

United States Air Force



Presentation

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Weeding Out Bad Contractors: Does the Government Have the Right Tools?

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Chairman Lieberman, Ranking Member Collins, and members of the Committee, it is a great pleasure to be called before you to testify concerning the adequacy and effectiveness of the suspension and debarment framework and the factors that make the Air Force's program successful. If it pleases the Committee, I will address these issues by focusing on three themes that I believe are central to the Air Force's effective suspension and debarment program, and I would be happy to answer any questions about any of the other areas of interest to the Committee.

I am the Air Force Deputy General Counsel (Contractor Responsibility), and a member of the Senior Executive Service. I have served as the Air Force Debarring Official for the last 15 years. I firmly believe that the existing suspension and debarment apparatus affords debarring officials like me the tools to not only address allegations of procurement fraud, misconduct and poor contractor performance, but also to be proactive and creative in ways that protect the government, improve our contracting process, and reduce the instances of procurement fraud at the front end. The following key themes are vital to a vibrant suspension and debarment apparatus that not only protects the government from non-responsible contractors, but also proactively reduces the instances of procurement fraud.

- **THEME 1: INDEPENDENCE FROM THE ACQUISITION CHAIN**

The first theme is independence from the acquisition chain of command. The Air Force's suspension and debarment program is effective because it has a full time, senior career Suspending and Debarring Official who is supported by a dedicated staff, is separate from the acquisition chain, and is empowered to do the right thing to protect the Government. This structure has allowed me in every instance to do what I believe is the right thing to protect the Government. I have never once felt political or acquisition-driven pressure to influence my decision making. On the contrary, I have been completely supported and empowered by senior Defense and Air Force leadership to act as I deem necessary.

Let me give you two very brief examples of what I mean:

- **Boeing suspension:** First, several years ago I suspended Boeing's three Launch Systems business units from Government contracting for nearly two years after some of its employees were found to have improperly taken significant, proprietary data from a competitor. That was a contractor of immense importance to the Air Force, but the unethical conduct called into question the business units' ability to deal fairly, honestly, and ethically with the U.S. Government. There was no question in my mind at the time that the Boeing business units should be suspended, and senior Air Force and Department of Defense leadership supported that view.
- **L-3 suspension:** Second, and more recently, after receiving a referral from the U.S. Special Operations Command, the Air Force suspended L-3 Communications' Special Support Programs Division (which I understand had the company's largest Government contract at the time) when some of its employees were caught secretly segregating Government email for L-3's review. As with the

Boeing case, L-3 was an important contractor which performed vital work for SOCOM's Bluegrass Station, Kentucky facility. Yet, the suspension received full support from SOCOM, Air Force, and DoD leadership.

I note that the Air Force's involvement with Boeing and L-3 did not stop with these suspensions. I terminated the suspensions when Boeing and L-3 entered into Administrative Agreements with the Air Force that committed the entire companies (not just the business units, but the entirety of these major, global defense contractors) to very specific undertakings to become best-in-class ethical business operations. Those corporate changes are still in effect, and the Agreements are available on my office's public web page.

- **THEME 2: DEBARRING OFFICIAL DISCRETION IS VITALLY IMPORTANT**

The second theme is that Debarring Officials must have discretion in deciding what is necessary to protect the Government. We all know that debarment and suspension are not forms of punishment, but are imposed to protect the government. But, given recent suggestions by some that debarments should be mandatory, and a growing (and incorrect) sentiment that debarment should be "punishment," I think the following example might be helpful to this Committee.

- **BAE show cause letter:** We had been monitoring for some time news reports of allegations of corruption with respect to sales of military equipment by BAE Systems, plc, to foreign Governments. In late 2009, we received information from the U.S. Department of Justice ("DoJ") that raised the level of my concern. Because of the restricted nature of the information, we were not privy to certain documents from the investigation that would have afforded the Air Force sufficient basis to suspend or debar BAE. However, I sent BAE's CEO a "Show Cause Letter" which expressed the Air Force's concern about the allegations and offered the company a chance to respond. Not only did the company respond, but within weeks they reversed their reported history of non-cooperation with DoJ, pled guilty to a felony, and paid a \$400 million fine. And, over the next year, the company cooperated with me and my staff as we conducted a deep dive into BAE's processes, procedures and culture. BAE also accepted our recommendations for ethical change, company-wide. Documents relating to this review are also available on our website.

I share this BAE case with you for two reasons. First, I want to make clear how important freedom and discretion to do the right thing is for Suspending and Debarring Officials. The Air Force's approach to the BAE case is unconventional when compared with many other programs in the Government that might wait for a final conviction or a final contract action like a termination before acting – or not acting at all, because the misconduct in this case did not relate to a US government contract. But, the freedom I have to do the right thing not only enabled me to engage early, but also to facilitate further ethical transformation throughout BAE that will benefit all U.S. Government contracts with the company in the future. And second, I raise this case because I want to highlight for the Committee that we are not limited to taking action for misconduct relating only to U.S. Government contracts. None of us in this room would welcome

a contractor into our home to do work for us when, on another project, they did shoddy work or engaged in unethical or illegal behavior. We should be, and the Air Force is, similarly concerned with misconduct committed by Air Force contractors – even if that misconduct is unrelated to an Air Force or any U.S. Government contract.

For full time, independent Suspending and Debarring Officials, this freedom to maneuver and craft creative and forward looking ways to protect the Government is of utmost importance. This freedom is based largely upon my ability to exercise discretion. Because I am free to either debar or not debar a contractor, I am able to both fashion creative remedies in response to misconduct, and to proactively influence contractors to prevent misconduct from happening in the first place.

Some have suggested that debarment should be mandatory—that is, that it should be imposed automatically following a triggering event such as an indictment or a conviction. I believe that such an approach would be ill-advised. Respectfully, Suspending and Debarring Officials already have all the tools we need to protect the Government and effect meaningful change. And many of the tools that I use (such as the show cause letter in the BAE case), derive their power to effect meaningful change in the cultures of our contractors from my discretion to debar if I am unsatisfied with the contractor’s answer. If debarments became mandatory (rather than permissive and subject to the Debarring Official’s discretion), contractors would no longer have an incentive to work with me in proactive, creative ways to benefit the entire Government. Instead, they would have every incentive to stonewall, deny problems exist, and not make changes for fear of potential liability that would result in a mandatory debarment regardless of their willingness to change.

- **THEME 3: MISCONDUCT MUST BE VIEWED BROADLY**

The third theme is that Debarring Officials must take a broad view of misconduct. Debarring officials who analyze only specific legal definitions of government contract-related misconduct, or limit their actions only to misconduct proven by convictions, in my opinion are not protecting the government. Recalling my earlier example, if a plumber who engaged in unethical behavior on a job down the street swears to you “I would never do that in your house,” there is no way you would let that person in your home. Government contracting should be no different. There is no logical basis to conclude that a corrupt corporate culture that leads government contractors to engage in unethical behavior abroad or in their commercial businesses would not also lead to misconduct in their government businesses. This is precisely why we engaged with BAE—and why we engage with many other contractors for misconduct that is not related to Government contracting.

It is also important to understand that Debarring Officials can exclude contractors for negligent conduct. We demand more of our contractors than the mere requirement that they obey the law. For example, the FAR permits debarment for a history of failing to perform on contracts or a significant performance failure. This is an important tool for protecting the Government. We can, and the Air Force does, protect the Government by debarring contractors who continue to bid for work they cannot perform, obtain contracts, and leave the Government

holding the bag with unfinished or poor quality work. We also save the government the time and expense of evaluating new proposals from contractors who are unable to perform the work.

Finally, debarring officials must be willing to take fact-based actions. Many part-time debarring officials may only have time to debar contractors who have been indicted or convicted of fraud. The Air Force regularly suspends or debars contractors as soon as the evidence exists to do so. Sixty-two (62) percent of our 367 actions last year were these types of fact-based actions. Prosecutions generally take years to complete. In that time, countless new awards and millions in new funds can go to non-responsible contractors. Debarring officials have the ability to shut off the flow of dollars to these contractors well before final conviction, and we should do so whenever the facts require such an action.

It has been a pleasure to testify before you today. I thank you for your time and attention and I would be happy to answer any questions.

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