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**BEFORE THE**

**AD HOC SUBCOMMITTEE ON CONTRACTING OVERSIGHT**

**COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS**

**U.S. SENATE**

**April 21, 2009**



Good afternoon Chairman McCaskill, Ranking Member Collins, and members of the subcommittee. Thank you for inviting me to testify today at this first hearing of the Ad Hoc Subcommittee on Contracting Oversight about statutory tools to enhance the critical oversight work of Inspectors General. For my testimony, I will draw on the work of the Legislation Committee of the National Procurement Fraud Task Force (Task Force), which I co-chair with my colleague, the Honorable Brian D. Miller, Inspector General of the General Services Administration and vice-chair of the Task Force.

First, let me express my appreciation to Senator McCaskill for her support of the Inspector General (IG) community and her efforts to ensure that we have the tools necessary to conduct meaningful oversight. I applaud the creation of this Subcommittee to oversee Government contracting. With Congress, the Administration, and the American taxpayer demanding unprecedented levels of transparency and accountability over Government spending, the work of this Subcommittee adds a critical perspective in assessing one aspect of that spending, the federal acquisition system.

### **Examining Federal Procurement Practices**

Contractor performance has become essential to accomplishing almost every aspect of agency missions, including emergency preparedness, response, recovery, and mitigation. The federal government spends approximately \$500 billion annually for a wide range of goods and services to meet mission needs. The federal procurement system consists of those processes, procedures, and personnel with the responsibility for the purchase of goods and services necessary to outfit the war fighter, protect our homeland, conduct medical research, control crime, and provide other essential services to the taxpayer.

During Fiscal Years 2000-2008, the value of procurement actions has grown significantly, from \$208.3 billion to \$517.8 billion. This year, the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5 (Feb. 17, 2009) (Recovery Act) will pump an additional \$787 billion into the economy, primarily through federal contracts, grants, and loans. The Department of Homeland Security (DHS) spends almost 40% of its annual budget through contracts. In the fiscal year 2009 annual cycle, Congress appropriated approximately \$40 billion to DHS and DHS received another \$3 billion for stimulus spending.

At the same time that funding spent through contracting increased considerably, federal agencies' ability to detect and prevent fraud has been diminished. A combination of rapidly increasing procurement activity and greater reliance on contractors to perform essential services, including assisting with acquisition planning, defining requirements, drafting statements of work, evaluating proposals, and source selection, inhibits management oversight of contractors. Contracting officers frequently lack relevant information, such as unreported conflicts of interest among contractor employees, to assess a company's responsibility and ability to successfully perform on time and within budget.

A high performing acquisition workforce is fundamental to DHS' ability to accomplish its missions. Commitment to human capital management, integration and alignment of human capital approaches with organizational goals, and investment in people are critical success factors. Changes in the federal acquisition environment have created significant challenges to building and sustaining the acquisition workforce across the federal government.

The department has identified acquisition workforce staffing levels, particularly those of contract specialists, as a serious challenge and has established an acquisition intern program to address the need, among other initiatives. As we reported in November 2008, in *OIG-09-08 Major Management Challenges Facing the Department of Homeland Security*, DHS has made modest progress in building and maintaining a skilled acquisition workforce. Previously, we reported that budget increases had allowed the department to fill many acquisition staff positions. However, there are still workforce challenges across the department. In addition to the department-wide intern program, some components have initiatives to develop and retain a workforce capable of managing complex acquisitions; in the interim, they must still rely on contractors to fill key positions in the acquisition process.

Just as agency procurement offices across the Government face a shortage of experienced staff so do OIGs. In order to be most effective in contracting oversight, we need a mix of auditors, inspectors, and investigators with acquisition experience. Unfortunately, we compete for these resources with the very same offices for which we have oversight responsibilities. As we continue to grow the DHS OIG, one area of focus is to add experienced acquisition professionals to our audit and inspection teams. Madame Chairman, as you stated in your March 19<sup>th</sup> open letter to the acquisition community, "the growth in contracting has outpaced oversight," with problems occurring "at every stage of the contracting process . . . . The contracting workforce is no longer adequate to handle the volume and complexity of the . . . workload and the lack of oversight has been an invitation to waste, fraud, and abuse." These concerns are exacerbated by the desire to promptly spend the \$787 billion made available through the Recovery Act.

Against this backdrop, the recommendations of the Task Force Legislation Committee discussed below take on added urgency.

### **National Procurement Fraud Task Force**

In October 2006, the Deputy Attorney General formed the Task Force, a partnership among Federal agencies charged with investigating and prosecuting illegal acts in connection with Government contracting and grant activities. Task Force principals include the Federal law enforcement community, 35 Offices of Inspectors General (OIG), and the litigating arms of the United States Department of Justice (DOJ) and United States Attorneys offices. Chaired by DOJ's Acting Assistant Attorney General for the Criminal Division, the Task Force promotes the early detection, prevention, and prosecution of procurement and grant fraud, and associated corruption.

The Task Force has established the following objectives:

- Increase coordination and strengthen partnerships among OIGs, other law enforcement agencies, and DOJ to more effectively address procurement fraud;
- Assess existing efforts to combat procurement fraud and work with audit and contracting staff both inside and outside Government to detect and report fraud;
- Increase civil and criminal prosecutions and administrative actions to recover ill-gotten gains resulting from procurement fraud;
- Educate and inform the public about procurement fraud;
- Identify and remove barriers to preventing, detecting, and prosecuting procurement fraud;
- Encourage greater private-sector participation in the prevention and detection of procurement fraud; and
- Evaluate and measure the performance of the Task Force to ensure accountability.

Areas of focus include defective pricing or other irregularities in the pricing and formation of contracts, product substitution, misuse of classified and procurement sensitive information, false claims, grant fraud, labor mischarging, bid rigging, false testing, false statements, accounting fraud, contract fraud associated with overseas contingency operations, and ethics violations, particularly conflict of interest.

The Task Force has effectively bolstered the investigation of fraud, waste, and abuse in federal contracts by making significant progress toward its objectives. Coordination within the law enforcement community has multiplied. The Task Force has significantly increased training opportunities for OIG agents and auditors regarding the investigation and prosecution of procurement fraud cases. Since the creation of the Task Force, over 300 procurement fraud cases have resulted in criminal convictions. In addition, DOJ, with the assistance of OIGs, has recovered more than \$362 million in civil settlements or judgments arising from procurement fraud matters since the start of the Task Force.

As a result of proposals from the Task Force, the Federal Acquisition Regulation (FAR) has been modified to require contractors to establish business ethics programs, maintain internal controls to prevent and detect improper business conduct, and notify the Government, including OIGs, of significant overpayments and credible evidence of certain criminal and civil violations of fraud statutes.

To achieve its objectives, the Task Force created nine working committees with representatives from multiple agencies to address common issues such as training,

intelligence and classified contracts, information sharing, private sector outreach, suspension and debarment, grant fraud, international procurement fraud, and legislation.

## **Task Force Legislation Committee**

The Legislation Committee, which I co-chair with my colleague, Brian Miller, Inspector General at the General Services Administration, has considered an array of potential legislative and regulatory reforms to reduce the risk of procurement fraud in critical federal programs and activities and to enhance the Government's ability to detect, prevent, and prosecute procurement fraud. Three key areas of reform have been targeted:

- Improving ethics and internal controls among contractors;
- Improving the prosecution and adjudication of procurement fraud matters; and
- Improving the Government's ability to prevent and detect procurement fraud.

In June 2008, the Task Force Legislation Committee submitted a "White Paper" to the Acting Assistant Attorney General for the Criminal Division containing numerous legislative proposals and ideas to significantly aid in preventing, detecting, and prosecuting procurement fraud, thereby reducing its risk in the federal sector. I strongly endorse the White Paper to this committee's consideration. Several of the proposals have been enacted already, such as the clarification of OIG subpoena authority to include tangible things and electronic evidence (section 9 of the Inspector General Reform Act of 2008, Pub. L. No. 110-409 (Oct. 14, 2008)) and extension of the Program Fraud Civil Remedies Act to designated federal entities with OIGs (section 10 of the IG Reform Act). I personally thank Congress for its efforts in passing these needed reforms. Several other proposals in the White Paper have been implemented through regulatory changes such as requiring contractors to notify the Government of significant overpayments.

## **Proposals for Reform**

### ***Contractor Ethics and Internal Controls***

As discussed earlier, the Task Force successfully guided a change to the FAR requiring contractors to establish codes of business conduct for their employees and subcontractors performing work for the Government. The requirements include periodic compliance reviews; employee avenues for reporting suspicious conduct, such as posting of an applicable OIG hotline number; regular and recurring internal audits; disciplinary action for misconduct; mandatory reporting of certain violations and significant overpayments to the contracting officer and OIGs; and full cooperation with Government audits and investigations.

Going forward, we agree with the recommendations of the Office of Government Ethics (OGE), the Government Accountability Office (GAO), and others that service contractor employees who frequently work alongside Government employees should be subject to

the same conflict of interest rules as Government employees. Issues such as financial conflicts of interest, impartiality concerns, misuse of information, misuse of apparent or actual authority, and misuse of property are all areas of potential personal conflicts of interest for contractor employees that could result in harm to the integrity of Government operations. Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. 110-417 (Oct. 14, 2008) (Defense Authorization Act), is a step in the right direction. It requires the Administrator of the Office of Federal Procurement Policy (OFPP) to issue policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions and requires a joint review by OGE and OFPP to identify other areas that raise similarly heightened concerns for potential personal conflicts of interest on the part of contractor employees.

### ***Improvements in the Prosecution and Adjudication of Procurement and Grant Fraud Matters***

The Legislation Committee identified proposals which, if implemented, would ensure more systematic decision-making in the handling of procurement and grant fraud cases. These include:

- 1) Amending federal sentencing guidelines to better define economic loss in procurement and grant fraud cases;
- 2) Expanding OIG authority to include access to contractor and grantee employees; and
- 3) Encouraging OIG counsel to be detailed to DOJ to assist in prosecuting procurement and grant fraud cases.

With respect to interviews of contractor and grantee employees, section 1515 of the Recovery Act provides OIGs access to interview any officer or employee of a contractor, grantee, subgrantee, or State or local agency regarding transactions funded with Recovery Act money. We note that section 902 provides similar authority to GAO and specifically grants GAO access to subcontractor employees. OIGs should have the same authority as GAO in this regard. The recently published change to the FAR implementing these Recovery Act sections states that OIGs do not have access to interview subcontractor employees, while GAO does. We urge a speedy amendment to ensure that OIGs are clearly authorized to interview subcontractor employees regarding transactions involving stimulus money. Moreover, we urge a change to authorize OIGs such access in the oversight of all agency programs and activities.

Under the Inspector General Act of 1978, as amended, (IG Act), IGs are tasked to conduct, supervise, and coordinate audits and investigations related to the programs and activities of federal agencies. Because many agencies now rely so heavily on contractors to carry out their programs and activities, the OIGs require more and greater access to contractor and subcontractor employees and records. Likewise, the amount of federal dollars awarded through grants has increased significantly since fiscal year 2000. Grant

spending averages almost 20 percent of total federal spending, slightly more than contract spending. Delays in responding, failures to provide complete responses, and refusals to respond to IG requests for contractor and grantee documents and for interviews of employees disrupt the work of the OIGs.

IG subpoenas issued pursuant to section 6(a)(4) of the IG Act and enforceable in United States district courts are the most commonly used and versatile tool in investigating civil fraud cases. They are limited to documentary or other tangible evidence. IGs have no authority to obtain interviews of contractor and grantee employees. Having the right to interview contractor and grantee employees or other witnesses during investigations, audits, and inspections, would be invaluable in detecting fraud, waste, and abuse. Further, section 871 of the Defense Authorization Act provides GAO authority to interview contractor and subcontractor employees with respect to all contracts awarded under other than sealed bid procedures. This provision was implemented by a change to the FAR, effective March 31, 2009. OIGs need this same authority.

In a report issued by my office, *Acquisition of the National Security Cutter, U.S. Coast Guard*, OIG-07-23, we describe the impediments experienced in obtaining access to contractor employees and records related to that particular audit. At one point, audit fieldwork was suspended until access issues could be resolved. Because of the burdensome procedures imposed by the contractors involved and the refusal of the contractors to allow DHS OIG unsupervised access to contractor employees most knowledgeable of the design and performance issues of the cutter, we were denied the benefit of those informed perspectives. These hurdles are unacceptable in light of the statutory mandates on IGs; the critical importance of federal programs and activities; and the expenditure of billions of taxpayer dollars that are invested with contractors to provide the Government needed goods and services and with grantees to achieve defined public purposes, such as economic stimulus and protecting the homeland.

OIGs need the same access rights and abilities as GAO to interview contractor and subcontractor employees with respect to transactions under Government contracts. We would use this authority recognizing the interviewees' rights against self incrimination and other constitutional protections.

### ***Improvements in the Government's Ability to Prevent and Detect Procurement and Grant Fraud***

The following proposals would enhance the capacity of OIGs and federal procurement officials to better identify opportunities to reduce risk and vulnerabilities:

- 1) Ensuring appropriate background checks for contractor personnel/principals responsible for federal contracts; and
- 2) Amending the Computer Matching and Privacy Protection Act of 1988, Pub. L. 100-503, codified at 5 U.S.C. § 552a (Computer Matching Act), so that OIGs are exempt.

I would like to focus my comments on amending the Computer Matching Act, which revised the Privacy Act to add procedural requirements that agencies must follow when matching electronic databases for the purpose of establishing federal benefit eligibility, verifying compliance with benefit program requirements, or recovering improper payments under a benefit program. The procedural requirements include formal matching agreements between agencies, notice in the Federal Register of the agreement before matching may occur, and review of the agreements by Data Integrity Boards at both agencies. While the Computer Matching Act provides certain exemptions including for statistical matches to produce data without personal identifiers, matches for research purposes, and law enforcement only if a specific target of an investigation has been identified, agency decision makers and data owners rarely consider OIG oversight work to fall under any of the exemptions. Moreover, GAO, as an arm of the Legislative Branch, is not subject to the Computer Matching Act.

The legislative history of the Computer Matching Act identifies IGs as among the earliest users of computer matching as an audit tool to detect fraud, error, or abuse in federal benefit programs. Interagency sharing of information about individuals can be an important tool in improving the integrity and efficiency of Government programs. By sharing data, agencies can often reduce errors, improve program efficiency, identify and prevent fraud, evaluate program performance, and reduce the information collection burden on the public by using information already within Government databases. Because many federally funded programs are administered at the State and local level, such as unemployment compensation, food and nutrition assistance, and public housing, the ability to match data with State and local governments is as important as the ability to match with other federal agencies. The Computer Matching Act governs computer matching between federal agencies and State or local governments.

The work of the IG community in identifying control weaknesses within agency procurement activities would be facilitated by expanding the current law enforcement exemption to permit IGs, as part of audits and inspections, not only targeted investigations, to match computer databases of contractor personnel, excluded parties (those ineligible to receive federal contracts and certain subcontracts), Government acquisition personnel, sole proprietorships, etc. Because OIGs rarely control the databases to be matched, valuable effort and time is lost persuading the agency system managers that matching is appropriate and necessary and to cooperate with the OIG to fulfill the Computer Matching Act administrative requirements. The OIG's dependency on the cooperation of the agencies to meet the Computer Matching Act requirements allows agencies to delay, and even obstruct, legitimate OIG oversight.

In the aftermath of Hurricane Katrina, the IGs at the Departments of Agriculture and Housing and Urban Development, and at the Small Business Administration, along with my office, pursued computer matching agreements to facilitate audits and investigations. However, only one agreement was executed. In June 2006, almost 10 months after Hurricane Katrina struck, the Department of Housing and Urban Development successfully executed a computer matching agreement with the Federal Emergency Management Agency (FEMA). The absence of computer matching agreements forced



the Hurricane Katrina Fraud Task Force to rely on manual record searches to detect improper payments and fraud. The authority to conduct data sharing would have greatly enhanced our ability to quickly begin reviews to detect internal control weaknesses early in the payment process.

Directly related to contracting oversight, OIGs could use computer matching to validate various certifications made by businesses to obtain Government contracts, such as being a service disabled veteran owned small business. Another use would be to validate the effectiveness of certain contractor services. For example, the Federal Emergency Management Agency (FEMA) contracts with a commercial data provider to verify certain eligibility data provided by disaster assistance applicants. One data element verified through a third party vendor is the applicant's Social Security Number. This additional authority would allow us to more easily validate the accuracy of the information obtained through the vendor with data already existing within Government databases.

A concern that motivated passage of the Computer Matching Act was failure in some early matching programs to provide due process protections. One example is a computer matching program conducted by Massachusetts in the early 1980s. Lists of welfare recipients were matched against bank records in order to identify individuals with assets in excess of program requirements. Over 1600 people so identified were immediately sent termination notices without any action on the part of the state to verify the results of the match. Appeals produced a rate of reversals six times that of the usual rate. This example makes clear the necessity of conducting follow up work to verify the accuracy of any results produced through computer matching. Both generally accepted Government auditing standards and the Office of Management and Budget's guidelines on matching programs recognize that referrals 1) to agency program officials for verification of results and 2) to investigative entities if fraud or other criminal activity is suspected, are expected outcomes of matching.

Creating an OIG exemption to the Computer Matching Act would not authorize greater access to records than IGs have under existing law. It would allow access in less time and with fewer administrative burdens.

Also, the Legislation Committee is examining ways to provide agencies with additional resources to pursue procurement fraud. General proposals under consideration include allowing recoveries to be credited back to current accounts of agencies that have experienced procurement fraud-related loss, regardless of when the loss occurred. These recoveries often are deposited in Treasury's miscellaneous receipts fund. A related proposal would establish a working capital fund available to OIGs for procurement fraud investigations and activities.

## **DHS OIG Contracting Oversight**

Since the establishment of DHS OIG in 2003, our office has performed numerous audits and inspections of acquisition activities within DHS. Some of the audits have focused on

management issues such as organizational alignment and leadership; acquisition policies and procedures; the acquisition workforce; and the integration of acquisition-related information systems. Others have highlighted specific contracts. For example, reports on the Transportation Security Administration's screener recruitment contract, FEMA's Individual Assistance technical assistance contracts, and the Coast Guard's Deepwater acquisition process, have resulted in improvements in DHS' procurement functions.

Our long term recommendations can generally be summarized as:

- Developing strong program and procurement offices;
- Improving internal controls and effective monitoring of contracts;
- Clearly articulating program goals and defining program technical requirements, performance measures, and acceptance terms in contracts;
- Thoughtfully structuring contracts with input from all relevant offices;
- Establishing a process to share best practices among acquisition staff throughout the department; and
- Developing a streamlined, integrated information technology system to help manage the billions of dollars of goods and services acquired by the department.

Contingent upon the availability of resources, my office will continue a vigorous audit, inspection, and investigative program to identify acquisition vulnerabilities and recommend prompt, cost-effective improvements. Acquisition oversight is a priority of my office. Our future work will include crosscutting management issues such as corporate compliance, small and disadvantaged business utilization, use of personal services contracts, the department's suspension and debarment program, and performance by contract of inherently governmental functions, as well as review of significant individual projects, such as Custom and Border Protection's Secure Border Initiative, modernization of the Citizenship and Immigration Service's information technology, and the department's integrated financial management system.

## **Conclusion**

The Task Force Legislation Committee continues to search for opportunities to strengthen efforts to fight procurement fraud and to improve Government procurement to ensure that taxpayer funds are spent wisely. In an era of significantly increased federal procurement spending and dwindling numbers of qualified acquisition personnel, we believe the changes discussed here today merit strong support. We appreciate your continued leadership on matters of concern to the IG community and look forward to working closely with the Subcommittee.

Chairman McCaskill, this concludes my prepared remarks. I would be happy to answer any questions that you or the Members may have. Thank you.