STATEMENT OF

ALAN CHVOTKIN
SENIOR VICE PRESIDENT AND COUNSEL

BEFORE THE

HOUSE COMMITTEE ON HOMELAND SECURITY

HEARING ON

"RESPONSIBLE BIDDERS IN FEDERAL HOMELAND SECURITY CONTRACTING"

APRIL 20, 2007

Introduction
Mr. Chairman and Members of the Committee, thank you for the invitation to testify at today's hearing. I am Alan Chvotkin, the senior vice president and counsel of the Professional Services Council (PSC). PSC is the leading national trade association representing companies that provide services of almost every kind to virtually every agency of the federal government.

We believe that the taxpayer and the government are best served by a vibrant partnership between the public and private sectors through which the government is able to access the best solutions and capabilities. By any measure, the federal government has the largest and most complex procurement system in the world, and the Department of Homeland Security is one of its many components. Since public dollars are involved, it is imperative that the federal procurement system be underpinned by credibility, trust, and competency. As such, we share your commitment to ensuring that the Federal government generally, and the Department of Homeland Security specifically, only does business with responsible, ethical parties. After all, contracting with the federal government is a privilege—not a right.

DHS Procurement Spending is Significant
In Fiscal Year 2006, the Federal government spent more than $400 billion on the purchase of goods and services, through over 30 million individual contract transactions, with nearly two-thirds of the dollars spent on services. The Department of Homeland Security spent more than $14 billion through contracts, awarding business to almost 16,000 contractors through close to 67,000 individual contract transactions. The vast majority of this DHS spending also was for the procurement of services. To its credit, more than $4.5 billion of the DHS prime contracting dollars went to small business.

Despite much of the current rhetoric, it is heartening and important to note that, even with its size and complexity, the federal acquisition system actually work quite well. Clearly, it is also a system that faces many challenges and areas where improvements are needed. But the bottom line is that this system, on the whole, serves the public well. Real fraud and abuse, while deeply troubling whenever it is uncovered, is actually relatively rare and the government has in place a wide array of generally effective statutes and standards that apply to entities seeking to do business with it.

Regulating Businesses
As you know, any organization wishing to do business with the government must comply with all generally applicable laws and regulations for maintaining a business, including all relevant tax, environmental, and labor provisions. Each area of law or regulation is enforced and adjudicated through its own experienced and knowledgeable entities at the federal, state, and local levels. For example, Congress has given responsibility to the Internal Revenue Service to write regulations to implement tax laws. The Environmental Protection Agency has similar primary responsibility for environmental laws, the Labor Department for labor matters, and so on. Many of these agencies also have internal administrative enforcement authority, while the Justice Department is generally charged with civil and criminal enforcement at the Federal level.

Taken together, this layering of statutes and regulations across the government, at all levels, provides a construct under which all businesses in the nation must operate. But for government contractors, there is much more.

Regulating Government Contractors

There are numerous laws and regulations that only apply to firms that want to do business with any agency of the federal government—such as registering in the government's central contractor registration (CCR) system, agreeing to unique audit and/or competition rules, meeting the government's unique accounting and billing standards, or agreeing to utilize small business for a certain percentage of subcontracting opportunities. For these government-wide procurement requirements, most federal agencies follow the uniform Federal Acquisition Regulation (FAR) requirements. The FAR is maintained by three lead agencies -- DoD, GSA and NASA -- and policy is provided by those agencies under the leadership of the Administrator of the Office of Federal Procurement Policy in the Office of Management and Budget.

Beyond those general rules, frequently there are also specialized laws and regulations that apply when doing business with specific agencies of the federal government or for specific types of activities. For example, DHS has a restriction on the types of companies with which it can do business. The Defense Department has an entirely separate set of specialized rules to guide its procurements for major weapons systems. In those specialized areas, each federal agency is responsible for developing, publishing and maintaining separate acquisition regulations that supplement the government-wide regulations. For the Department of Homeland Security, this supplemental regulation is called the Homeland Security Acquisition Regulation (HSAR). Each agency is also responsible for writing its own contracts and monitoring compliance with agency-specific requirements.

In addition, a myriad of laws and regulations provide the authority and responsibility for government officials—primarily contracting officers and grants officers—to ask the right questions and take the right action against those who fail to follow the laws and regulations. If a contracting officer is concerned about putting the federal government at risk by doing business with inappropriate entities—whether it is an individual, a company, a university or a non-profit organization—he or she has wide latitude with regard to information that can be sought from that concern. These procedures apply to both contracts and grants.

But there are appropriate and important constraints on the government's flexibility. For instance, the government may not act arbitrarily and it must adhere to its own regulations and procedures. One of these is respect for due process before denying work to an individual or a contractor, unless the government has an urgent need to protect its interest. There are also long-standing procedures to protect small business from arbitrary agency decisions about the competency of these businesses to perform federal contracts. On February 16, 2007, the FAR agencies issued a proposed rule to require all government contractors receiving awards in excess of $5 million to have a formal ethics and

compliance program. The vast majority, if not all, of PSC's more than 210 member companies have formal ethics and compliance programs and place a high premium on corporate and individual responsibility. We support the direction taken in this proposed rule, although in our April 17 detailed comments we raised a number of concerns with its operational aspects.*

I mention all of this because it is important to recognize the many layers that exist to protect the government's interests and equities. It is equally important to recognize that this extensive regime of rules and regulations has evolved over many years in an effort to strike the proper balance between protecting the government's interests and maintaining a vibrant and effective marketplace that can support the government's diverse and increasingly complex missions. The government marketplace is vastly different and far more regulated than the commercial marketplace and we would not suggest that the two can be or should be identical. However, a balance is vital to ensure that the government has access to the widest possible array of suppliers and solutions.

Unfortunately, no matter what laws or regulations are in place, a system this large and complex will have problems. With so many dollars spent, unethical government and contractor employees will seek to enrich themselves at the expense of the taxpayer and the mission. Just a few weeks ago, five individuals were arrested for conspiring to embezzle funds intended for Iraq reconstruction—the five included two Army reservists, a government civilian, and a contractor. While the arrest is not an indicator of final guilt or innocence, such activities are never acceptable and those responsible should be dealt with aggressively.

But because these cases are a distinct minority, policymakers should focus on how to appropriately punish such behavior while still guarding against imposing new and often untenable burdens on the entire federal procurement system. Overly punitive measures unnecessarily increase costs for the government or its suppliers, all in the name of achieving the unachievable. In the end, this is a delicate balancing act. This hearing offers an important opportunity to make progress toward that balance.

POGO Hysteria

I have reviewed the POGO "Federal Contractor Misconduct Database" as well as its 2002 "Pick-pocketing" report. Taken at face value, without understanding how the federal acquisition system works or even digging just a little bit beneath the surface, it is easy to mistakenly conclude that the acquisition system has failed.

Yet none of that information really tells us what we need to know and thus, what, if anything, we need to change. For example, the POGO website cites only 639 cases for the past nineteen plus years (from 1/8/88 through 4/17/07); of those, scores involve settlements of civil actions—with no indication of any admission of guilt. Under our system of laws, a settlement, particularly one without any finding or admission of guilt, cannot be equated with a guilty verdict. Yet the POGO database makes no such

* The full PSC comments are available at http://www.pscouncil.org/pdfs/PSCFARCodeOfConduct04-17-07.pdf.

distinctions. Nor does the information separate out scores of relatively common legal actions, such as disputes between employees and employers which were settled, again, without any specific findings. Instead, the list simply presumes guilt. Each of these cases are fact-specific but the report fails to account for critical differences in the activities, such as whether the company identified the problem, whether any senior officials were involved, and whether and when corrective action was taken. Even the 2002 POGO report is fraught with a remarkable number of mistakes and misstatements.

If we are to remain a government of laws under which due process is a sacrosanct privilege afforded all citizens and entities, then we must look at their "Federal Contractor Misconduct Database" through a very different lens. To understand the real implications of the report and the degree to which the rhetoric surrounding the database matches the realities, real scrutiny is needed. That scrutiny must assess the degrees to which violations of any kind have been proven to have occurred, whether restitution was paid, how old the allegation is, and, of course, how serious the violation is. These are essential elements but, unfortunately, the database is of little help.

Similar rhetoric surrounds allegations that government contractors have reputedly violated tax laws but continue to receive contracts. However, if one carefully reads the Government Accountability Office (GAO) and other objective reports on the subject, very few contractors are actually accused of, let alone proven to have committed, tax fraud. In fact, the main point of the GAO report was that the systems to link IRS tax collection procedures with agency payment processes were not working as planned. Since those reports were prepared, regulatory and corrective administrative actions have already been taken and more are in process.

Indeed, each of these topical area assertions raises complex and difficult questions of compliance with highly regulated areas, yet none of them have been adequately answered. Nor is this a new debate; it dates back to the Clinton Administration's so-called "blacklisting" initiative, ostensibly developed to ensure that the government did not award contracts to unethical companies or individuals. At that time, many of the government's own senior career contracting leaders opposed that initiative. Then, as now, any such rule is both unnecessary and unexecutable.

Role of the Government Contracting Officer

Some have suggested that contracting officers be required to deny federal contracts to companies that have demonstrated a "consistent pattern" of abusing federal laws and/or regulations. How is a GS-9 or GS-11 contracting officer supposed to make these determinations? On what information, advice, counsel, or assurances is the determination certified to be objective and fair? This proposal neither includes nor contemplates any guidelines or definitions as to what constitutes a consistent pattern or what types of violations are considered serious enough to merit the exclusion of a company from government contracting and these would be difficult to draft comprehensively and fairly.

The proposal places on the government's contracting officers the entire burden of making complex legal determinations about a company's compliance with tax, environmental, labor, and other federal statutes that would warrant being denied the opportunity to compete for government work. These are fields for which entire legal communities are created and mastery can take years of training and practice.

Moreover, are we now going to change the fundamental construct of our federal procurement system so that, with no guidelines relating to the severity of a charge and its ultimate impact on the government, and even after a company or individual pays restitution, an individual or company continues to be punished through the denial of access to government contracts? Do we simply ignore the overlay of the numerous statutes and adjudicative processes?

Answers to these questions are central in determining how this issue should be addressed. In short, in too many of these discussions, the concept of due process appears to be largely ignored!

Conclusion

In our view, the current mix of laws and regulations does a very good job of enabling the government to ensure it only does business with responsible parties, and provides numerous, appropriate means that enable the government to fully and adequately "protect its interests."

Mr. Chairman, as I said at the outset, we are strong supporters of the government's business compliance rules and routinely encourage our member companies to ensure that their business conduct and compliance programs are current and complete. We recognize that, regrettably, individuals and organizations violate the law and we have little sympathy for those that do. But it would be a costly travesty if we were to impose new and unnecessary rules, let alone ineffective and unexecutable ones, based on the mistaken impression that the current system has failed us. By and large, it hasn't.

We are always ready and willing to work with you on ways to make the system stronger even as we seek to maintain that critical balance I mentioned earlier. But I would urge you to reject precipitous proposals based on limited information and dangerous assumptions.

Mr. Chairman, thank you again for the opportunity to testify here today. I look forward to answering any questions you might have.

STATEMENT REQUIRED BY HOUSE RULES

In compliance with House Rules and the request of the Committee, in the current fiscal year or in the two previous fiscal years, neither I nor the Professional Services Council, a non-profit 501(c)(6) corporation, has received any federal grant, sub-grant, contract or subcontract from any federal agency.

BIOGRAPHY

Alan Chvotkin is Senior Vice President and Counsel of the Professional Services Council, the principal national trade association representing the professional and technical services industry. PSC is known for its leadership in the full range of acquisition, procurement, outsourcing and privatization issues.

Mr. Chvotkin joined PSC in November 2001. He draws on his years of government and private sector procurement and business experience to facilitate congressional and executive branch knowledge of and interest in issues facing PSC's membership. Previously, he was the AT&T vice president, large procurements and state and local government markets, responsible for managing key AT&T programs and opportunities. Earlier at AT&T, he was vice president, business management, responsible for the government contracts, pricing, compliance and proposal development organizations. From 1986 to 1995, he was corporate director of government relations and senior counsel at Sundstrand Corporation. Mr. Chvotkin also was a founding member of industry's Acquisition Reform Working Group.

Before joining Sundstrand, Mr. Chvotkin spent more than a dozen years working for the U.S. Senate. He first served as professional staff to the Senate Budget Committee and to the Senate Governmental Affairs Committee. He became counsel and staff director to the Senate Small Business Committee and then counsel to the Senate Armed Services Committee.

He is a member of the Supreme Court, American and District of Columbia Bar Associations. He is also a member of the National Contract Management Association and serves on its national board of advisors and as a "Fellow" of the organization. Alan is also a two-time "Fed 100" winner. He has a law degree from The American University's Washington College of Law, a master's in public administration and a bachelor's in political science.