

RESPONSIBLE BIDDERS IN FEDERAL HOMELAND SECURITY CONTRACTING – ARE CURRENT STANDARDS ENOUGH?

**STATEMENT OF
ELAINE DUKE
CHIEF PROCUREMENT OFFICER
DEPARTMENT OF HOMELAND SECURITY
BEFORE THE
COMMITTEE ON HOMELAND SECURITY
UNITED STATES HOUSE OF REPRESENTATIVES
APRIL 20, 2007**

Chairman Thompson, Congressman King, and Members of the Committee, thank you for this opportunity to appear before you to discuss the Department of Homeland Security (DHS) acquisition program and our contracting procedures as they relate to responsibility determinations. I am the Chief Procurement Officer (OCPO) for the Department of Homeland Security (DHS). I am a career executive and I have spent most of my 23 years of public service in the procurement profession.

Before addressing responsibility determinations, I'd like to convey my top three priorities, which are essential elements to enhancing our ability to procure from responsible contractors.

- First, to build the DHS acquisition workforce.
- Second, to make good business deals.
- Third, to do effective contract administration.

As the CPO, I provide oversight and support to eight procurement offices within DHS – Customs and Border Protection (CBP), Federal Emergency Management Agency (FEMA), Immigration and Customs Enforcement (ICE), Transportation Security Administration (TSA), United States Coast Guard (USCG), United States Secret Service (USSS), Federal Law Enforcement Training Center (FLETC), and the Office of Procurement Operations (OPO). As the CPO, my primary responsibility is to manage and oversee the DHS acquisition program. I provide the acquisition infrastructure by instituting acquisition policies and procedure that allow DHS contracting offices to operate in a uniform and consistent manner.

Mr. Chairman, I know that you are very concerned about ensuring that DHS and its Components procure goods and services on behalf of the American taxpayer from responsible contractors. I can assure you that we share your interest.

Not just at DHS, but throughout Federal agencies, there is an emphasis on conducting business with responsible contractors. The Federal Acquisition Regulation (FAR) requires all Federal agencies to procure goods and services only from responsible contractors. Prior to entering into a contract, the Contracting Officer is required to obtain acceptable evidence of the prospective contractor's ability to obtain required resources, and also must be provided with a satisfactory performance record. When a Contracting Officer awards a Federal contract, he or she is making an affirmative determination that the recipient of the contract is a responsible contractor with

respect to that contract. If there are concerns about the responsibility of responsive small businesses, the Small Business Administration is the sole authority for these determinations.

The FAR provides the guiding principles and the processes and procedures the acquisition community uses to ensure that the Government does business only with responsible contractors. The process for reaching a conclusion that a contractor is responsible is governed by FAR Subsection 9.104-1(a), which requires that in order to be deemed responsible, a prospective contractor must:

- Have adequate financial resources;
- Be able to comply with the delivery or performance schedule;
- Have a satisfactory performance record;
- Possess a satisfactory record on integrity and business ethics;
- Possess the necessary organization, experience, technical skills, accounting and operations oversight;
- Have the production, construction and/or technical equipment and facilities to perform the work required; and
- Otherwise be qualified and eligible.

At DHS, our Homeland Security Acquisition Regulation, the HSAR, and our Homeland Security Acquisition Manual, the HSAM, supplement the FAR guidance and make it very clear that our Contracting Officers are to perform responsibility determinations prior to making a new contract award. In fact, DHS has even developed a form, DHS Form 700-12, to guide the responsibility determination process. The list of factors required by the form expands upon those required by FAR 9.104 and includes drug free workplace, small business subcontracting compliance, equal employment opportunity, and environmental/energy considerations.

Our Contracting Officer's assessments with respect to a contractor's responsibility are based on a number of inputs, ranging from information collected in response to a specific procurement to centrally available information. For example, when assessing financial responsibility, a DHS Contracting Officer may review and evaluate the latest company financial statements. Other considerations may include how long the company has been in business, any bankruptcies declared by the company, bond rating by Moody's or Standard and Poor's, etc. Additionally, since April of 2003, DHS has had a memorandum of understanding in place with the Defense Contract Audit Agency (DCAA) that makes available their expertise in determining financial responsibility of prospective contactors.

Prior to making an award, the Contracting Officer reviews the web-based Excluded Parties List System (EPLS) operated by the General Services Administration to ascertain whether the contractor is debarred or suspended from Government contracting; those on the list are excluded from doing business with the Government. The focus of debarment and suspension is to exclude companies that are not presently deemed responsible. A contractor may be suspended or debarred for broad range of conduct - commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; commission of embezzlement, theft, forgery, bribery, falsification, or destruction of records, making false

statements, tax evasion, or receiving stolen property. However, it should be noted that convictions or civil judgments are not required; a debarment may use a preponderance of evidence standard when making decisions. The standard for suspension is adequate evidence and often is imposed when there is an indictment, but not a current conviction or judgment. Additionally, suspension and debarment may occur as a result of any other offense indicating a lack of integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor. But, that said, it is important to note the existence of a cause for suspension or debarment does not necessarily require that the contractor be suspended or debarred; the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors are considered.

The Excluded Parties List System (EPLS) and the Government's debarment and suspension procedures are well-established and well-understood within the Government and by companies who do business with the Government. EPLS is a tool integral to the way we do business. It provides the single comprehensive list of individuals and firms excluded by Federal Government agencies from receiving Federal contracts or federally approved subcontracts. A single agency's suspension or debarment decision, with limited exceptions, precludes all other agencies from doing business with an excluded party.

Another critical step in determining contractor responsibility is consideration of contractor Past Performance. DHS Contracting Officers are also required to use the Past Performance Information Retrieval System, known as "PPIRS", to obtain information on contractor past performance to assist with source selections. PPIRS is a government-wide data warehouse which contains information on past performance of contractors with whom the Government does business. DHS Contracting Officers and Contracting Officer Representatives (CORs) use a feeder system to input information on DHS contractor performance into PPIRS. The Contractor Performance System (CPS) managed by NIH allows us to input performance information on our DHS contract actions. This data then feeds into the PPIRS data warehouse.

An overall responsibility determination also is dependent on contractor representations and certifications – "reps & certs" as they are known. Contractors provide these FAR- required statements by using the Online Representations and Certifications (ORCA) system. As part of the submission, the contractor certifies, to the best of its knowledge and belief, whether it and/or any of its principals, within a three-year period preceding the offer, have been convicted of or had a civil judgment rendered against them for the following: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, State or local Government contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property. The Contracting Officer is responsible for reviewing the "reps and certs" prior to award to ensure that the company does not present information that would prevent an affirmative finding of contractor responsibility.

A more expanded pre-award survey may be conducted if the Contracting Officer has reason to believe that one or more of the responsibility standards I mentioned earlier is in doubt, or if information is not readily available.

In response to the central question of this hearing is – Are the standards for determining responsibility sufficient? - Let me start by saying that people frequently use the terms “responsibility” and “suspension and debarment” almost interchangeably. Yes, responsibility determination and suspension and debarment are both for the purpose of protecting the interests of the Government, but the scope, the consequences of an action, as well as the decision makers involved, differ considerably. A responsibility determination is made by the Contracting Officer and pertains to a specific contract action. Of course, there are instances where during the course of a responsibility determination, the Contracting Officer becomes aware of serious systemic problems or a single serious breach that warrants suspension and debarment based on actions under a single contract; but, generally, responsibility determinations are confined to a single award scenario and focus on answering the question: Does the contractor have the integrity, past performance and resources to meet the Government’s requirement? Very importantly, the consequences of that determination are limited to that contract action. On the other hand, suspension and debarment actions are made by the Head of the Agency, or designee, and frequently relate to patterns of behavior and violations of law. Once the offending contractor is entered into the EPLS, the government-wide suspension and debarment system, Contracting Officers are, almost without exception, precluded from making any contract award to that contractor.

To get back to your central question, are standards for determining responsibility sufficient? I am among those across the Government who believe that problems surrounding contractor responsibility assessment are a training and implementation issue, not a policy issue. Concerns about DHS doing business with contractors that may not be complying with laws or regulations should be handled by agency suspension and debarment officials in accordance with FAR government-wide suspension and debarment procedures at FAR Subpart 9.4, not handled by Contracting Officers under FAR contracting responsibility determination procedures leading to award of individual contracts.

Let me expand on a point I made earlier. It is important to recognize that the current regulations regarding responsibility, suspension and debarment reflect a philosophy that emphasizes that the intended purpose is to prevent poor performance, waste, fraud and abuse in Federal procurement. The motivation behind an action to suspend or debar a contractor from Federal Government contracts or for a Contracting Officer to make a negative responsibility determination is not punitive in nature. These actions are not intended as punishment, but rather a measure designed to protect the Government’s interests.

A responsibility determination is required for each contract award; however, Contracting Officers use their discretion when evaluating the information before them. What I mean by this is, our acquisition professionals must make decisions based on the information available to them and the situation before them so that when applying the rules, there may be a different outcome in different situations. I believe that as you consider whether additional guidance, tools and government-wide processes should be added to our existing approach to determining responsibility, it is important to maintain this discretion. Our contracting professionals are able to make appropriate business decisions based on the particular facts of a given situation.

I would also like to address certain important presumptions and considerations that are built into our current processes and procedures for responsibility. We strive to be fair, to be reasonable, to

be aware of privacy concerns, to ensure due process is afforded where appropriate, and to craft regulations that allow for those that may not have been model citizens in the past to be rehabilitated such that they are eligible for Government contracts. To be sure there are competing interests at play when we are making our determinations, but in the end, we should be mindful that we have a very real responsibility to balance these competing interests. After all, the consequences of our actions with regard to responsibility determinations ultimately may mean that we are depriving an individual of their livelihood.

Mr. Chairman, I know that you and the Members of the Committee are concerned that contracts are being awarded to non-responsible and unethical contractors. To that end, the Civilian Agency Acquisition Council (CAAC) has initiated several FAR cases related to responsibility.

In the past two months, the FAR Secretariat published two proposed rules dealing with contractor responsibility matters. A proposed FAR rule, entitled *Contractor Code of Ethics and Business Conduct*, was published in the Federal Register on February 16, 2007. The rule, initiated by members of my OCPO staff, establishes a clear and consistent policy regarding contractor code of ethics and business conduct, and responsibility to avoid improper business practices. Additionally, the proposed rule requires contractors to provide their employees with information on contacting the appropriate Inspector General to report potential wrongdoing to include posting this information on company internal websites and prominently displaying hotline posters. The second proposed FAR rule, *Representations and Certifications-Tax Delinquency*, published in the Federal Register for public comment on March 30, 2007, proposes to amend the FAR clause governing offerors' representations and certifications to specifically address delinquent Federal or State tax obligations within a three year period.

Another new FAR case, currently under consideration and not yet published, would amend Federal regulations to address updates to Past Performance procedures. The Office of Federal Procurement Policy's (OFPP) Best Practices Guide, last published in May of 2000, is also presently being updated as directed by OFPP through the Chief Acquisition Officers' Acquisition Committee for E-Gov (ACE), which has established an interagency working group to review regulations, policies, and guidance associated with contractor performance information.

In keeping with my top three objectives I iterated earlier in my testimony, I have been growing both the size and capability of my staff, both in operations and in my policy, training, and oversight cadre. This is allowing us to approach our oversight responsibilities both on the front end of the procurement cycle and the post-award back end. We are developing a robust training program for acquisition professional. Our Excellence in Contracting Training Series for DHS Headquarters and Component personnel is designed to enhance the acquisition workforce's understanding of contracting regulations and policies. Recent topics have included Contracting by Negotiations, Contract Financing, the SAFETY Act, and Strategic Sourcing. We are also planning additional in-depth training in targeted areas such as Buy American Act procedures and Performance-Based Acquisition. The growth in the number of talented and experienced acquisition professionals in OCPO to serve as Desk Officers enhances our ability to work closely with the Components on their specific acquisition issues, and the growth in the size of my Oversight group will enable OCPO to perform more structured procurement management reviews of the Components' acquisition programs.

Ethical behavior is a core DHS value. OCPO has developed additional on-line ethics training, beyond what is required, which highlights ethical acquisition practices for our Government acquisition professionals department-wide. The training is expected to be launched by the end of the month to our contracting personnel and all within the Department who participate in DHS acquisitions.

Mr. Chairman, thank you for the opportunity to testify before the Committee about DHS contracting procedures. I am glad to answer any questions you or the Members of the Committee may have for me.