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

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

June 12, 2013

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

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

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

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

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

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

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

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

Pre-Award Responsibility Determinations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Suspension and Debarment

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

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

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

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

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[15] Government Accountability Office, *Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds* (GAO-09-174), February 2009, pp. 3, 8, 9, 28. http://www.gao.gov/new.items/d09174.pdf (Downloaded February 22, 2011)
[16] The EPLS was integrated into the General Services Administration's "System for Award Management" (SAM). https://www.sam.gov/portal/public/SAM
[17] FAR Subpart 9.4. https://acquisition.gov/far/current/html/Subpart%209_4.html
[18] FAR Subparts 9.407-4.
[19] FAR Subparts 9.406-4.
[20] FAR Subpart 9.405-1.
[21] FAR Subpart 9.402(b).
[22] FAR Subpart 9.1.
[23] Government Accountability Office, *Suspension and Debarment: Some Agency Programs Need Greater Attention, and Governmentwide Oversight Could Be Improved* (GAO-11-739), August 2011. http://www.gao.gov/assets/590/585277.pdf (Downloaded June 7, 2013) (Hereinafter *Suspension and Debarment: Some Agency Programs Need Greater Attention*)
[24] Department of Defense Inspector General, *Additional Actions Can Further Improve the DoD Suspension and Debarment Process* (D-2011-083), July 14, 2011. http://www.dodig.mil/audit/reports/fy11/11-083.pdf (Downloaded June 7, 2013) (Hereinafter *Additional Actions Can Further Improve the DoD Suspension and Debarment Process*)

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

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

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

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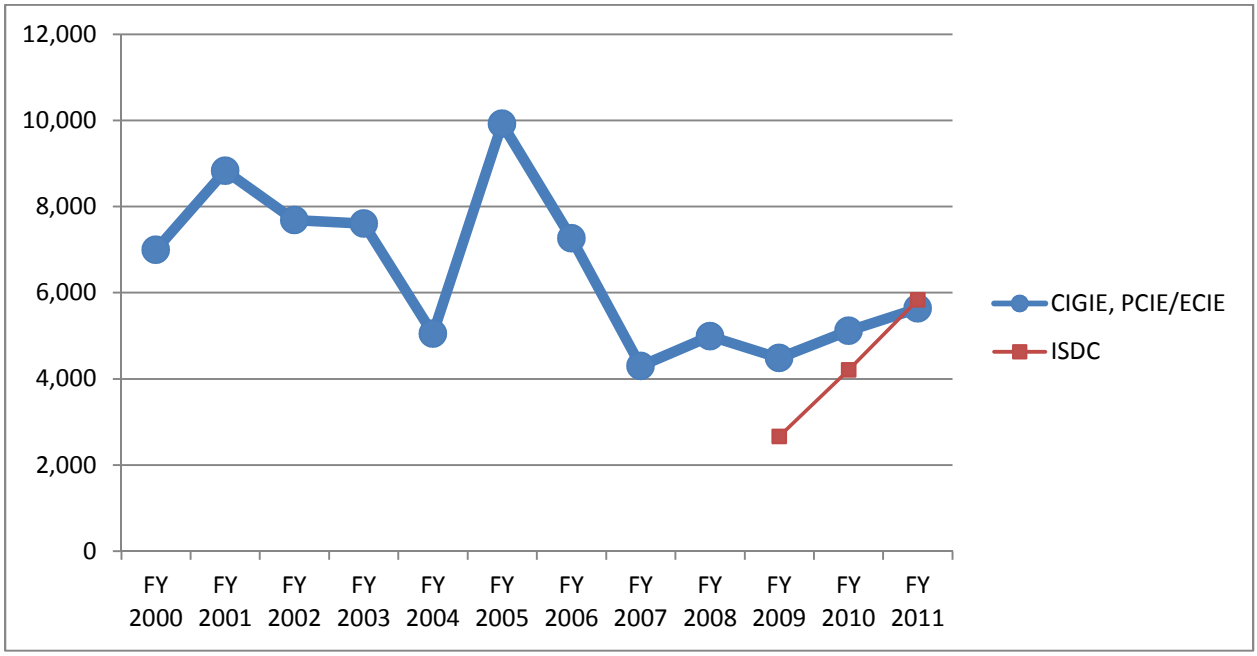
[25] *Suspension and Debarment: Some Agency Programs Need Greater Attention*, pp. 11-17.
[26] *Additional Actions Can Further Improve the DoD Suspension and Debarment Process*, pp. 14-17.
[27] Interagency Suspension and Debarment Committee, *Fiscal Year 2011 Report to Congress on Federal Agency Suspension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

Suspension and Debarment Actions Since FY 2000



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

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

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

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[30] ISDC FY 2011 Report, p. 22, Appendix 3.

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

[32] *Audit of Administrative Suspension, Debarment*, pp. iii.

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

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

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

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[33] ISDC FY 2009-2010 Report, p. 5.

[34] Special Inspector General for Afghanistan Reconstruction, *Immediate Action needed to Prevent Individuals and Entities Actively Supporting the Insurgency in Afghanistan from Obtaining Contracts, Grants, or Cooperative Agreements*, October 17, 2012, p. 4. http://www.sigar.mil/pdf/investigations/2012-10-17-alert-12-3-ndda841.pdf (Downloaded June 10, 2013)

[35] Senator Jeanne Shaheen, "Bipartisan Group of Senators Call on Army to Address Concern over Contractors with Links to Terrorist Groups," December 6, 2012. http://www.shaheen.senate.gov/news/press/release/?id=beebf6cb-ce3b-4449-a3fb-b94d6c20043d (Downloaded June 10, 2013)

[36] Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress*, October 30, 2012, p. 50. http://www.sigar.mil/pdf/quarterlyreports/2012-10-30qr.pdf (Downloaded June 10, 2013)

[37] Army Secretary John M. McHugh, Letter to Senator Jeanne Shaheen, January 15, 2013. http://www.pogoarchives.org/m/co/sigar-army-response-20130131.pdf (Hereinafter McHugh Letter)

[38] McHugh Letter, pp. 1-2.

[39] FAR Subparts 9.407-2.

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

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

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

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

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

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

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

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

SUSPEND Act

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

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

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

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

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

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

Recommendations

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

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

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

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

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

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

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

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

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

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

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