

RECORD VERSION

STATEMENT BY

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BEFORE THE

HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE
SUBCOMMITTEE ON CONTRACTING OVERSIGHT

ACCOUNTABILITY FOR FOREIGN CONTRACTORS

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STATEMENT BY MR. FIORE

Thank you for the opportunity to provide testimony before you here today on the important issue of accountability for foreign contractors.

I serve as the Director, Soldier & Family Legal Services, Office of The Judge Advocate General, Department of the Army. In that capacity, I am responsible for policy and oversight of legal services provided to Soldiers and their families, including legal assistance and claims services, with particular emphasis on legal support to Soldiers undergoing Medical Evaluation Boards and Physical Evaluation Boards in the Army Physical Disability Evaluation System.

On October 2, 2008, I also was designated as the Department of Army Suspension and Debarment Official (SDO). I succeeded Mr. Robert N. Kittel who served as the Army SDO from September 2003 to September 2008.

Army Suspension and Debarment Practices

The Army follows the suspension and debarment regulatory process set forth in the Federal Acquisition Regulation (FAR) Subpart 9.4. Pursuant to that regulation, an agency may suspend, debar, or otherwise declare ineligible certain contractors in order to protect the interests of the Government on behalf of the public. Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts from the Government. Further, agencies may not solicit offers from, award contracts to, or consent to subcontracts with debarred or suspended contractors. Debarment and

suspension are discretionary actions taken to ensure agencies contract with responsible contractors only and "... not for the purposes of punishment." (FAR 9.402(b)).

Pursuant to FAR Subpart 9.403, suspension and debarment authority is vested in the agency head or a designee authorized by the agency head to act as SDO. As the Army SDO, I am the decision authority for all Army suspension and debarment cases, including those cases arising in the Iraq and Afghanistan theaters of operation. In Europe and the Republic of Korea, the Army has further delegated overseas suspension and debarment authority for contractors located within those geographic areas of responsibility to officers in those locations. As the Army SDO, I am an independent decision-maker and I report directly to The Judge Advocate General. I do not supervise the Army attorneys in the Procurement Fraud Branch (PFB) who monitor procurement fraud investigations and prepare and present procurement fraud cases. I receive their recommendations and provide guidance and decisions on the disposition of those cases.

The Army Procurement Fraud Branch, part of the Contract and Fiscal Law Division, United States Army Legal Services Agency (USALSA), is the single, centralized organization within the Army to coordinate and monitor criminal, civil, contractual and administrative remedies in procurement fraud cases. PFB has a staff of five attorneys who work closely with Army Criminal Investigation Division Major Procurement Fraud Unit (CID MPFU) and the Department of Justice (DoJ). Cases arising under Army contracts or involving Army personnel are investigated by MPFU. PFB coordinates and monitors cases referred to DoJ for criminal and civil action. Over 250 Army Procurement Fraud Advisors (PFAs), located in the legal offices of commands and installations worldwide, assist PFB attorneys.

The Army's resources for investigating procurement fraud include approximately 100 CID criminal investigators. DoD also provides investigative support through the Defense Criminal Investigation Service (DCIS), which is part of the DoD Office of the Inspector General (DoDIG).

Army Suspensions and Debarments over the Past Three Years, Current Investigations, Referrals to DoJ

For the past several years, the Army has led DoD in the number of suspensions and debarments. During Fiscal Year (FY) 09, the Army had 151 suspensions, 115 proposed debarments, and 124 debarments, for a total of 390 actions (including 27 actions on cases decided by overseas suspension and debarment officials in Korea and Europe). In FY 08, the Army had 111 suspensions, 113 proposed debarments and 77 debarments for a total of 301 actions. In FY 07, the Army had 112 suspensions, 94 proposed debarments, and 122 debarments for a total of 328 actions. Since 2005, the Army has taken over 290 suspensions, proposed debarments, and debarment actions against contractors and individuals in cases arising from Iraq and Afghanistan.

PFB has a current caseload of over 1000 cases and monitors and coordinates those cases referred to DoJ. Army Criminal Investigation Division coordinates with DoJ when there is an ongoing criminal investigation.

Barriers the Army Faces in Ensuring it is Contracting only with Responsible Contractors

I am not aware of any legal or regulatory barriers in this area.

The Baragona Case

I understand that this committee is very concerned about the Army's decision not to debar the contractor involved in the accident that resulted in the tragic death of LTC Baragona. While I cannot comment on future proceedings in the case, I can address the background of the case and the rationale for the Army's decisions to date.

On August 8, 2006, the Army received an inquiry from Sen. DeWine that Kuwait and Gulf Link Transport Company (KGL) negligence (KGL truck – HMMWV collision in theater) led to LTC Dominic Baragona's death in May 2003 and that KGL failed to appear in a related wrongful death civil lawsuit filed in the U.S. District Court (N.D. Ga.). PFB formally advised KGL in a September 6, 2006 letter that the Army SDO was considering suspending or debarring KGL from Government contracts.

On October 20, 2006, KGL replied that it did not accept the initial service of process because it was served improperly, but that it subsequently accepted a properly served complaint on July 11, 2006. As a result of this information, then Army SDO, Mr. Robert N. Kittel, decided against a suspension or debarment of KGL.

On November 27, 2007, the Baragona family attorney then notified PFB of a \$4.9 million default judgment against KGL. Responding to an SDO Request for Information (RFI) dated December 19, 2007, KGL advised PFB that on February 15, 2008 it had sought to vacate the judgment. The court ultimately vacated the judgment and dismissed the case for lack of jurisdiction in May 2009. PFB is unaware of any other KGL criminal or civil action.

LTC Baragona's father (Dominic Baragona) wrote to the Army in June 2008 seeking to debar KGL based on an accident investigation conducted by the Army, which concluded that the KGL truck driver's negligence caused the accident. Mr. Baragona also alleged KGL was involved in illegal "human trafficking" in India and the Philippines. In separate correspondence, the Baragona family attorney also alleged that KGL lacked adequate automobile liability insurance coverage at the time of the accident. KGL responded to a second RFI with proof of automobile insurance and documentation that it had not employed Indian workers since 2005. Further inquiry also uncovered no evidence of human trafficking. After carefully reviewing this information, I concluded that the evidence did not warrant suspension or debarment.

An SDO has authority to debar a Government contractor when there is a criminal conviction or civil judgment for fraud or a similar offense. Absent that, an SDO can debar a Government contractor for cause only when he determines by a preponderance of the evidence that a contractor willfully failed to perform one or more terms of a contract, has a history of unsatisfactory performance of a contract, or has engaged in conduct of so serious or compelling a nature that it affects that contractor's present responsibility as a Government contractor.

The materials provided in response to PFB's September 6, 2006 letter, evidenced that proper service of process was not made to KGL until July 11, 2006 via the Kuwaiti Ministry of Justice. The materials provided in response to the Army SDO's December 19, 2007 RFI indicated that KGL was exercising its legal rights in the civil litigation by contesting jurisdiction in the Northern District of Georgia. After evaluating KGL's January 5, 2009 RFI response, I determined that the allegations of improper recruitment

of Indian nationals and lack of third party liability insurance were not substantiated and did not warrant a debarment proceeding.

As SDOs, Mr. Kittel and I are not empowered to make determinations regarding KGL's civil liability in the death of LTC Baragona. Such determinations are the province of an appropriate judicial system; in this case, the plaintiffs chose to bring an action in a Federal District Court. Neither the existence of a wrongful death lawsuit, nor KGL's decision to contest jurisdiction constitute a basis for debarment of a contractor.

Under present authorities, a contractor's failure to respond to properly served process of a U.S. court or administrative tribunal would be an indication of a lack of present responsibility and could be the basis for a suspension or debarment proceeding. Indeed, although it is a matter involving a criminal indictment, I have recently declined to lift a foreign contractor's suspension on that specific basis. KGL, however, did respond within its legal rights once it was properly served with the process of the U.S. District Court, and a suspension or debarment action was not warranted on that issue.

The decisions to date do not preclude future Army suspension or debarment action if it is determined that KGL has acted, or intends to act, in a manner lacking of business integrity or honesty.

Thank you again for this opportunity to appear before you today and for the support Congress and the Members of this Committee have provided for our Soldiers, Sailors, Airmen, and Marines.

I am happy to answer any questions you may have.