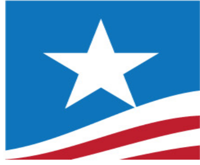

Council of the INSPECTORS GENERAL on INTEGRITY and EFFICIENCY

IMPROVING THE ABILITY OF INSPECTORS GENERAL TO DETECT, PREVENT, AND HELP PROSECUTE CONTRACTING FRAUD

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Statement of

J. Anthony Ogden

Inspector General

U.S. Government Printing Office

Chairman of the Legislation Committee

Council of the Inspectors General on

Integrity and Efficiency

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Subcommittee on Contracting Oversight

Committee on Homeland Security

and Governmental Affairs

U.S. Senate

Good afternoon, Madame Chair and Ranking Member Collins, and members of the Subcommittee. Thank you for inviting me to testify on the role of the Inspectors General in detecting, preventing, and helping prosecute contracting fraud. I am the Inspector General at the U.S. Government Printing Office but I am here today representing the Council of the Inspectors General on Integrity and Efficiency (CIGIE) in my capacity as the Acting Chairman of the Legislation Committee. On behalf of the CIGIE, I would like to express our appreciation of Senator McCaskill for her unwavering support of the Inspector General community and congratulate her on being the first Senator to lead this new Subcommittee on Contracting Oversight.

My testimony will focus on the general views of the Inspector General (IG) community regarding the major recommendations proposed by Legislative Committee of the National Procurement Fraud Task Force ("Task Force") outlined in a June 9, 2008, White Paper. The Task Force was formed by the Department of Justice's Criminal Division in October 2006 as a partnership among Federal agencies charged with the investigation and prosecution of illegal acts in connection with government contracting and grant activities, and includes many IGs as members.

Recommended Task Force Changes Already Enacted

We are happy to report that some significant recommendations proposed by the Task Force to aid in the prevention, detection, and prosecution of procurement fraud have already been enacted. For example, on November 12, 2008, the Federal Acquisition Regulation (FAR) Council issued a Final Rule, which became effective on December 12, 2008, that imposes a mandatory requirement on Federal government contractors to disclose to a relevant Office of

Inspector General whenever they have "credible evidence" of certain criminal violations and civil False Claims Act violations.

Furthermore, this Final Rule also requires contractors to disclose significant overpayments by the Government and for the majority of Federal contractors to establish an ethics and internal control program. Failure to disclose fraud violations and significant overpayments may result in suspension and debarment. We believe these changes will help the Inspector General community detect potential contractor fraud at an early stage.

The Inspector General Reform Act of 2008 (IG Reform Act), which became effective October 14, 2008, also included several changes recommended by the Task Force. For example, the IG subpoena authority language was amended to clarify that, apart from documentary evidence, its reach includes information and data in any medium (including electronically stored information, as well as any tangible things such as hard drives and computers). In addition, the IG Reform Act amended the Program Fraud Civil Remedies Act (PFCRA) of 1986 to allow IGs from Designated Federal Entities to use PFCRA authority.

Although these changes are encouraging, many other Task Force recommendations have not been acted upon. To gauge the support of the IG community for some of the remaining recommendations, the CIGIE, through its Legislation Committee, conducted an online survey of its 65 Inspectors General members.

Survey Results

Our survey covered three general Task Force recommendation areas:

1) Inspector General Subpoenas for Compelled Interviews; 2) Reform of the Program Fraud Civil Remedies Act; and 3) Other General Recommendations, including establishing a National

Procurement Fraud Database and allowing the use of Social Security numbers to identify individuals in the Excluded Parties List System.

A. Inspector General Subpoenas for Compelled Interviews

The White Paper proposed that the current IG subpoena authority include the authority to compel witnesses to appear at interviews in connection with OIG investigation, audits, and other reviews. This proposal is similar to the recent limited authority provided to IGs under Section 1515(a) of the American Recovery and Reinvestment Act of 2009 to "interview any officer or employee of the contractor, grantee, subgrantee, or agency regarding such [stimulus funds] transactions." The proposed subpoena authority would not include the power to compel witness testimony.

The survey results show overwhelming support for this enhanced IG subpoena authority.[1] Out of the 56 IGs that responded to this survey question, 95% supported the idea of expanding the IG subpoena authority to include compelled interviews, while 5% were opposed. Supporters cite the need to have access to contractor employees, ex-employees, or other third parties to discuss aspects of a civil or criminal investigation still in development.

In addition, this authority is necessary to be able to ask questions regarding voluminous records that companies serve in response to a subpoena that are not self-explanatory. Finally, supporters note that this authority would allow their offices to provide a more robust investigative record to Department of Justice (DOJ) prosecutors to make a decision of whether or not to proceed with a case, and if not, be better prepared for an administrative action.

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[1] Most respondents understood that the proposed IG subpoena authority would include the authority to compel testimony.

A small minority opposed the proposal because they believed it included the power to compel testimony, the need for which has not yet been adequately demonstrated. For example, they noted that, in criminal cases, IGs may work with a DOJ prosecutor who can issue a grand jury subpoena for testimony and that in civil cases a DOJ trial attorney can issue a civil investigative demand.

B. Reform of the Program Fraud Civil Remedies Act (PFCRA)

In 1986, Congress enacted the PFCRA to enable agencies to recover losses resulting from false claims and statements where the claims are $150,000 or less. Until recently, only Executive departments, the military, presidentially appointed IGs, and the United States Postal Service had PFCRA authority. IGs that were appointed by agency heads of Designated Federal Entities were not created until 1988 and therefore were not initially covered by the 1986 PFCRA law. On October 14, 2008, the Inspector General Reform Act of 2008 amended PFCRA to provide these IGs PFCRA authority, but did not extend the authority to Legislative Branch agencies.

Our survey focused on the major Task Force recommendations regarding the use of PFCRA authority, the increase of PFCRA jurisdictional and civil liability amounts, agency retention of PFCRA recoveries, and the revamping of PFCRA procedural requirements.

PFCRA Authority Use. To establish a baseline of PFCRA authority use by presidentially appointed IGs to date, we asked whether IGs had used the PFCRA authority and how many cases and recoveries they had tallied during the past five years. The survey results show that very limited PFCRA authority use has occurred, at least during the last five years. Eighteen presidentially appointed IGs answered that they had used PFCRA authority in the past and had

handled 5 or less cases in the past five years; 1 had handled more than 10 cases in the past 5 years. Sixteen reported recovering $100,000 or less in the past five years, 1 had recovered between $100,001 and $500,000, and 1 had recovered between $1 million and $5 million.

Some respondents said that they do not use the PFCRA authority because the procedural requirements are cumbersome and too resource intensive for cases of $150,000 or less. In addition, some IGs noted that agencies use better administrative remedies for monetary penalties available under their program oversight, such as authority under the Social Security Act under 42 U.S.C. §1320a-8 or the Civil Monetary Penalty Law under 42 U.S.C. § 1320a-7a that applies to Medicare and Medicaid. Finally, other respondents suggested that PFCRA authority should also be extended to Legislative Branch agencies.

PFCRA Jurisdictional and Civil Liability Limits. Our survey asked whether the PFCRA jurisdictional limit under 31 U.S.C. § 3803(c)(1) should be raised from the current $150,000 to $500,000. Thirty-five IGs responded and 80% supported the increase while 23% did not. In addition, 36 IGs responded to the question of whether the civil penalty limit under 31 U.S.C. § 3802(a)(1) should be increased from the current $5,500 to $15,000, with 78% in favor and 9% opposed. Two respondents suggested the amount should be increased in accordance with the view of DOJ's Commercial Litigation Branch, Fraud Section, that the PFCRA civil penalty amount should be the same as the maximum penalty under the False Claims Act, which is currently $11,000.

Retention of PFCRA Recoveries. The Task Force noted that "one obstacle for agencies in PFRCA actions is the non-reimbursable costs associated with pursuing a PFCRA action, including investigative fees, and costs of discovery and litigation." Out of the 36 IGs who responded to

whether the PFCRA should be amended to allow agencies to retain PFCRA recoveries to the extent necessary to make the agency whole, 92% supported this proposed amendment.

PFCRA Procedural Requirements. In its White Paper, the Task Force noted that PFCRA imposes burdensome procedural requirements that agencies do not consider worth the cost of pursuing. For example, currently, PFCRA limits the authority to refer allegations to DOJ of false claims or statements to an agency "reviewing official." This "reviewing official" is the only one who can refer allegations that have been investigated by IGs as the "investigating official" to DOJ to determine if the agency can go forward with an administrative PFCRA case.

The Task Force recommended amending the PFCRA to add a definition of "proposing official" to include the agency "reviewing official" as well as the "investigating official" to allow a much more efficient process by IGs: IGs investigate, refer allegations to DOJ, and, if approved, are then able to litigate the claims before agency "presiding officials." All 35 IGs who answered this question support this proposed PFCRA amendment.

In the same vein, the Task Force recommended amending the PFCRA definition of "presiding officer" because the statute requires that this official be an Administrative Law Judge (ALJ) or someone appointed in a manner similar to ALJs. Because some agencies don't have ALJs, the Task Force recommended amending the definition of "presiding officer" to include members of Agency Board of Contract Appeals or military judges in military organizations. Out of the 36 IGs who responded, 89% supported this proposal.

C. Other Recommendations

The Task Force also recommended three specific ideas to generally prevent and detect procurement fraud.

1. *National Procurement Fraud Database.* The Task Force recommended the creation of a national procurement fraud background check system, the "Procurement Inquiry Check System-PICS." PICS would be used by Federal, state, and local procurement officials prior to authorization of contract actions involving Federal funds. The database would be developed and maintained by the General Services Administration (GSA) and could be an expanded version of the Excluded Parties List System (EPLS), a Web-based database maintained by GSA of businesses or individuals that have been suspended or debarred by Federal agencies.[2] The PICS database would include information on debarred and suspended contractors from all participating Federal, state, and local government entities engaged in procurement and non-procurement activities using Federal funds.

Forty-two IGs answered this survey question and 93% supported the idea of a national procurement fraud database. Some respondents suggested that it would be more efficient and cost effective for PICS to be an expanded version of EPLS given that EPLS is a mandatory database and could be upgraded to include links to state and local government online databases on suspended/debarred contractors or individuals.

Some respondents commented, however, that the Government Accountability Office (GAO) had recently completed a report on the EPLS that found ineffective GSA management of the EPLS database and control weaknesses by agencies that provide the information that goes into the database. These shortcomings caused some excluded businesses and individuals to

[2] Under the FAR, Federal agencies are required to provide information about suspended or debarred companies or individuals to EPLS within five working days after exclusion becomes effective.

continue receiving federal contracts. Any consideration of PICS as an expanded EPLS should take the GAO recommendations into account when considering this proposal.[3]

2. *Allow Use of Social Security Numbers (SSN) to Identify Individuals in the EPLS.* The Task Force recommended that an exception be made to Section 7 of the Privacy Act of 1974, which provides that the Federal government may not deny any right, benefit, or privilege based on the refusal of an individual to provide his or her SSN, to enable agencies to properly identify individuals who have been debarred or suspended in the EPLS. Currently, the FAR requires agencies to provide information to the EPLS about excluded businesses or individuals, including name and address, and the contractor's DUNS number, a unique nine-digit identification number assigned by Dun & Bradstreet. If available and disclosure is authorized, agencies should also enter an employer identification number, other taxpayer identification number, or a SSN if excluding an individual.[4]

Of the 41 IGs that responded, 76% supported this proposal, while 24% opposed it. Some who opposed it cited privacy concerns concerning the use of SSNs. One respondent noted that a unique identifier other than the SSN should be considered given the requirements of Office of Management Memorandum M-07-16, which requires that agencies reduce the use

[3] *See* GAO-09-174, February 25, 2009, accessible at http://www.gao.gov/new.items/d09174.pdf.

[4] It should be noted that the EPLS database can be searched by "Name" and "SSN." According to the EPLS Privacy Notice, the EPLS includes information such "as Social Security Numbers, Employer Identification numbers or other Taxpayer Identification Numbers, if available and deemed appropriate and permissible to publish by the agency taking the action." In addition, while the information available "on the public EPLS has been deemed publicly accessible. . .[t]he EPLS does not display SSNs or an excluded individual's residential information to public users." *See* https://www.epls.gov.

of SSN and explore alternatives for their use.[5] Another participant suggested that a Tax Identification Number for individuals other than an SSN, which is accessible from the Internal Revenue Service, should be required for individuals who do business as individuals with the Government.

3. Extending Criminal Conflict of Interest Provisions under 18 U.S.C. §208 to Contractors Who Perform Agency Acquisition Functions. The Task Force noted that the Government is increasingly outsourcing the acquisition process to contractors who may have financial conflicts of interest during the performance of their functions. Although some of these conflict issues may be addressed through contractual clauses with contractors, the Task Force believes that contractors who perform critical acquisition services similar to what other federal employees perform should be under the same criminal conflict of interest prohibition under 18 U.S.C. § 208. Therefore, the Task Force recommended amending the definitions in 18 U.S.C. § 202 to include contractors and consultants, and their employees, when they perform "key" acquisition functions for federal agencies. Ninety-five percent of the 42 IGs that responded supported this proposal.

4. *Appropriations for IG Attorney Details to DOJ.* The Task Force proposed funding to detail IG lawyers to DOJ's litigating components in order for those lawyers to prosecute or assist in prosecuting criminal or civil procurement fraud cases. The proposal is intended to provide some funds, at least in the first year, to facilitate details by reimbursing participating IGs.

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[5] This OMB memo is accessible at http://www.whitehouse.gov/omb/memoranda/fy2007/m07-16.pdf.

Currently, authority exists for details to DOJ for service under the Special Assistant United States Attorney program, and under other authorities.

Out of the 43 respondents, 56% supported appropriations for DOJ to fund and facilitate IG personnel details to DOJ to litigate procurement fraud cases; 9% supported providing appropriations directly to the IGs or another agency to act as a clearinghouse; 7% opposed the proposal; and 28% had no opinion.

Finally, some survey respondents suggested other recommendations to combat procurement fraud. I'd like to briefly address two of those recommendations.

First, some respondents noted that recent procurement fraud investigations have indicated that owners or individuals that control contractors or manage federal contracts may have criminal or civil fraud backgrounds that are not required to be disclosed under current FAR certification requirements. Currently, the FAR requires contractor certifications concerning criminal convictions or civil fraud judgments limited to three-years prior to the contract submission offer.

These respondents recommended requiring certification for all Federal contracts that the contractor has no knowledge of any convictions of civil or criminal fraud for owners, officers, or managers involved in the contract, with no time limit on the convictions or civil fraud judgments. Such certifications would provide a basis for criminal or administrative actions when individuals fail to disclose their criminal or civil fraud backgrounds and would allow agencies to prevent awarding contracts to contractors that are owned or managed by individuals with fraud backgrounds.

Second, survey respondents noted that the FAR does not apply to Legislative Branch agencies. Because Legislative Branch agencies operate under different acquisition regulations, they may be at a disadvantage in trying to prevent and detect procurement fraud, particularly if FAR changes related to the prevention and detection of procurement fraud are not reflected in the agency's acquisition regulations. These respondents recommended that consideration should be given to requiring Legislative Branch agencies to adopt FAR provisions related to the prevention and detection of procurement fraud in their acquisition regulations.

This concludes my testimony. I would be pleased to address any questions you may have. Thank you again for the opportunity to testify before the Subcommittee.