UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Charles Tiefer
Professor of Law
CTIEFER@ubalt.edu

3904 Woodbine Street
Chevy Chase, MD 20815
Tel: (301) 951-4239

TESTIMONY BEFORE
HOUSE HOMELAND SECURITY SUBCOMMITTEE
ON MANAGEMENT, INTEGRATION AND OVERSIGHT

Hearing on
Responsibility in Federal Homeland Security Contracting

April 20, 2007

by Professor Charles Tiefer

NON-RESPONSIBILITY IN DHS CONTRACTORS: WHO'S RESPONSIBLE? WHAT CAN BE DONE?

Thank you for the opportunity to testify on the subject of responsibility among contractors at the Department of Homeland Security (DHS). I am Professor of Law at the University of Baltimore Law School since 1995, and the author of a book, and of pertinent law review and journal studies, on federal procurement policy.[1]

I. Executive Summary
II. The Narrow Current DHS Approach to Contractor Responsibility.
III. Broader Consideration of Past Contracting Waste, Fraud and Abuse
IV. Broader Contractor Responsibility -- Civil Rights, Expatriates, and Other Issues

[1] These include GOVERNMENT CONTRACT LAW: CASES AND MATERIALS (Carolina Academic Press 2d edition 2004)(co-authored with William A. Shook). In 1984-1995 I was Solicitor and General Counsel (Acting) of the U.S. House of Representatives, and participated in numerous oversight investigations of federal procurement policy.

I. Executive Summary

"Responsibility" is a key criterion for prospective government contractors, which DHS should consider more broadly, in several respects. Under current law, after DHS selects a contractor for award, it conducts a pre-award survey to determine responsibility. This existing "responsibility" determination consists mostly just of checking that the awardee is not on the list of suspended or debarred contractors ("excluded persons"); has adequate finances (from Dun & Bradstreet); and has satisfactory "past performance" in a narrow sense.

Whether and how DHS should consider "responsibility" more broadly involves several issues.

For one issue – upon which this testimony focuses – DHS's methods examine only a narrow version of the "past performance" record of the contractor. DHS makes little effort to gather up broadly the whole of the government contractor's record of fraud, waste, abuse, and other violations, which may not get into the narrow "past performance" database. The revelations by Inspectors General, auditors, qui tam False Claims Act plaintiffs, and the press often do not go into the databases primarily maintained by contracting officers of solely their own experiences with the contractor.

To make this concrete, this testimony looks at the past record of some of DHS's biggest and best-known contractors with irregularities in their past performance, drawn from those public record sources sometimes not included in the DHS past performance review. It starts with SAIC, which has botched DHS work, and has a full-length recent article in *Vanity Fair* about its many questionable episodes. This part continues with Boeing, for which a 20-month partial debarment can, and did, work. It discusses BearingPoint (KPMG), which bungled eMerge2.

For another issue, responsibility could be expanded to include significant federal law deviations or transgressions besides poor past performance. American contractors that move abroad – technical "expatriates" or those like Halliburton that move their CEO to Dubai – raise a potential responsibility subject. More generally, the "contractor responsibility" rule, promulgated during that Clinton Administration and rescinded in the Bush Administration, raised subjects such as compliance with civil rights, tax, environmental, and labor laws. DHS may be the right department for a version of the contractor responsibility rule.

II. The Narrow Current DHS Approach to Contractor Responsibility.

Agencies may award contracts only to "responsible" offerors – in other words, only after their contractor officers determine that the potential awardee is "responsible." The law about contractor responsibility for all government departments, including DHS, comes from Federal Acquisition Regulation (FAR) 9.104 (emphasis added and details omitted):

> Subpart 9.1 Responsible Prospective Contractors
>
> 9.104 Standards
> 9.104-1 General standards.
>
> To be determined responsible, a prospective contractor must--
>
> (a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a));
>
> (b) Be able to comply with the required or proposed delivery or performance schedule . . .
>
> (c) Have *a satisfactory performance record*. . . . .
>
> (d) Have *a satisfactory record of integrity and business ethics*;
>
> (e) Have the necessary organization, experience, accounting and operational controls, and technical skills . . . . ;
>
> (f) Have the necessary production, construction, and technical equipment and facilities . . . .; and
>
> (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

Government contracting law has long-standing and elaborate provisions for finding contractor responsibility – discussed in own book, and written about by others in detail.[2]

These criteria have great potential for flexibility – in particular, the notion that a contractor must have a "satisfactory record of integrity and business ethics" and a "satisfactory performance record" have wide potential. Under current law, after DHS selects a contractor for a large award, it conducts a "pre-award" survey to determine responsibility. But, this is relatively narrow. This existing "responsibility" determination consists mostly just of checking that it is not on the list of suspended or debarred contractors ("excluded persons"); is financially responsible (from Dun & Bradstreet); and has acceptable "past performance" in a narrow sense.

[2] David Z. Bodenheimer, *Responsibility of Prospective Contractors*, 97-09 Briefing Papers 1 (available in Westlaw); Steven W. Feldman, 2 *Government Contract Awards: Negotiation and Sealed Bidding*, ch. 18, sec. I, "Performance Responsibility" (2006 ed.)(available in Westlaw).

Two GAO reports, one of them a quite recent and relatively overlooked study released in January 2007, investigated just how narrow the pre-award survey of contractor responsibility can be. GAO, *Selected Agencies Use of Criminal Background Checks for Determining Responsibility*, GAO-07-215R (Jan. 12, 2007); GAO, *Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process*, GAO-05-479 (July 2005). The January 2007 GAO study disclosed that contracting officers these day often depend upon rather narrow pre-award surveys (conducted for them by, e.g., the Defense Contract Management Agency). The surveys use two important tools, tracked by a contractor's Data Universal Numbering System (DUNS) number: the data in the Excluded Parties List System (EPLS) about suspensions or debarments; and, the data in the Central Contractor Registration System (CCR) about contract awards.

The government has a standard arrangement to obtain Dun & Bradstreet data on potential awardees to check their financial resources.

What is left out by surveys of suspensions or debarments, financial solvency, and past performance? A striking example is that the GAO found that there is no particular reason that the ordinary pre-award survey would turn up whether the principals on an awarded contract had prior criminal records. In general, criminal background checks are not required and may well not have occurred.[3]

Presumably the survey also picks up, if the contracting office has not already tapped this in evaluating the offer, the relevant past performance database. For the Defense Department, NASA, and NIH, that is the Past Performance Information Retrieval System (PPIRS). Many expect a trend toward a single federal database on past performance information for all agencies.

To step back, the agency systems for past performance derive from one of the most highly regarded procurement initiatives of the 1990s – the expanded importance of past performance as a source selection factor.[4] This works by a process starting when agency contracting officers do evaluations of the contractors' performance of contracts at the time of performance. (The contractor's awareness of this evaluation and its importance is expected to "motivate" the contractor to perform well.) This evaluation goes into the aforementioned databases. Then, when contractors compete for subsequent awards, the agency source selection personnel consider each offeror's past performance as a factor in selecting the awardee.[5]

One DHS example, among countless others, reflects how big a factor past performance can be. When DHS awarded a task order to Security Consultants Group Inc for security guard

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[3] Criminal records might come out if DHS is implementing Homeland Security Presidential Directive 12, about the standards for issuing identification to employees and contractors. Criminal records also might come out if there has been the kind of criminal investigation of the awardee in which part of the standard procedure is to run a criminal record check.

[4] Nathanael Causey, *Past Performance Information, De Facto Debarments, and Due Process: Debunking the Myth of Pandora's Box*, 29 Pub. Cont. L.J. 637 (2000).

[5] Steven W. Feldman, supra, sec. 6:12 ("Past Performance") and 10:28 ("Organizational experience/past performance"); Richard White, *Overall Government Contract Evaluation process – Past Performances*, FedMarket.com, May 19, 2005.

services, it weighted past performance 60% of the technical factors – an impressively decisive weight.[6]

However, there is no particular reason that the ordinary pre-award survey would turn up the allegations of prior fraud or other irregularities, that an agency may receive from many sources apart from contracting officers. In its section, "Data on Instances of Previous Fraud by Contractor Principals Not Readily Available," the January 2007 GAO report noted that "investigations of fraud" are assigned to investigative units "such as the office of Inspector General." Those units keep their case files in "narrative" form – not entered in the aforementioned databases – so there is no particular reason a pre-award survey must pull up what Inspector Generals have found out about the contractor.

Besides the Inspector General, there are other sources of information about contractor fraud, waste, and abuse. The Project on Government Oversight website on contractors provides a survey of such sources. For example, private relators may bring qui tam False Claims Act lawsuits against contractors. Such qui tam cases may win in court, or, the contractor may settle them. The success of a suit reveals a false claim, that is, statutory fraud.

Yet, contracting officers may very well, for a number of reasons, put nothing about such a successful suit in their database. The suit, and especially its eventual outcome, may post-date the contract; the contracting officer may not agree with the suit, regardless of the outcome, from partiality to the contractor or a desire to minimize what might seem a blemish on the C.O.'s own record; or, the contracting officer may just decide against taking on the argument with the contractor ensuing from penalizing it by making a big record of the false claim suit's allegations and outcome. The example of SAIC below draws on a False Claims Act case settled by SAIC, that reflects negatively on SAIC, yet may not be found in the kinds of records checked when SAIC is a potential awardee.

III. Broader Consideration of Past Contracting Involving Waste, Fraud and Abuse

As discussed above, the current DHS approach to responsibility draws too narrowly on what contractors have done on past contracts, in assessing "past performance." Specifically, it does not even draw on the investigations of the Inspector General of DHS, let alone the auditing agencies of other departments (such as DCAA). And, it does not draw on private suits – qui tam False Claims Act cases. All this results from a narrow approach to past performance which uses databases filled out by contracting officers – not inspectors general, not auditors, and not information from qui tam lawsuits about government contract fraud.

DHS could remedy this by tasking its Inspector General, or, its central procurement office, with two steps as to its records for past performance. (Any excess burden from these could be handled by restricting this, at least at first, to matters and contracts with some high minimum, such as $1 million.

[6] Government Contractor, April 14, 2004, p.166, discussing Comp. Gen. Dec. B-293344.2. The 60%, although impressive, is not so surprising. DHS is much more involved in purchasing of services, than of commodities, and for these services, past performance is a uniquely indicative factor in a way that mechanical tests on the physical characteristics of the "product" cannot be.

First, the IG (or procurement office) should enter, in the past performance records, its conclusions from its investigative work. This should not be left to contracting officers, particularly when they may not be familiar with, or may not want to follow up, the investigation. Moreover, the IG could enter information from matters that fall naturally to it, such as private qui tam False Claims Act suits, as to which the IG office is routinely tasked to become familiar when the government is deciding on joining the suit.

Second, the IG (or procurement office) should consult certain kinds of public databases for a larger sweep of information about important offerors or awardees. These include criminal record databases; the press databases of Lexis-Nexis; and those public databases (notably, that of the Project on Government Oversight) that systematically collect government contractor information.

Of course, as with other past performance information, the government contractor should have the opportunity to enter its own response to correct or to clarify anything with which it takes issue.

Example: SAIC

To see what is not put together by current DHS responsibility practice, let us take as an example of a very important DHS contractor with negative episodes in its background: SAIC. Helpfully, a comprehensive investigative treatment of SAIC's contracting has appeared recently -- Donald L. Barlett, *Washington's $8 Billion Shadow*, Vanity Fair, March 2007, at 342 – supplementing similar prior accounts.[7]

SAIC has sold a great deal to departments such as the Defense Department and intelligence agencies. With DHS as well it has a particular important contract. In 2003, TSA awarded it a contract with a billion-dollar potential, pursuant to which SAIC provided about 400 cargo-screening monitors for border crossings and ports. As *U.S. News & World Report* reported in 2005, "[T]he government awarded a contract to San Diego-based Science Applications International Corp. . . . The machines were plagued by performance problems."[8]

This committee is familiar with the problem, having held hearings on that failure,[9] but, it warrants noting. "What's the problem? Well, for starters, the monitors can't distinguish between a nuclear bomb and radiation that occurs naturally in a variety of materials, including ceramic tiles, quarry tile, cat litter, fertilizer, and bananas . . . ." Id.[10]

Suppose DHS's experience with that large, sensitive contract with SAIC caused it to look broadly at questions of SAIC's past negative performance, as part of SAIC's responsibility. It would find these specific legal and ethical controversies:

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[7] A prior description of SAIC is in "Windfalls of War – The Center for Public Integrity," http://www.publicintegrity.org.

[8] "A Radioactive Contract," USNews.com, May 22, 2005.

[9] *Hearings on Detecting Nuclear Weapons and Radiological Materials*, House Homeland Security Committee (June 21, 2005).

[10] A similar story is Eric Lipton, "U.S. to Spend Billions More to Alter Security Systems," New York Times, May 7, 2005.

-- SAIC is organized primarily for a revolving-door approach to Washington lobbying. It rotates, on and off its payroll, officials at the very top level, which includes former Secretaries of Defense and heads of the CIA and NSA. It has a pattern of obtaining highly profitable contracts from such officials while they are in office, and providing them lucrative rewards, particularly stock options, when they are on its payroll.[11]

--SAIC had to settle a federal fraud (False Claims Act) case in April 2005. Those widely reported allegations might involve gross understatement of excess profits on extensive national SAIC contracting. I discussed this in the NBC-TV segment, "The Fleecing of America," on May 5, 2005. As *Vanity Fair* says about SAIC's formula for understating its excess profits uncovered in that case, "the principle involved was large, and it had potentially national implications. Was SAIC using the same formula in thousands upon thousands of other contracts it had with the government?" Yet, it does not appear that current DHS methods for checking "past performance" would even put this on the table in front of a contracting officer.

--SAIC had a major contract terminated after revelations of a spectacular conflict of interest. It had the NRC's contract to formulate safety guidelines for radiation-contaminated waste. Then, it became a subcontractor on a major DOE contract for recycling radioactive scrap metal. When the SAIC conflict of interest came out, the NRC not only terminated its contract with SAIC, it filed suit against SAIC alleging false representations.[12]

-- SAIC was involved in several of the most questionable contracts by which Defense Department funds have been paid for untoward "support" in Iraq. SAIC was the contractor for paying the "Iraqi Reconstruction and Development Council" exiles including Ahmed Chalabi. As the *Vanity Fair* article comments, a typical exile on this SAIC payroll was "a onetime atomic-energy official in Iraq, who insisted that Saddam posed an imminent nuclear danger to the United States . . . ." SAIC's obtaining this contract has been criticized by the GAO on pure contracting grounds,[13] the DoD IG also criticized SAIC on it,[14] and I have discussed it critically in the *Washington Post.*[15] From what the GAO, the DoD IG, and the *Washington Post* laid out, this was not some small matter. At the most critical of all times, SAIC was doing a very wrong thing. [16]

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[11] As the *Vanity Fair* article commented, "Civilians at SAIC used to joke that the company had so many admirals and generals in its ranks it could start its own war. Some might argue that, in the case of Iraq, it did." The existence of SAIC's company-wide pattern of obtaining contracts by revolving-door methods puts each individual controversy into a larger framework.

[12] This is discussed in the *Vanity Fair* article.

[13] The Government Account Office received and upheld a protest against the award of that contract, from commercial companies that wished to compete to provide such services legitimately. *Matter of Worldwide Language Resources, Inc*, B-296693.2 (Nov. 14, 2005).

[14] Demetri Sevastopulo, *US Military "Cut Corners" on Iraq Contracts*, FIN. TIMES, March 26, 2004, at 4; Bruce V. Bigelow, *Report Rips SAIC Over Iraq Contracts*, SAN DIEGO UNION-TRIBUNE, March 25, 2004, at C-1.

[15] Renae Merle, *Air Force Erred with No-Bid Iraq Contract, GAO Says*, WASH. POST, Nov. 29, 2005, at A17.

[16] The GAO and DoD-IG criticisms are important. This is not just some reporters' lack of appreciation of a contractor with whom the reporters disagree. Rather, SAIC was found to be acting to obtain greater profit, without competition, but in ways – such as sole-source providing of personnel services that were being manipulated to pay off specific Iraqi exiles providing false intelligence.

Also, this includes hiring SAIC for establishing the Iraq Media Network, which the press found initially to be a disseminator of DoD disinformation contrary to the official United States policy (particularly for a department, such as DoD, and its contractors, which are not part of the intelligence agencies tasked with such covert actions); SAIC's network has since become, with painful irony, an Iraqi government disseminator of virulent anti-American messages.[17]

Lessons from SAIC

SAIC illustrates a number of points about the need for greater attention to contractor responsibility.

First, it would help if, at the time contractors engage, and are caught, in waste, fraud, and abuse, the agencies made a strenuous effort to create a "past performance" record of this – not just have it occur only if a contracting officer would ordinarily mention the matter in filling out the performance paperwork. Without pushing, low-ranking DHS officials may not be expected to stand up to contractors with the demonstrated clout and connections of SAIC. But, if the prospect of a record that would block future awards forced it, SAIC may be obliged to either clean up its act or cease to drain DHS's funds.

Second, a good way for DHS to address and to change a company-wide pattern like this with an important vendor (like SAIC) is via the issue of responsibility. A company which faces a broad loss of contracts may change its culture to rein in the abuses. Without that prospect, a company like SAIC will simply settle the consequences of each individual abuse that is caught, and continue its pattern with the expectation that what it does that is not caught, will more than make up in revenues for what it does that is caught.

Third, DHS must stand ready to impose formal sanctions, like terminations for default, upon the particular contracts of a contractor like SAIC when its performance of a contract involves waste, fraud, or abuse meeting the standards for formal sanctions. DHS may have been able to terminated for default SAIC's contract for radiation monitors on the ground that the monitors materially failed to perform as promised (there is insufficient information available on the public record to tell this for certain), rather than simply not continuing to order more units. Doing so lays the groundwork to consider findings of poor past performance the next time around.

Responsibility is a Properly Tough Criterion Even for (Perhaps, Especially for) the Biggest DHS Contractors

Boeing at DHS and Boeing's Billion-Dollar Suspension

Boeing is by no means the worst DHS contractor, but, reviewing Boeing provides important lessons about responsibility. The TSA awarded Boeing a contract that included the delivery and installation of 1100 explosive detection (baggage screening) systems. A 2004 IG

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[17] Barlett, supra.

report found wasteful spending and mismanagement.[18] Boeing's bid was the highest. Boeing insisted on a "cost plus a percentage of cost" arrangement, which is about as close to per se abuse as procurement can get. Then, Boeing turned around and subcontracted 92 percent of the work to L-3 and another company – which is the way to most abuse such a contract. And so it proved: Boeing received a 210 percent return on investment, and the IG deemed more than half of that profit to be "excessive."[19]

Boeing is, of course, one of the biggest government contractors, but it is not alone in abuses both at DHS and elsewhere. Just two months ago, DHS's Inspector General criticized a multibillion-dollar program run by Lockheed Martin and Northrop Grumman, which, together with Boeing, make up the "Big 3" of defense contracting. The Coast Guard awarded its Deepwater contract to a joint venture of Lockheed and Northrop. The DHS IG found design flaws for the Coast Guard cutters that led to spiraling maintenance costs and, without a fix, could reduce the ships' longevity. Deepwater is a $24 billion, 25-year program. So this could be a waste problem on a gargantuan scale – as a hearing by the House Oversight and Government Reform Committee on February 13, 2007, discussed.[20]

It need hardly be said that a check of the background of Boeing or Lockheed would readily display a very large set of prior matters reflecting adversely on responsibility. Boeing has been responsible for the Darleen Druyun scandal, with high-level criminal convictions (Druyun and former Boeing CFO Michael Sears) and the resignation of Boeing's CEO[21] – the single most dramatic criminal procurement scandal (leaving aside the Iraq and post-Katrina scandals) of this Administration. Lockheed has the highest number by far (92) of issues on the POGO website for any government contractor.[22]

What lessons can be learned about responsibility from the abuses in the contracts of Boeing (or, for that matter, Lockheed)? Most important: DHS can, as a viable and practical matter, treat even the very biggest contracts and contractors with toughness on responsibility.

On many grounds, the contracting industry, and even this Administration, might dispute this. They might say that DHS nonresponsibility determinations cannot occur against giant companies because the government needs them too much both when they are the sole source, and when they are among the few competitors, for important contracts. And, they might say that DHS nonresponsibility determinations are unfair or ineffective as to the very biggest contracts and contractors, because such contractors operate on so large a scale, with so many units and such decentralization, that it is unfair or ineffective to sanction the whole company for the faults of "the one rotten apple in the whole barrel." After all, they are the biggest government contractors, and some of the extent of their record simply owes to their contracts' scale.

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[18] DHS IG, *Evaluation of TSA's Contract for the Installation and Maintenance of Explosive Detection Equipment at United States Airports* (Sept. 2004).
[19] *Contracting Rush for Security Led to Waste, Abuse*, WashingtonPost.com., May 21, 2005.
[20] Deborah Billings, *DHS: Waxman Blasts DHS for Outsourcing Too Much Authority Under Major Contracts*, BNA Fed. Cont. Rep., Feb. 13, 2007, at 160.
[21] *Druyun Scandal Prompts DOD-wide Review of Procurements, Wynne Says*, BNA-FCR, Nov. 23, 2004, at 549.
[22] Lockheed's reputation goes back to when Lockheed's worldwide payoff scandals dominated the inquiries of an entire Senate special committee's existence (the Church Subcommittee on Multinationals) and led to the enactment of the Foreign Corrupt Practices Act.

There is a very concrete example that supports DHS treating even the very biggest contractors like Boeing with toughness: the Defense Department did treat Boeing that way as recently as 2003-2005. The Air Force awarded Boeing 19 of 28 contracts for upcoming launching satellites, a multi-billion dollar contract. Then, the government investigated Boeing's having improperly and obtained Lockheed proprietary information to compete for those contracts, with criminal charges against Boeing officials on the satellite proposal team. From 2003-2005, the Air Force suspended three Boeing units from eligibility for future government contracts, for twenty months; and, it reallocated Boeing's number of launches from 19 to 12 -- $1 billion in work.[23]

The 20 month Boeing suspension also illustrated the doubly effective lesson of such a sanction, even in (indeed, especially in) spheres of contracting where there are only a few sufficiently large or specialized contractors available to perform major specialized contracts.[24] By reallocating $1 billion in work from Boeing to its "victim" (Lockheed), the suspension taught the whole industry two lessons. One was that "crime doesn't pay." The other is that "honesty DOES pay." The lesson is taught by giving the work that would otherwise go to the nonresponsible contractor to other, responsible contractors. And, contractors are not being held to impossibly high standards – Lockheed is itself no angel, as just explained above – just to the workable standard that those who go beyond the pale see a large quantity of their work go to those who stay within the pale.

Moreover, limited exceptions, by waiver, can occur in the course of a suspension.[25] Similarly, DHS could make nonresponsibility determinations about particular contractors, and reserve the right to make limited exceptions by waiver.

Bearing Point/KPMG and eMerge2

A detailed press article in 2006 entitled "*Security for Sale*," had the subheading: "The Department of Homeland Security has a Section on Its Web Site Labeled 'Open for Business.' It Certainly Is."[26] The article assembled many examples, some well-known within the procurement community, of contractor exploitation, often facilitated by lobbyists, of lax standards at DHS. *Security for Sale* develops usefully one particular example about which this Committee has recently held important hearings.

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[23] *Air Force Lifts Suspension of Boeing From Eligibility for Federal Contracts*, BNA-FCR, March 8, 2005, at 226.

[24] As much as any other suspension or nonresponsibility determination, the 20 month suspension of Boeing involved the issues that the industry raises to argue against nonresponsibility determinations by DHS or other agencies. The government had very few choices, but must reallocate work to Lockheed, and must forego needed competition in the field. And, it could be argued that the suspension harshly penalized a substantial contingent in the Boeing workforce, who suffered loss of work for the misconduct of a few officials.

[25] The Air Force twice waived the suspension, letting Boeing launch one rocket in 2003 for "compelling need" and another in 2004 for "national security." These amounted together to about a $100 million in work – nothing to sneeze at, but a small fraction of what Boeing lost overall. *Air ForceLifts Suspension of Boeing From Eligibility for Federal Contracts*, BNA-FCR, March 8, 2005, at 226.

[26] By Sarah Posner, in The American Prospect (Jan. 2006).

It describes how the company BearingPoint, formerly known as KPMG Consulting, obtained the eMerge2 contract. "In 2004, after signing on with Blank Rome, the company won three major DHS deals: a $229 million contract for its 'eMerge2' software, designed to integrate the financial management of the department's 22 component agencies [and 2 other contracts]."[27] Blank Rome was a Philadelphia lawyer-lobbyist firm extremely well connected to the DHS Secretary, Tom Ridge of Pennsylvania.[28]

There was reason from the beginning to be skeptical of the BearingPoint contract. At the very moment that DHS awarded the eMerge2 contract to BearingPoint, another federal agency, the Department of Veterans Affairs, was canceling a computer systems integration contract with BearingPoint for a Florida VA medical center after paying BearingPoint $117 million, and the State of Florida was canceling a similar $173 million with BearingPoint and Accenture.[29] More broadly, the technical procurement world grouped BearingPoint's eMerge2, as an enterprise resource project (ERP), as one of the "well-known ERP implosions" as to which "the history of failed ERP projects [are] dotting the federal landscape."[30]

It seems rather blithe for DHS just to walk away from that failure without asking some hard questions of BearingPoint and of its own project workforce. DHS has a painful history of material weaknesses in its component financial statements and financial management systems precisely in the context that the BearingPoint contract was to fix, as GAO reported to this Committee at its March 29, 2006 hearing.[31] DHS depended on that contract for a solution, having chosen the BearingPoint proposal over a rival proposal by established solution-provider IBM – and over simply implementing the internal solution of the Coast Guard's much-praised system. It seems BearingPoint's failure was apparent "within weeks,"[32] yet DHS, having stayed several years with BearingPoint, now finds itself having lost years in this key effort.

There are important lessons for "past performance" and responsibility of contractors at DHS. The contracting officers of the department evidently face pressure to go lightly upon contractors who engage in waste or abuse or simply fail badly. Moreover, the contracting officers seem insensitive to organizational conflicts of interest (OCI) – using a company during an early phase of a project, then awarding a lucrative deal to the same company during a later phase. That is why it would be beneficial for the IG or some other separate office to make sure that contractor abuses at DHS were entered in databases in appropriately serious terms, and, that contractor abuses elsewhere were also entered so as not to be overlooked during "past performance" and responsibility determinations. eMerge2 might have been avoided. In any event, its recurrence might be prevented. To paraphrase an old saying,[33] "history repeats itself – because people didn't put a record of it, the first time, in the 'past performance' database."

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[27] *Id.*
[28] *Id.*
[29] Paul de law Garza, *Critics Question Federal Contract*, St. Petersburg Times, Oct. 7, 2004
[30] Wilson P. Dizard III & Mary Mosquera, *ERP's Learning Curve*, TechNews (Feb. 16, 2006).
[31] Statement of McCoy Williams Before the Jt. Hearing of the Subcomm. On Government Management, Finance and Accountability of the House Government Reform Comm. and the Subcomm. On Management, Integration, and Oversight of the House Homeland Security Comm. (March 29, 2006).
[32] U.P.I., *DHS Financial Management Plan Collapses* (April 3, 2006).
[33] It is usually stated as: "history repeats itself because people weren't watching the first time."

IV. Broader Contractor Responsibility -- Civil Rights, Expatriates and Other Issues

For another set of issues, subject matters for contractor responsibility are suggested besides past performance involving waste, fraud and abuse.

A. Expatriates and Other Contractors Making a Foreign Shift

One issue concerns American contractors that make moves abroad. These may include business that are, technically, "expatriates" – American companies that reincorporate in foreign tax havens. A 2002 GAO report found out the following about such expatriates, notably including Accenture, which is a well-known contractor for DHS (notably in relation to the $10 billion U.S.-VISIT contract)

> On October 1 [2002], the General Accounting Office reported that $2.7 billion in Government contracts were awarded to expatriate companies during Fiscal Year 2001. Although only four companies were named as being incorporated in international "tax haven" countries, the total awarded to them was about 2.6% of the $102 billion awarded to the top 100 federal contractors, according to GAO's report. GAO also reported that the Department of Treasury has found a "marked increase" in the frequency, size, and profile of "inversion" transactions, which occur when a U.S.-based multinational company "restructures its corporate group so that after the transaction the ultimate parent of the corporate group is a foreign corporation." The four companies incorporated overseas were: (1) McDermott International, Inc., incorporated in Panama; (2) Foster Wheeler, Ltd., incorporated in Bermuda; (3) Accenture, Ltd., incorporated in Bermuda; and (4) Tyco International, Ltd., also incorporated in Bermuda. All of these contractors were on the top 100 publicly traded federal contractors list. See 44 GC ¶ 61. McDermott International was number 11 on the list, Foster Wheeler ranked 57, Accenture ranked 58, and Tyco International ranked 68, according to the report.

GAO Finds $2.7 Billion Awarded to Expatriate Companies in FY 2001, Gov't Cont., Oct. 9, 2002, at 387.

Of course, a series of enacted provisions, followed up by provisions in DHS regulations (the HSAR), have dealt with expatriate companies. As an article about DHS's regulations laid out:

> Prohibition Against Contracts with Corporate Expatriates--Section 835 of the Homeland Security Act of 2002 (the Act) prohibits DHS from contracting with "a foreign incorporated entity which is treated as an inverted domestic corporation." In short, the bar renders certain otherwise "domestic" entities that incorporated overseas after the Act's effective date (November 25, 2002) ineligible to receive DHS contracts.
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> *Treated as a matter of contractor responsibility*, HSAR 3009.104-70 implements the prohibition and requires the clause at HSAR 3052.209-70 to be inserted in all DHS solicitations and contracts; however, the exclusion is not mandatory. Requests for waivers submitted to DHS' Chief Procurement Officer (CPO) may be granted by the

> Secretary of DHS on a contract-by-contract basis if doing so would be "required in the interest of homeland security, or to prevent the loss of any jobs in the United States or prevent the Government from incurring additional costs that otherwise would not occur." See HSAR 3009.104-74(a). As part of the Homeland Security Act Amendments of 2003, however, this waiver authority was restricted so that the Secretary can only waive the prohibition upon making a determination that the waiver is required in the interest of homeland security (and for no other purpose). See Pub. L. No. 108-7, § 101(2), 117 Stat. 528 (2003). DHS will modify the waiver authority to be consistent with this amendment.
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> The exclusion applies only to a narrow group of entities. To fall within the exclusion, the entity must be incorporated overseas and treated as a "domestic inverted corporation" as that term is defined by the regulations (i.e., certain otherwise domestic entities whose place of incorporation was transferred off-shore after November 25, 2002). The exclusion is entirely unique in Government procurement. There is no analogous requirement in the FAR or any other agency-unique acquisition regulations applicable to such "corporate expatriates."

Richard P. Rector & William J. Crowley, *Homeland Security—The New Acquisition Regulations and Guidelines*, Gov't Cont., Feb. 25, 2004, p.80 (emphasis added). Not that the mechanism by which the expatriate provision works, is a DHS regulation (in the HSAR) as to contractor responsibility.

Even so, such companies that are technically expatriates are only one part of this issue. Without technically becoming expatriates by reincorporating overseas, companies raise diverse issues by other kinds of what might be called "foreign shifts" -- foreign takeovers, such as the Dubai Ports issue; or, moving their headquarters or their CEO abroad, such as Halliburton moving its CEO to Dubai. This testimony need not delve into the concerns raised in this way. The foreign shift suggests a diminished and even potentially conflicted commitment to American security concerns, which may become attenuated as the Halliburton CEO, for example, relocates away from America and learns to identify less with his former country and more with his chosen locus in Dubai (and close-at-hand customers there) and its regional perspective.

Moreover, in many ways, a foreign shift can lead to a changed, and possibly diminished, commitment to the laws that contractors are expected to carry out. For example, Title VII, and the related proscriptions of sex and race discrimination, envisage a strong effort by contractors to hire women and minorities at all levels, especially at the top. It is not at all clear that Halliburton's new CEO headquarters in Dubai is in a vicinity where he will vigorously recruit American (or any) women for top posts. More likely, the Dubai-based CEO may develop a version of the corporate glass ceiling.

B. The "Contractor Responsibility" Rule

The government-wide "contractor responsibility" rule, promulgated during the Clinton Administration and rescinded in the Bush Administration, cited noncompliance with civil rights, tax, environmental, and labor laws as a basis for finding an awardee nonresponsible. As for whether to have such a rule on a government-wide basis, it is unnecessary to go back through all

the arguments made in the period of the late 1990s and early 2000s. Before the rule was promulgated, the Administration made a strong record in its favor. Moreover, while this was not so noticed in the din of debate, as the consideration of the rule went along, a sound conception developed about how best to draft and implement it, so that lawyers were able to advise their contractor clients how the vast majority of them could live quite easily with the rule:

> The commentary emphasizes that the government is not so much concerned by contractors who may have individual violations at some point in their histories as it is by contractors who have *a recent history of "repeated, pervasive and significant violations."* Moreover, the regulations encourage contractors to institute ameliorative actions when violations are found, instructing contracting officers to consider as positive evidence of responsibility efforts by companies to comply with administrative settlement agreements that reflect an effort to ameliorate past violations.

Anthony H. Anikeeff, *Avoiding the "Blacklisting" Minefield*, Fed. Law., April 2001, at 42 (emphasis added). In other words, a big company which lost some limited number of race and sex discrimination cases by individuals, some not even recent, would point out that this did not show a recent history of "repeated, pervasive and significant" violations. Even if the company had resolved some large-scale issue with the EEOC or other administrative body, it could point out its successful effort to comply afterward, as positive evidence of responsibility. In contrast, the systematic and hardened discriminator, with a pattern of extensive recent discrimination and no sign of effort at amelioration or improvement, would be challenged to explain its responsibility.

Putting aside the issue not present here of a government-wide rule, it is worth considering whether there is some greater reason to having some version of a "contractor responsibility" rule just for the Homeland Security Department. As just discussed, there is no government-wide expatriate rule, but there is such a rule for DHS, in the department's acquisition regulation, the HSAR. Among other factors, the spirit of homeland security suggests a particular type of idealistic patriotism, with which the notion of dropping American corporate citizenship and reincorporating in a foreign tax haven seems peculiarly at odds. Moreover, Americans are asked to undertake the effort of creating a new department, and funding its large and growing programs, to meet potentially great perils. Furthermore, DHS contracts may well prove more lucrative than other contracts; they tend to be less commercial in nature, less competitive in allocation, and lack the longstanding cost controls of more established fields. All that seems to warrant asking something of the contractors who received that large-scale and especially lucrative funding, namely, to maintain an identification with this country.

Similarly, the spirit of homeland security, and the demand upon Americans to fund its large and growing programs, is at odds with a business mentality that would consistently violate the laws embodying national ideals – like civil rights, environmental, and labor laws. Contractors ought not take, with one hand, DHS's especially lucrative contracts, and, with the other hand, refuse to invest the relatively modest sums needed to comply with federal laws. It is understandable that the Congress more willingly enacts large and growing appropriations for DHS if it provides that the money will not go into the pockets of those systematically violating the civil rights laws and similar laws.

Moreover, there may be some value in having one department – DHS – serve as a test site for a version of the contractor responsibility rule in its departmental regulations (the HSAR), rather than either having no such rule or going to a government-wide rule. There has been dispute over just how extensively any such rule would affect contractors. Proponents have argued that a large majority of businesses do, in fact, obey these federal laws and need have no concerns, and that it is only a rather small handful of corporate "outlaws" with exceptional records of scorning compliance with federal laws. Only because that handful has taken over a disproportionate role, on this issue, in the business lobby, is a corporate responsibility rule made to seem problematic. By having a DHS rule, this debate would be resolved by concrete experience. If the large majority of DHS contractors do not experience particular difficulties with such a rule, as the rule's proponents suggest, then that could be taken into consideration as to expansion to other departments. On the other hand, the expatriate rule did not immediately expand to other departments, showing that a contractor responsibility rule may last, applying just to DHS.