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COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

"WEEDING OUT BAD CONTRACTORS: DOES THE GOVERNMENT HAVE THE RIGHT TOOLS?"

November 16, 2011

Chairman Lieberman, Ranking Member Collins, and members of the Committee, I appreciate the opportunity to appear before you in my capacity as Chair of the Interagency Suspension and Debarment Committee (ISDC) to offer observations regarding the role of the Federal procurement and non-procurement suspension and debarment system.

The debarment remedy is one of the government's most powerful tools to protect taxpayers from entities who engage in dishonest, unethical or otherwise illegal conduct or are unable to satisfactorily perform their responsibilities under Federal funded awards. The basic Federal policies and procedures governing suspension and debarment in procurement and nonprocurement activities are sound. However, reports issued in recent years by agency Inspectors General, and others, serve as important reminders of the heightened attention that agencies must continually give to how these processes are managed. Such attention is essential for ensuring that agencies are able to apply these tools whenever necessary to protect taxpayers from non-responsible parties.

The ISDC is an interagency body, comprised of Executive Branch organizations that work together to provide support for the implementation of the government-wide system of suspension and debarment. The ISDC was created in 1986, initially to monitor implementation of Executive Order 12549, which established a suspension and debarment system for non-procurement matters. The ISDC has evolved to serve today as both a forum for agencies to discuss policy and procedure regarding suspension and debarment actions taken in connection with either procurement or non-procurement activities and a coordinating body when two or more agencies have an interest in initiating suspension or debarment proceedings pertaining to the same contractor or non-procurement participant (known as the "lead agency" coordination process).

The role of the ISDC was amplified by Section 873(a) (7) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417. Section 873 requires the ISDC to report to Congress on the Federal suspension

and debarment process on: (1) progress and efforts to improve the suspension and debarment system; (2) agency participation in the Committee's work; and (3) a summary of each agency's activities and accomplishments in the government-wide debarment system.

The specific functions for the ISDC enumerated in section 873 include:

- (1) resolving issues regarding which of several Federal agencies is the lead agency having responsibility to initiate suspension or debarment proceedings and coordinating actions among interested agencies with respect to such action:
- (2) encouraging and assisting federal agencies in entering into cooperative efforts to pool resources and achieve operational efficiencies in the government-wide suspension and debarment system;
- (3) recommending to the Office of Management and Budget (OMB) changes to the government suspension and debarment system and its rules, if such recommendations are approved by a majority of the Interagency Committee; and
- (4) reporting to Congress.

Each of the 24 agencies covered by the Chief Financial Officers Act (CFO Act) is a standing member of the ISDC. In addition, nine independent agencies and government corporations participate on the ISDC. A few agencies are represented by multiple members. For example, the Department of Defense is represented by each of the military services (i.e., Air Force, Army, and Navy) as well as by several of the larger defense agencies, including the Defense Logistics Agency, Defense Contract Management Agency, and the Office of the Secretary of Defense.

The ISDC provides an important support structure to help agencies implement their debarment and suspension programs. It serves as a forum for agencies to share best practices and lessons learned, and to assist in coordinating suspension and debarment actions among agencies to facilitate their government-wide effect. The ISDC's activities are overseen by OMB, which works closely with the ISDC to identify where refinement of current policies or practices may be needed.

Debarment is a discretionary decision by the Government as a consumer of goods and services, which serves the purpose of protection not punishment. The focus is on business risk where the Government learns of information indicating that a potential contractor or award participant lacks business honesty, integrity, or has evidenced poor performance. The action is forward looking. It is prospective in application. It serves best to head off the participation of problem actors in Federal funded activities rather than to remediate misconduct after occurrence of misconduct.

It should be noted that for purposes of cause, the misconduct in question need not have actually occurred under a Federal contract or assistance agreement. The rules factor into the decision process an assessment of whether there are remedial factors or mitigation measures present that show that notwithstanding the existence of misconduct in the past, the contractor or participant has responsibly and effectively dealt with the problem to preclude recurrence, and consequently a period of debarment is unnecessary. The rules build in the flexibility and discretion to permit decisions by suspending and debarring officials which are in the best interests of the Government as a consumer.

In terms of framework, the discretionary debarment and suspension programs operate under either of two rules. Under the Federal Acquisition Regulation (FAR), debarment rules are set out at 48 CFR 9.4. For Federal discretionary assistance, loan and benefit programs (non-procurement), departments and agencies adopted OMB Guidelines at 2 CFR Part 180 through implementing regulations. These rules, by specific enumerated action bases and broad "catch all" cause provisions, set forth a comprehensive spectrum of action bases in terms of conduct indicating a lack of business honesty, integrity, or poor performance. The rules are similar, if not identical, in terms of due process provisions for notice issuance, contest steps, and the decision process. Whether action is under the FAR or Part 180, it serves through reciprocity of effect to protect both contracts and grants.

It is my observation, formed from experience in the debarment field spanning more than 20 years, that the rules as currently stated provide agencies and departments with a highly effective tool kit for application of the remedy. Those agencies with robust programs show that the tool kit is effective when used. The tool kit needs employment by more agencies and departments, rather than modification.

I strongly agree with the Government Accountability Report's (GAO) assessment of the factors that promote an active agency discretionary suspension and debarment program: defined implementing guidance, practices and procedures that encourage the referral process, and staff dedicated to the program. I believe that the following additional factors also strongly contribute to robust, successful program: commitment from upper management; and a collaborative working relationship with the agency's Office of Inspector General. Collectively, the above factors are relevant to all suspension and debarment programs, whether operating under the FAR or the nonprocurement rule.

Under both the FAR and the nonprocurement debarment rule where more than one agency has an interest in the debarment or suspension of a contractor, the ISDC is to "resolve the lead agency issue and coordinate such resolution among all interested agencies prior to the initiation of any suspension, debarment, or related administrative action by any agency." The lead agency coordination process enhances the efficiency of the suspension and debarment process, by helping agencies from needlessly expending funds for duplicative actions or from working at cross purposes, and by furthering the collaboration needed to support a government-wide system designed to address systemic problems.

The ISDC has evolved an informal collaborative process for the lead agency utilizing email notifications broadcast to the membership that an agency is considering action and inquiring whether any other agency has an interest. The ISDC alerts agencies to actions planned by other agencies and helps to focus the lead for action in the agency with the most direct and appropriate interest. Lead coordination can also continue beneficially after action initiation. For example, if an administrative agreement is being considered by the lead agency, coordination can allow other agencies to contribute useful information regarding agreement terms beneficial to the larger government award community. This allows the lead agency to understand the steps being taken by the contractor or nonprocurement award participant so that the agency can determine if such steps represent appropriate risk mitigation to help the entity qualify as a presently responsible source. The ISDC has this month created a workgroup to explore and evaluate possible alternatives for the existing mechanism for the lead agency coordination.

As noted previously, one element of a robust program is the existence of a collaborative working relationship with an agency or department's Office of Inspector General (OIG). The prevention of fraud, waste, and abuse is a central element of the OIG's mission. The debarment remedy is a proactive tool for that effort. OIG has access to information data bases which can provide information supportive of and often critical to the prompt taking and ultimate success of debarment or suspension actions. At the Department of the Interior for example the debarment and suspension action development and referral process is located in the OIG.

Over the past two fiscal years, the ISDC has focused much of its attention on contributing its collective expertise in support of government-wide efforts to enhance information systems designed to protect and strengthen the integrity of procurement and nonprocurement award activities. The ISDC in the past year worked with the General Services Administration on an ongoing project to improve the Excluded Parties List System (EPLS), which identifies the names and addresses of parties excluded from receiving contracts, certain subcontracts, and Federal financial and non-financial assistance by simplifying and streamlining the large number of cause and treatment codes to boil down displayed information to the essential information needed by contracting officers and award officials who must by regulation check the list for award eligibility prior to making an award.

The EPLS provides a real time listing of ineligible persons. The key to its successful use is timely and accurate entrance of names onto the list by program personnel and compliance by contracting and award personnel with regulatory requirements to check the list prior to award to preclude award to listed parties. Existing rules already impose these requirements. Compliance can be enhanced through internal directives from agency management stressing the importance of using the list and training of personnel required to use the list. As an example of policy enhancement, at the Department of the Interior we issued a directive defining the FAR requirement that contracting officers check the EPLS "immediately prior to award" to mean "the day of"

the proposed award decision, to guard against an award where a party appears on the list after bid or proposal submission.

This concludes my remarks. I am happy to answer any questions you may have.