

**HOLD
UNTIL RELEASED BY THE
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
COMMITTEE**

TESTIMONY OF

RICHARD GINMAN

**DEPUTY DIRECTOR FOR
DEFENSE PROCUREMENT AND ACQUISITION POLICY,
OFFICE OF THE UNDER SECRETARY OF DEFENSE
(ACQUISITION, TECHNOLOGY AND LOGISTICS)**

BEFORE THE

**HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS COMMITTEE
SUBCOMMITTEE ON CONTRACTING OVERSIGHT**

ACCOUNTABILITY FOR FOREIGN CONTRACTORS

November 18, 2009

**HOLD
UNTIL RELEASED BY THE
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
COMMITTEE**

Chairman McCaskill, distinguished members of the Committee, thank you for the opportunity to appear before you today on behalf of the Honorable Robert Gates, Secretary of Defense, to discuss Accountability for Foreign Contractors.

But first let me introduce myself. I am Dick Ginman, a Career Civil Servant, and I serve as the Deputy Director, Defense Procurement and Acquisition Policy (DPAP), in the Office of the Under Secretary of Defense for Acquisition, Technology and Logistics. I have more than 38 years experience in government and commercial business in the fields of contracting, acquisition and financial management. Before assuming this position in October 2006, I held several private sector positions including Vice President of General Dynamics Maritime Information Systems and Director of Contracts for Digital System Resources. I served in the United States Navy for 30 years retiring as a Rear Admiral, Supply Corps. In addition to three tours afloat, I served in a variety of contracting and acquisition positions that included Commander, Navy Exchange Service Command; Deputy for Acquisition and Business Management in the office of the Assistant Secretary of the Navy, Research Development and Acquisition; and Deputy Commander for Contracts, Naval Sea Systems Command.

Before I begin, I would like to convey my condolences to the Baragona family. They have my heartfelt sympathy on the loss of their son in service to his country.

You asked me to address several aspects of Section 526 cited as the, "Lieutenant Colonel Dominic 'Rocky' Baragona Justice for American Heroes Harmed by Contractors Act."

The Department's View of the Act

The legislation is designed to ensure foreign contractors with United States Government contracts, who perform contracts abroad, are held accountable for their actions that result in serious bodily injuries of members of the Armed Forces, civilian employees of the United States Government, and the United States citizen employees of government contractor companies. While I support the overall substance of the legislation, I believe there are portions that could be improved. These include: limiting to performance on a DoD contract; applicability to all subcontract levels; lack of a dollar threshold; retroactive applicability; and the ability to waive the legislative requirement when unique circumstances arise that, but for a waiver, could jeopardize our warfighter mission.

The Department's capacity to enter into future contracts with foreign contractors

First, I believe liability should be limited to actions directly linked to performance required under a government contract and should not be broadly applied to any action by a government contractor, subcontractor, independent contractor, or any respective employee. Second, applying this provision to contractors at all tiers is problematic. Changing the definition of “contractor” and limiting the applicability of this legislation to the prime contractor would allow us to more effectively implement and enforce it. It is likely, in order to protect themselves, that prime contractors would require all their subcontractors, at all tiers, to certify compliance with the provision. This will undoubtedly impact the issuance of contracts in a combat environment and support

in the field, and impact the ability to get our troops what they need in the required time they need it. Third, the legislation could effect competition to some degree; however, I do not know to what extent. Because the statute would apply to “any contract” regardless of dollar value, many smaller local vendors overseas would either refuse to do business with U.S. forces, or would need to increase prices to cover the additional insurance for handling possible U.S. litigation costs, particularly for injuries unrelated to their business with the U.S. Government. This expansion of jurisdiction could significantly alter our relationship with contractors overseas, to include contractors providing mission critical services. Fourth, there should be a threshold used to apply the consent provision to contracts; otherwise, the Government is faced with the prospect of having contractors consent to jurisdiction of Federal courts of the U.S. on thousands upon thousands of much smaller dollar value acquisitions overseas, leaving the Federal Government with no executable means of serving if the contractor has no agent within the U.S. The result may be there is no real enforcement mechanism via the contract should a civil action commence in the Federal courts of the U.S., or that the cost of serving process may far exceed the value of the contract itself. The provisions requiring a contractor to maintain an office in the U.S. for contracts valued over \$5M to be served notice of a pending court action may be unnecessary. I understand that treaties such as The Hague Convention and diplomatic methods of service are already in place, to which the U.S. has agreed, with regard to service of process of civil suits.

How legislation will affect the Department's existing contracts

Fifth, prospective applicability under current contracts and retroactive application as a condition to receiving payments under current contracts would fall outside the changes clause and require bilateral modifications. It would eliminate the Department's ability to unilaterally exercise valuable option requirements or gain acceptance and performance of future task or delivery orders. Modifying existing contracts to include this legislation would require bilateral modifications which allow the contractor to ask for consideration, likely an increase in contract price, to account for the additional cost the legislation would impose on the contractor. The contractor could refuse to sign the modification and the contract would then have to be terminated and recompeted. In the case of a multiple award, indefinite delivery contract, inserting a clause implementing the legislation could reduce the level of competition if one or two contractors decide not to propose based on this requirement.

How this legislation would impact the Department's mission

We do not know for certain the extent that this new law will have on our ability to contract overseas and obtain mission critical supplies and services. If foreign contractors opt not to bid on U.S. contracts as a result of the legislation, there would be negative impacts on the Department's mission. In Iraq and Afghanistan, for example, our men and women rely upon the delivery of food, fuel and supplies from local or foreign contractors. If these contractors refuse to accept contracts from the U.S. Government to perform these services, a disruption of the logistical and supply system would disrupt operations while trying to find a contractor who could mobilize and perform these critical

functions. Sixth, it would make sense to include a waiver or exception to the legislation, to allow the Commander in the field to authorize an exception to the legislation and for the contracting officer to properly document that decision in the file.

The legislation may adversely impact section 886 of the Fiscal Year 2008 National Defense Authorization Act, “Acquisitions in Support of Operations in Iraq or Afghanistan,” as well as section 801 of the Fiscal Year 2010 National Defense Authorization Act, “Temporary Authority to Acquire Products and Services Produced in Countries Along a Major Route of Supply to Afghanistan.” Both sections establish authority to limit competition and grant a preference for products or services from Iraq or Afghanistan, or along major supply routes to Afghanistan. Sections 886 and 801 are critical to gaining local support for the presence of United States forces and maximizing employment in these countries to diminish the pool of the unemployed, who are more easily drawn into the insurgency. This authority will also align U.S. procurement and acquisition policy to support critical efforts to bolster stability in Pakistan, expand the Northern Distribution Network, resupply U.S. forces in Afghanistan, and build partnerships and improve stability throughout the region. Finally, the United States will demonstrate in a concrete way that we value the support of these countries, and that we aim to develop with them lasting partnerships tied to the international efforts for stabilization in the Middle East.

Barriers the Department faces in ensuring that it is contracting only with those entities responsible for fulfilling their legal and contractual obligations

The Department agrees that we contract with only entities that are responsible for fulfilling their contractual obligations. The Federal Acquisition Regulation prescribes policies, standards, and procedures for determining whether prospective contractors and subcontractors are responsible. By statute the U.S. Government may contract only with responsible contractors.

The legislation's anticipated effect on the suspension and debarment of foreign contractors

Finally, as far as the legislation's anticipated effect on the suspension and debarment of foreign contractors, I will defer to Mr. Fiore's testimony to address this area, keeping in mind the Federal Acquisition Regulation already prescribes policies and procedures governing the debarment and suspension of contractors by agencies for specific causes.

To summarize, I believe the goals of the proposed legislation are sound. The U.S. Government should not do business with companies that are not accountable for their actions. However, as discussed, we can achieve the intended end state, and also limit any adverse impact or unintended consequences by addressing the concerns I have shared with you today. Again, thank you for the opportunity to appear before you today.