Senate Democratic Policy Committee Hearing

"An Oversight Hearing on Contracting Abuses in Iraq"

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Good morning Mr. Chairman. On behalf of the Coalition for Government Procurement I'd like to thank you for giving us this opportunity to testify today on our views of the government's suspension and debarment procedures for government contractors.

The Coalition is a non-profit association of over 310 companies selling commercial goods and services to the federal government. Our members come from a variety of industry segments and include both the largest and smallest companies in the federal arena. Collectively, our members account for about half of the commercial goods and services purchased by the government each year and over 70% of the sales made through the General Services Administration's popular Multiple Award Schedule program. The Coalition has worked *with* officials in the executive and legislative branches throughout our 25 year history to promote common sense acquisition policies.

We believe this hearing covers some very important topics. The government's suspension and debarment activities have recently received much attention from the media and others. As with any topic that suddenly finds itself thrust into the spotlight, there has been a lot of confusion and misunderstanding about how these systems work and the situations in which they become part of the government's procurement process. We hope that our testimony today can bring some answers and clarity to this issue.

SUSPENSION AND DEBARRMENT ARE TWO TOOLS

At their core, suspension and debarment discussions are really about maintaining the integrity of the government procurement process. These procedures, and the rules that govern them, are important parts of ensuring that the government does business with responsible firms. It is important to remember, however, that suspension and debarment actions are just one part of ensuring an open and fair procurement system. Discussions of suspension and debarment must take place within this context.

Industry places a high value on openness and fairness in the government market. Members of the Coalition take their contract performance responsibilities very seriously. The association routinely includes contract compliance training at its conferences and seminars. This includes presentations by suspension and debarment officials from

various agencies. These officials usually pull no punches when speaking before an industry group and are quite clear about the consequences of failing to properly perform on government contracts.

The suspension and debarment officials who we know are all outstanding public servants. They are seasoned professionals who make serious decisions based on what is in the overall best interests of the government. These decisions are not often easy to make given the complexities of procurement rules and the needs of government.

As we mentioned above, however, suspension and debarment are only one part of a sound government procurement system. Just as the government wants to ensure that it is doing business with responsible firms, so to should it ensure that its own contracting professionals fully understand, and follow, federal acquisition regulations. Current issues making headlines provide a good example to illustrate this point.

Certain contractors have received steady criticism on their performance with some of their operations in Iraq. Was there overcharging on some contracts? Did the work performed fall within the scope of the contract originally awarded? These are valid questions that should be answered, but answered correctly and thoroughly.

While the Coalition shall not endeavor to answer these questions this morning, we can shed some light on the process that has led to allegations of improper contractor behavior.

When this country went to war in Iraq, government contracting officers mobilized as well. The need to support the war fighter is an intense, visceral responsibility deeply felt by all involved in government contracting. Contracting officers at the Department of Defense and elsewhere were under tremendous pressure to meet multiple demands in a tightly compressed time frame. As a result, they turned to companies with which they had existing contracts and which had well-established reputations for getting the government what it needed, when it needed it, at a good value. The need to serve the war-fighter was paramount.

In this atmosphere it is certainly possible that contracting officers used wide latitude to meet the demands placed on them. Generally, we believe these officials made mostly correct decisions based on what they felt were the imperatives of the time. It is better, for example, to make sure a soldier in the field has the equipment he or she needs than to focus exclusively on whether the exact correct Federal Acquisition Regulation was put in a contract. Fresh in the minds of contracting officers and others were headlines from the first Gulf War trumpeting the fact that the US Army had to rely on the government of Japan to buy modern communication radios quickly.

Contractors, as well, wanted to meet the demands placed on them by their customers. In addition to being patriotic citizens themselves, no company of which we are aware likes to disappoint a customer, especially when its need is critical. Again, we feel that most companies acted in good faith inside a highly pressurized and politicized crucible.

We do not believe that any of the companies of which we are aware purposely set out to gouge the government. The varying conditions, complexities, and demands of each task, however, resulted in constantly moving goals which contractors consistently tried to meet. It is important to note that many government contractors, including most Coalition members have been in the government market for many years and perform work for multiple agencies. No responsible company would recklessly endanger such a good portion of their business by gouging their customer on one project.

Another important factor in considering what leads to allegations of contractor wrong-doing are the still complex set of government procurement rules. These rules can trip even those most determined to achieve 100% compliance with each contract clause.

The best example of this that the Coalition can comment on is in pharmaceutical procurement. The rules governing how the Department of Veterans Affairs, the agency that contracts for pharmaceuticals across the government, are easily the most complex covering the acquisition of a commercial item. Companies spend hundreds of thousands of dollars annually on personnel, legal advisors, and even specially constructed automated computer systems to track the maze of compliance regulations.

Even the very best and brightest, however, get tripped up in a system that guarantees failure. Both the pharmaceutical companies and the VA Inspector General's (IG) office know this. The VA IG "recovers" money from companies who know they are doomed to fail somewhere and the companies pay the fines as a cost of doing business. To those not familiar with the system it appears that some pharmaceutical firms routinely shake-down the government and are bad actors. In reality, however, it is the government's procurement rules that cause this situation. Suspending or debarring such companies for failing to comply with a system that assures non-compliance is fundamentally unfair and unjust.

In short, it is both contractors and government contracting officials who bear responsibility for ensuring that the federal procurement system remains open, fair, and efficient. Singling out one part of the partnership when troubles arise guarantees that you will only look at half the situation and address half of any problems that are found.

The Coalition supports further streamlining the government's acquisition rules to better allow for quick responses in times of war or national emergency. We believe that such a system will serve the government well and reduce allegations of wrong-doing. We have been working with the House Government Reform Committee on this issue and plan to address it with the Senate Governmental Affairs and Armed Services Committees in the next Congress.

WHAT TRIGGERS SUSPENSION AND DEBARMENT?

Another significant issue that is part of the suspension and debarment debate is exactly what type of actions can trigger these processes.

Traditionally, suspension and debarment penalties were only applied to a contractor in response to egregious behavior related to the performance of its government contract. A paint company, for example, was debarred for certifying on its government contract as new paint from cans that had actually been previously opened and, worse, been through a warehouse fire. The company, we believe, was properly dealt with by the government's suspension and debarment officials.

Suspension and debarment officials have been thoroughly trained on how to deal with contractors who fail to perform on their *government* contract. While not always easy decisions, these actions do fall within the scope of the officials' responsibility and professional experience.

In the past two years, however, there has been pressure placed on these officials to suspend or debar contractors based on alleged or real misconduct related to the company's non-government business. The Coalition believes that this is very risky business.

While we strongly support the government's desire to do business with responsible companies, using the suspension and debarment system as a mechanism toward this goal is a little like using the tire iron in your trunk to change a flat when a pneumatic wrench can be used. You'll get your tire changed with the manual iron, but it's not the best tool for the job and you'll likely be a mess when you're done.

So it is with suspension and debarment proceedings being used to judge a company's fitness for government business based on factors that have nothing to do with its government business. There are no rules that guide government officials on what types of behavior might trigger the suspension or debarment process. As such, all evaluations are inherently subjective and, even if rules are devised, calling for the consideration of such factors exposes the government procurement process to unprecedented politicization.

The federal procurement process today, while not perfect, is fundamentally open and fair. Our procurement practices are routinely studied and adapted throughout the world as an example of a government acquisition system free from rife political cronyism, posturing, and business routinely funneled to one's brother-in-law.

The Coalition believes that the basics of this system must stay intact. Making decisions on which firms the government should do business with based on outside factors creates a slippery slope that can quickly create an air of favoritism, rife political posturing, and unintended consequences. Just one such consequence is in the area of international treaties that mandate an open and level playing field if products from one country are to be acceptable to another. Allowing inherently political and subjective criteria to be part of the U.S. contractor selection process may make U.S. products less viable overseas and be inconsistent with our treaty obligations.

The cases of MCI and Enron are prime examples of how determining eligibility for government contracts based on outside factors can cause trouble. Despite problems in its commercial business, MCI was performing well on its government contracts. In fact, it was one of just two long distance providers with the most popular contract for such services. By debarring MCI, the government lost a good performer and reduced competition in the marketplace. While MCI suffered, so to did thousands of government customers. (MCI has since been reinstated as a contractor due both to its popularity and new corporate ethics guidelines.)

In addition, it now appears certain that Enron would have been debarred if the normal debarment process had been allowed to unfold. Government contracting officials were already examining Enron contract documents and were making a case for debarment through normal channels. Thus, a debarment process based on companies' government contract performance, as opposed to commercial business, has worked well.

The Coalition believes that government contractors ought to be primarily judged on how they perform on their government contracts and that the regulations that govern those contracts must provide a realistic opportunity for compliance. As with the earlier example of pharmaceutical contracts, this is not always possible today. Federal contractors must already adhere to labor, environmental, tax, and other laws. Each contractor must certify that it is in compliance with workplace safety and other applicable wage and employment laws. The mountain of government paperwork commercial item and service firms must comply with is staggering. Failure to comply sometimes is not only an option, but nearly a given. Existing suspension and debarment rules allow action against companies that are truly bad actors. Adding new layers of compliance without reducing the complexity of existing rules merely sets up more companies to run afoul of some law or other.

In addition, it is important to remember that suspension and debarment are just two tools. They are particularly blunt tools. There are others in the kit of government contracting officials to ensure responsibility and redress legitimate claims that, while less headline grabbing, nevertheless protect the government.

All companies seeking a GSA Multiple Award Schedule contract, for example, must submit contact information on as many as 20 customers. Background checks with these customers are routinely conducted before a company is awarded a contract. If a record of bad past performance is indicated, the company is not awarded a schedule contract.

Similar tools are used on other government-wide acquisition contracts. In addition to assuring good past performance, these checks also validate technical expertise, fiscal competency, and a host of other factors. Federal contractors, in short, are already among the best screened companies in the world.

DETERMINING WHO GETS SUSPENDED AND DEBARRED

The decision on whether to suspend or debar a contractor can be inherently complex. The debarring official must consider not only the offense(s) of the company in question, but also the ramifications for the government if it is to be without this supplier.

In the case of the paint company earlier mentioned, the decision was easy. The firm was a smaller supplier and there were plenty of other supply options for the government that supplied non-burnt paint. The misconduct was also severe enough to merit action.

As we saw with the MCI, example, however, not all cases are so clear cut. In addition, if a pharmaceutical company offering a sole source or innovator drug was debarred, veterans and active duty military personnel would be without a ready source of what could be an important treatment.

The government simply must have some businesses work with it in order to meet its varied missions throughout the world. Suspending or debarring them may not be a realistic option. This does not, however, mean that the government is over a barrel or that contractors brazenly break procurement rules.

Contracting officers may withhold payment, negotiate lower contract rates, shorten contract terms, or even cancel a current contract for convenience in order to punish companies that do not act in good faith to fulfill their obligations. These tools do get a company's attention and give the government many options short of suspension or debarment to ensure good performance.

As mentioned above, the great majority of contractors want to meet or exceed customer expectations. Many companies are long-time participants in the government market and have a vested interest in providing good service at reasonable prices. Companies spend thousands of dollars to ensure compliance with complex procurement rules.

CONCLUSION

The Coalition for Government Procurement believes that the current suspension and debarment process, in general, works well. It is run by highly-qualified and experienced contracting professionals and is, we believe, properly focused on how a company performs on its government contract.

We do not recommend an overhaul of this system, but rather continued streamlining of complex procurement rules. We hope that our testimony today has shown that suspension and debarment, while important, are just two aspects of a sound government procurement system. A comprehensive look at the system shows that there are a number of other mechanisms already in place to ensure the government does business with sound companies. We appreciate this opportunity to share our views and look forward to answering any questions.