

STATEMENT OF
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BEFORE THE
COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
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Chairman Towns, Ranking Member Issa, thank you for this opportunity to appear before the Committee to discuss both the General Services Administration's (GSA's) Suspension and Debarment Program and GSA's management of the Excluded Parties List System (EPLS).

I assumed the position of GSA Senior Procurement Executive in June of 2000 after having served as the DoD Deputy Program Manager for the Pentagon Renovation. At that time my title was Deputy Associate Administrator for Acquisition and I was part of the Office of Governmentwide Policy in GSA. The Acquisition Office had both internal responsibility for managing GSA's Suspension and Debarment Program and external responsibility for managing the EPLS. Following the passage of the Services Acquisition Reform Act of 2003 (SARA), authored by this Committee, GSA established, in June 2004, the Office of the Chief Acquisition Officer (OCAO) and I assumed the duties of Deputy Chief Acquisition Officer and Senior Procurement Executive. All of the functions of the Acquisition Office transferred to the new OCAO. Because the Chief Acquisition Officer must be a political appointee under SARA, GSA's Chief of Staff was also designated GSA's first Chief Acquisition Officer. In February 2005, Ms. Emily Murphy was appointed by the President to serve as GSA's first Chief Acquisition Officer. In September 2005 I had the opportunity to assist Ms. Deidra Lee in developing and setting up the Information Technology Service in the newly created Federal Acquisition Service. In January 2008 I returned to the Office of the Chief Acquisition Officer following a 6 month detail to the Senate Homeland Security Committee.

We note that the Government Accountability Office (GAO) Draft Report¹ covers a multi-year time period. The database of GSA's EPLS records that GAO reviewed apparently extended from October 2001 to January 2008. See Draft Report, App. I Scope and Methodology. In its Report GAO cites only 15 instances where mistakes appear to have been made. In a number of cases the errors were the direct result of Contracting Officers not complying with existing explicit guidance to check EPLS prior to making awards. In several other cases, the identities of the companies were entered incorrectly and in one case the company in question failed to comply with the terms of their administrative agreement. Any mistakes are very serious but given that the Government, during that seven year period, awarded over 70 million contract actions, the failure rate was extremely low. But we will continue to strive to do better.

Suspension and Debarment is not a punishment. Instead, suspension and debarment is a prophylactic measure intended to prevent the Government from doing business with companies or individuals who demonstrate a lack of present "responsibility," a term of art in use in the government since at least the 1950s under

¹ Government Accountability Office Report to the Chairman of the Committee on Oversight and Government Reform, House of Representatives, entitled: *Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds*, (GAO-09-174), February 2009. ("Draft Report").

the Armed Services act in use in the government since at least the 1950s under the Armed Services Procurement Regulation (ASPR) and the Federal Procurement Regulation (FPR), the forerunners of today's Federal Acquisition Regulation (FAR). We have, over time, expanded the definition of responsibility to include what a company does corporately, not just on government contracts. We have also adopted a government-wide policy prohibiting the placement of orders against contracts where the contractor has been suspended or debarred. We do not require the termination of existing contracts because a company has been suspended or debarred unless a proper determination is made under the FAR.²

The present responsibility of a company seeking to do business with the Government is determined prior to award.³ A contracting officer is required, among other things to check EPLS to determine whether a company has been suspended or debarred, one of a number of elements that make-up a responsibility determination. In addition, as a second check within the system, a company is required to certify that it is not suspended or debarred when submitting its offer to the government.

The methods by which we track and share information concerning the suspension or debarment status of a company have evolved over time. The EPLS was initially managed by GSA as a paper-based system. GSA then managed EPLS as an in-house electronic system within GSA's network and entered data on behalf of other agencies. EPLS is now a part of an interactive website managed as part of the Integrated Acquisition Environment (IAE), with GSA as the managing partner for its customer agencies. To reiterate, GSA does not manage EPLS or IAE by itself. GSA manages these programs on behalf of all federal agencies and has an interagency group that decides what changes are to be made and what the budget for managing EPLS and IAE will be. The budget is then paid for by each agency out of its existing funds based on a *pro-rata* usage basis. This process ensures that both EPLS and IAE are responsive to the needs of its customer agencies.

Today, agencies enter data directly into EPLS concerning the companies they suspend or debar, and they are responsible for updating that information as appropriate. There remain a number of concerns about how to make the data more accurate. For example, companies can be identified in a number of ways: by name, address, taxpayer identification number, social security number, DUNS number, CAGE code, trading name, etc. As you can see, there are a number of ways a company or individual can be identified, and each poses its own limitations and difficulties. In order to address these concerns we did agree to use the DUNS number as a required means to identify companies. However, using a DUNS

² FAR 9.405-1 makes the termination of existing contracts a matter of agency discretion. For instance, from a policy perspective, the basis for terminating a contract as a result of a suspension or debarment is if the action taken involved the specific contract in question and the contract is void *ab initio*, or it would otherwise serve the interests of the Government to terminate the contract.

³ Pursuant to FAR 9.405(d) the Contracting Officer checks the EPLS twice – once after opening of bids or receipts of proposals and then again immediately before award.

number, does not present a universal solution because there will be situations where DUNS do not apply.

In 2002 IAE developed the Online Representative and Certification Application (ORCA), as an online database to ensure more accurate data in this area and others. IAE mandated the use of ORCA on or after January 1, 2005. As its name implies, ORCA stores certifications and representations by contractors seeking to do business with the Government as well as those currently doing business with the Government. One of the required certifications is that the contractor is not currently suspended or debarred. Contractors are required to update the information in ORCA at least annually or as the contractor's information changes, whichever comes first. Contracting Officers are required to check ORCA in all cases where they are awarding a contract. Contracting Officers are not required to check ORCA before placing orders against Indefinite Delivery Indefinite Quantity contracts or Blanket Purchase Agreements.⁴ A contractor's failure to keep the certifications and representations current is a basis for finding that a contractor is not responsible and may also lead to a prosecution for making false statements to the Government.

FAR 9.105-2, requires a contracting officer to make a responsibility determination prior to making an award. Checking the EPLS is part of making that responsibility determination. FAR 9.105-1(c)(1).

When entering data into EPLS, existing guidance in *EPLS Debar Manual Version 3.7*, dated December 19, 2008, is linked to the online Debar Entry Form, which requires that certain information, including the name, address and DUNS number of the individual or company be entered into EPLS.

Federal procurement officials clearly have the responsibility to ensure that contractors and individuals suspended or debarred are not awarded any new business in accordance with the FAR, when those entities are suspended or proposed for debarment. Individuals or entities that are the subject(s) of administrative action are provided clear written instructions. For example, the letters from the agency Suspension and Debarment Official tell them that when their name is placed on EPLS they: 1) may not submit offers on Federal contracts, 2) may not be awarded any Federal contracts, 3) may not conduct business with the Federal Government as an agent or representative of a Federal contractor, and 4) may not receive a subcontract from a Federal contractor equal to or in excess of \$30,000. Among other things, they are also told any affiliation or relationship to any organization doing business with the Federal Government will be carefully examined. This is clear and not subject to interpretation. If they violate these terms,

⁴ In a Federal Register Notice, dated February 27, 1995, concerning a Federal Information Resources Management Regulation amendment, it states "GAO has also previously suggested that the ordering procedures for low dollar value items be less stringent than the procedures which apply to high dollar value orders." (60 FR 10508-01. Feb. 27, 1995). As an example, a micro purchase threshold of \$2,500 was incorporated into the guiding principles to alleviate this concern.

that is additional grounds for further independent administrative action by the Suspension and Debarment Official.

EPLS is scheduled to transition in 2010 to a new contract called Architecture and Operations Contract Support (AOCS). It is GSA's intent that AOCS will be awarded this year and will replace the individual contracts that currently exist for each program under the Integrated Acquisition Environment. AOCS will greatly simplify the information technology supporting these programs, which will make it significantly easier to share information between them and to provide automated alerts when a suspended or debarred contractor is being considered for a contract.

Mr. Chairman, Ranking Member Issa, I wish I could tell you that in the future there will never be another instance where a company that is suspended or debarred will receive a contract or order during the period of suspension or debarment. I cannot. We are working with GAO to expeditiously implement their recommendations. However, it is worth noting that GAO did not find any systemic errors or problems.

We provide policy that is clear on the requirements both for entering the data and then on checking the EPLS before making contract awards. We provide training to all Contracting Officers on the requirements on a number of occasions during their training to be Contracting Officers. Many agencies conduct post award reviews where they check to make sure that applicable procedures, including checking the EPLS, were followed. In GSA, for example, we instituted Procurement Management Reviews in 2004 to sample our contracting offices to ensure compliance.

The system is not foolproof and there is no way to make it foolproof without stopping the contracting process altogether. For example, were we to have a government-wide contract writing solution (including orders), such a system could be programmed to ensure that the check was made with EPLS before award. However, even this solution would not preclude an award to an individual or company who was suspended and debarred, if the data was not entered correctly, or if the individuals or company did not have a DUNS number at the time of its suspension or debarment, a contract might still be awarded to an individual or company that was suspended or debarred. In those cases where a company or individual is determined to "beat the system" by either not complying with the terms of an administrative agreement, by falsely certifying its status or by changing its name, etc., there is not much we can do except to catch them after the fact and institute appropriate action.

Mr. Chairman, Ranking Member Issa, that concludes my prepared remarks, The work of the GAO and of this Committee in this area have helped raise awareness of the problems and will in turn promote the implementation of the Report's recommendations and future program enhancements. I and my GSA colleagues would be pleased to answer any questions the Committee may have.