and post-award contract administration and oversight. Without those protections, taxpayer dollars are likely to be misspent.

Question 2

- Does this warrant additional standards for DHS, rather than increasing the number and training level of procurement staff? If so, why?

POGO Response

Additional procurement staff will help the process by allowing for better market research, pre-award decisions, responsibility determinations, and post-award contract administration and oversight. But hiring acquisition staff only goes so far. As stated above, DHS would certainly benefit from improved protections. The procurement system urgently needs to increase competition so that genuine market forces keep costs down and productivity high.

Additional safeguards should be created to protect taxpayers when DHS has to purchase under emergency conditions, or when it buys infant technology. Guidance for such contracts should mandate limits on the length of the term of the contract. As soon as practical after an emergency event ends or new technology proves faulty, the contracts awarded with limited or no competition should be re-competed. Furthermore, POGO knows that urgent situations come up and that there is some risk in buying new technology. However, these risks can be ameliorated so that the government is not subjected to huge mark-ups or to long-term contracts from which it cannot extricate itself.

POGO recommends that the Committee review DHS's emergency buying procedures, competition requirements, and contract types to limit the risk associated with buying quickly or buying unproven items.

Question 3

You indicate in your testimony that some contractors are playing on the vulnerabilities of DHS because DHS has poor contract management policies and procedures. You state that, "DHS must

¹Federal Procurement Data Service—Next Generation, "List of Agencies Submitting," as of May 10, 2007, p. 1. Available at http://www.fpdng.com/downloads/agency_data_submit_list.htm

establish integrity in its buying system: its current system is plagued with improperly awarded, out-of-scope, overpriced contracts and with contracts that produce little or no results."

- In your view, is the real issue the procedures, namely the FAR, which DHS is subject to and DHS' additional Homeland Security Acquisition Regulations (some 1300 pages of regulations), or is the real problem with compliance by companies with existing standards, training of procurement staff, and oversight?

POGO Response

There are genuine concerns with the laws, contractor compliance, staffing issues, and oversight. For example, responsibility determinations are a fallacy — FAR Subpart 9.104 does little to protect taxpayers. If it did, companies with long rap sheets would get a negative responsibility determination or would be on the Excluded Parties list maintained by GSA, and therefore not receive new contracts.

A recent example of DHS awarding business to a risky contractor is the contract for executive transportation and shuttle bus services with Shirlington Limousine and Transportation, Inc. A March 2007 DHS IG report found DHS had not followed regulations and that Shirlington was a risky contractor. The report stated:

The DHS Office of Asset Management (OAM) notified Shirlington approximately two months before it notified the public about DHS' executive transportation and shuttle service requirements and its intention to use a HUBZone solicitation. These actions did not comply with federal regulations and gave Shirlington an unfair advantage over other offerors by reducing competition and increasing the likelihood that Shirlington would win the contract. Further, the DHS Office of Procurement Operations (OPO) did not comply with federal regulations when it issued a competitive solicitation after SBA notified DHS that no HUBZone competition existed for Shirlington. Federal regulations allow such solicitations only when an agency reasonably expects that at least two HUBZone businesses will bid.

OPO awarded the contract to a nonresponsible contractor. Shirlington lacked financial resources adequate to fulfill the contract requirement to use buses not more than one year old. Shirlington did not have appropriate vehicles until almost two months into the performance period. OPO did not comply with federal regulations when it awarded the contract to a nonresponsible contractor and did not document contractor responsibility prior to the April 2004 contract award.

This example shows many weaknesses in DHS's contracting system — weaknesses that placed taxpayer dollars at risk and that could have been prevented.



Question 4

In your testimony you cite a report produced by the Acquisition Advisory Panel which proposed many recommendations that you assert, if passed by Congress, would improve the Federal Government's procurement system. You indicate that such recommendations would improve competition, negotiations, oversight, transparency, and spending decision-making (page 10 of testimony)

- Are your concerns primarily with Federal procurement in general, or are you specifically concerned with the system at DHS? If you're concerned only with DHS, what additional steps would you recommend be taken to improve contracting?

POGO Response

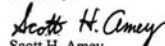
POGO is concerned with federal contracting as a whole, but particularly DHS's missteps. How many IG and GAO reports have to be published that expose DHS's internal weakness before DHS corrects the problems? Why do reports about Hurricane Katrina detail mistakes that mirror the mistakes made during and after Hurricane Andrew in 1992? For years **POGO** has been hearing that DHS is a "new" agency—that excuse is old and tired. DHS was created in 2003 and has had sufficient time to **learn** how to walk. The Department should now be up running, or at least jogging.

The House Committee on Homeland Security should considering improvements to:

- DHS's advertising of contracting opportunities to create a level playing field that is based on competition.
- DHS's process for making responsibility determinations.
- DHS's information upon which it makes responsibility determinations.
- DHS's contract time periods and requirements.
- DHS's use of risky contracts (*i.e.*, cost plus, **ID/IQ**, Time and Material, and commercial item contracts).
- **DHS's** quality of contract administration and oversight.
- **DHS's** ability to hold contractors accountable.
- **DHS's** use of the suspension and debarment system to prevent **nonresponsible** contractors **from** receiving future contract awards.

Thank you again for this opportunity to share **POGO's** views on DHS contracting. I **would** be pleased to answer any additional questions you may have, or to work with the Committee at any time in the future.

Sincerely,


 Scott H. Amey
 General Counsel

