



**Testimony of Scott Amey, General Counsel  
Project On Government Oversight (POGO)  
before the  
Commission on Wartime Contracting  
in Iraq and Afghanistan**

**Deficient Contractor Accountability Leaves  
Agencies and Taxpayers at Risk**

February 28, 2011

I want to thank the Commission for asking the Project On Government Oversight (POGO)<sup>1</sup> to testify about the issue of contractor accountability, and about how past performance information and the suspension and debarment process can be used to improve contingency operations.

Throughout its thirty-year history, POGO has created a niche in investigating, exposing, and helping to remedy waste, fraud, and abuse in government contract spending. We have opposed many acquisition reforms that reduce contract oversight, and that make it difficult for government investigators and auditors to find waste, fraud, and abuse. Additionally, we have voiced concerns about contracting vehicles that often place taxpayer funds at risk.<sup>2</sup> Those reforms were imposed prior to the large increase in federal contract spending that now exceeds \$530 billion a year, consolidation in the contractor community, the large-scale hiring of contractors to perform government services, and reductions within the acquisition workforce.

In January, the Department of Defense created a stir when it released its *Report to Congress on Contracting Fraud*,<sup>3</sup> which examined the extent to which the Pentagon awarded contracts to companies that defrauded the government. The report found that, from 2007 to 2009, the Department of Defense awarded almost \$270 billion in contracts to 91 contractors that were found liable in civil fraud cases, and \$682 million to 30 contractors convicted of criminal fraud.

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<sup>1</sup> Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. For more information on POGO, please visit [www.pogo.org](http://www.pogo.org).

<sup>2</sup> The Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355), the Federal Acquisition Reform Act of 1996 (FARA) (Public Law 104-106), and the Services Acquisition Reform Act of 2003 (SARA) (Public Law 108-136) have removed taxpayer protections.

<sup>3</sup> Department of Defense, *Report to Congress on Contracting Fraud*, January 2011.

[http://sandersonsenate.gov/graphics/Defense\\_Fraud\\_Report1.pdf](http://sandersonsenate.gov/graphics/Defense_Fraud_Report1.pdf) (Downloaded February 22, 2011)

It also found that companies barred from federal contracting continued to receive millions of taxpayer dollars in contracts. What was most astonishing about the report was its relatively unconcerned tone, which might explain the need for today's hearing.

## Responsibility Determinations

The government should be concerned when contracts are awarded to risky contractors. These include contractors that have defrauded the government or violated laws or regulations, performed poorly on contracts, or had their contracts terminated for default. Continuing to award contracts to such contractors undermines the public's confidence in the fair-play process and exacerbates distrust in our government. It also results in bad deals for the government and hinders mission accomplishment.

The federal government is shirking its responsibility to protect its constituents, the American public, by not vetting contractors to determine whether they are truly responsible. POGO is concerned that pre-award contractor responsibility determinations have fallen by the wayside. Federal agencies seem more concerned with awarding contracts quickly than with ensuring the government gets the best goods or services at the best practicable price from responsible contractors.

One of POGO's proudest achievements has been convincing the government that contractor responsibility information was inadequate, and that genuine responsibility determinations were not being made as required by the Federal Acquisition Regulation (FAR). FAR Subpart 9.103 states, in part:

(a) Purchases shall be made from, and contracts shall be awarded to, **responsible prospective contractors only**.

(b) No purchase or award shall be made **unless** the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility.<sup>4</sup> (Emphasis added)

According to FAR Subpart 9.104-1, agencies must ensure contractors:

(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, taking into consideration all existing commercial and governmental business commitments;

(c) **Have a satisfactory performance record** (see 9.104-3(b) and Subpart 42.15).  
A prospective contractor shall not be determined responsible or nonresponsible

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<sup>4</sup> FAR Subpart 9.103. [https://www.acquisition.gov/far/current/html/Subpart%209\\_1.html#wp1084071](https://www.acquisition.gov/far/current/html/Subpart%209_1.html#wp1084071) (Downloaded February 23, 2011)

solely on the basis of a lack of relevant performance history, except as provided in 9.104-2;

(d) **Have a satisfactory record of integrity and business ethics** (for example, see Subpart 42.15).

(e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a).)

(f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and

(g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations (see also inverted domestic corporation prohibition at FAR 9.108).<sup>5</sup> (Emphasis added.)

These standards, especially subparts and (c) and (d), require contractors to prove they have a satisfactory performance and responsibility record. However, there is no established government-wide definition of satisfactory. As a result, these standards have not prevented the government from awarding contracts to risky contractors.

At best, the General Services Administration's (GSA) Excluded Parties List System (EPLS) names suspended and debarred individuals and contractors, but it does not document a contractor's overall performance or responsibility track record.<sup>6</sup>

Moreover, the government's Contractor Performance Assessment Reporting System (CPARS)<sup>7</sup> and Past Performance Information Retrieval System (PPIRS)<sup>8</sup> provide contractors' past performance information to the federal acquisition community for use in making responsibility determinations. But neither system is publicly available, and both have a well-documented history of glitches.<sup>9</sup>

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<sup>5</sup> FAR Subpart 9.104-1. [https://www.acquisition.gov/far/current/html/Subpart%209\\_1.html#wp1084076](https://www.acquisition.gov/far/current/html/Subpart%209_1.html#wp1084076) (Downloaded February 23, 2011)

<sup>6</sup> The Excluded Parties List System (EPLS) names individuals and contractors prohibited, for a specified time period, from receiving future government contracts. A search can be performed for both current and archived individuals and contractors. General Services Administration, "Excluded Parties List System." <http://www.epls.gov/>

<sup>7</sup> "Contractor Performance Assessment Reporting System." <http://www.cpars.csd.disa.mil/cparsmain.htm>

<sup>8</sup> "Past Performance Information Retrieval System." <https://www.ppirs.gov/>

<sup>9</sup> Department of Defense, Office of Inspector General, *Contractor Past Performance Information* (Report No. D-2008-0570, February 29, 2008. <http://www.dodig.mil/Audit/reports/fy08/08-057.pdf> (Downloaded February 22, 2011) Government Accountability Office, *Federal Contractors: Better Performance Information Needed to Support Agency Contract Award Decisions* (GAO-09-374), April 2009. <http://www.gao.gov/new.items/d09374.pdf> (Downloaded February 22, 2011)

Maybe the disclosure of performance and responsibility information could have prevented taxpayer dollars from going to GTSI Corporation. The U.S. Small Business Administration (SBA) suspended the information technology firm in October 2010 from any future contract awards from the federal government.<sup>10</sup> Allegedly, GTSI improperly obtained contracts set aside for small businesses. That was not the first time GTSI ran afoul of the SBA. In 2006, GTSI was nearly debarred after the SBA Inspector General discovered it had falsely misrepresented itself as a small business in order to win an IT contract with the U.S. Navy.<sup>11</sup> POGO wonders if this 2006 incident factored into the recent suspension decision, or if the latest infraction could have been prevented or avoided entirely had the information on the firm's previous misconduct been available to government officials.

In an effort to place a spotlight on contractor accountability issues, POGO created a Federal Contractor Misconduct Database (FCMD) in 2002.<sup>12</sup> The database includes information on over 1,000 criminal, civil, and administrative instances of misconduct for over 150 of the federal government's top contractors. The instances cited in the FCMD have resulted in \$38.2 billion in fines, penalties, settlements, and restitution paid since 1995. Although the government is recovering federal funds from prosecutions and enforcement actions, more can be done to ensure contract dollars are not awarded to risky contractors prior to a contract award.

POGO's FCMD served as the model for the government-created Federal Awardee Performance and Integrity Information System (FAPIIS).<sup>13</sup> FAPIIS was created to provide the government with a tool to make *genuine* responsibility determinations. Despite its shortcomings and the difficulties encountered in getting it operational, POGO is pleased that FAPIIS will become publicly available on April 15, 2011.<sup>14</sup>

One missing item from FAPIIS will be past performance data, which was exempted from public release by law.<sup>15</sup> Such data has always been protected, but recently POGO has asked why. The Government Accountability Office (GAO) reveals some past performance information in bid protest decisions. That data, including offerors' scores and ratings in the following categories, might be of interest to all government officials, competitors, and the public:

- Customer satisfaction
- Increasing sales
- Continuing customer savings

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<sup>10</sup> Small Business Administration, "Statement from Administrator Mills on the Suspension of GTSI from Federal Contracting Program," October 1, 2010. <http://www.sba.gov/about-sba-services/7367/5533> (Downloaded February 22, 2011)

<sup>11</sup> Tiffani S. Clements, email message to [Blank], "FW: Re: ASBL/GTSI," December 1, 2006. <http://pogoblog.typepad.com/pogo/files/gtsi.pdf> (Downloaded February 22, 2011)

<sup>12</sup> Project On Government Oversight, "Federal Contractor Misconduct Database." [www.contractormisconduct.org/](http://www.contractormisconduct.org/)

<sup>13</sup> Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. Law 110-417, Sec. 872), October 14, 2008. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ417.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf)

<sup>14</sup> President Obama signed into law the Supplemental Appropriations Act of 2010, which contained a provision sponsored by Senator Bernie Sanders (D-VT) that requires the GSA to post all FAPIIS information, except past performance reviews, on a publicly available website. <http://www.gpo.gov/fdsys/pkg/FR-2011-01-24/pdf/2011-1323.pdf> (Downloaded February 22, 2011)

<sup>15</sup> Supplemental Appropriations Act of 2010 (Pub. Law 111-212, Sec. 3010).

- Quality assurance
- Transition approach
- Quality history/overall customer satisfaction
- Business relations

Exposing past performance information is extremely controversial, but the potential benefits to agencies and the contracting community cannot be overstated.

## **Change in Culture Needed**

Changes in the contracting landscape have hampered the government's ability to conduct genuine contractor performance and responsibility determinations. For example, contract award dollars have increased from approximately \$200 billion in fiscal year 2000 to over \$535 billion in fiscal year 2010.<sup>16</sup> Additionally, contract administration and oversight have decreased because the acquisition workforce is stretched thin. Government officials who are making the decisions about contracting are at a disadvantage because they do not have time to sufficiently assess a contractor's history of performance and responsibility.

In an effort to prevent contracting with the "usual suspects" that have misconduct rap sheets, government officials must look for alternative, responsible vendors. Some of the largest service contractors in Iraq and Afghanistan have checkered histories of misconduct, including instances of shooting civilians, false claims against the government, violations of the Anti-Kickback Act, fraud, retaliation against workers' complaints, and environmental violations. According to POGO's database:

- Agility has 1 instance which led to it being suspended from federal contracting since November 2009.
- Bechtel has 18 instances, including 13 environmental and labor violations.
- Xe/Blackwater has 7 instances, 4 of which involve shooting incidents in Iraq and another instance primarily involving illegal weapons exports to Afghanistan (\$42 million penalty).
- DynCorp has 6 instances, 2 of which involved alleged sex trafficking in Bosnia-Herzegovina (\$173,000 judgment).
- Fluor has 25 instances, including 3 government contract fraud cases (\$21.5 million in penalties), 3 instances of poor contract performance (\$147 million in penalties), and 2 instances of cost/labor mischarges (\$11.7 million in penalties).
- G4S/Wackenhut has 21 instances, including 7 involving instances of substandard conditions or brutality at its detention facilities, 4 instances of government contract fraud case, and 4 instances of poor contract performance.

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<sup>16</sup> Office of Management and Budget, "USAspending.gov," February 22, 2011. [www.usaspending.gov](http://www.usaspending.gov)

- Halliburton has 11 instances, including 3 settlements of foreign bribery allegations for which it paid over \$600 million in penalties.
- KBR has 23 instances, including 6 government contract fraud cases and 8 guilty pleas.

Despite these repeat offenses, the Army recently awarded its LOGCAP IV contract to Dyncorp, Fluor, and KBR, three contractors with questionable responsibility records. According to the Army's press release,<sup>17</sup> three other contractors bid on the LOGCAP contract—one can only wonder if they were less risky contractors.

Even the president of a contractor industry association, the Professional Services Council, has stated that responsibility is an important factor when making contracting decisions. In an April 2007 column in *Washington Technology*, Stan Soloway wrote: "After all, no one advocates the award of government contracts to proven crooks," and that "No one wants to see his or her tax dollars go to companies or individuals that routinely and blithely violate the law."<sup>18</sup> He argues, however, that there are too many subjective contractor responsibility factors, placing contractors at a disadvantage.

POGO agrees that responsibility and performance determinations should not be overly subjective. FAPIIS and the past performance databases provide objective tools, but further improvements are required so that the government can truly make well-informed contract award decisions.

## **Suspension and Debarment Failures**

The suspension and debarment system is riddled with problems. The recent finding by the Defense Department that barred contractors are still receiving millions in new contract awards is nothing new. In 2009, the GAO found 25 instances in which companies and individuals suspended or debarred for committing serious offenses were awarded new contracts.<sup>19</sup> Contracting officials either failed to check the EPLS database before awarding the contract, or, if they did check it, the clunky EPLS search engine failed to turn up the name of the suspended or debarred entity.

Admittedly, outsourcing government functions to the private sector and the changes in contracting laws have made adequately safeguarding taxpayers' interests an incredibly daunting challenge. As a result, speed and convenience frequently trump accountability and oversight.

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<sup>17</sup> U.S. Army, "ASC selects LOGCAP IV contractors," *Army.mil*, June 27, 2007. <http://www.army.mil/news/2007/06/28/3836-asc-selects-logcap-iv-contractors/> (Downloaded February 22, 2011)

<sup>18</sup> Stan Soloway, "The debate on contractor responsibility flares anew," *Washington Technology*, April 9, 2007. [http://www.washingtontechnology.com/print/25\\_05/30430-1.html](http://www.washingtontechnology.com/print/25_05/30430-1.html) (Downloaded February 22, 2011)

<sup>19</sup> Government Accountability Office, *Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds* (GAO-09-174), February 2009, pp. 8, 9, 28. <http://www.gao.gov/new.items/d09174.pdf> (Downloaded February 22, 2011)

In addition to speed, the government has a large task in ensuring that competition drives its decisions. Yet, in some instances only a handful of contractors can provide the needed services or goods. As a result, as time goes on, the government becomes increasingly dependent on particular contractors to fulfill particular functions—if one of the contractors is suspended or debarred, competition is seriously diminished.

Another contractor accountability problem is the under-utilization of the suspension and debarment system to weed out risky contractors, especially for the companies that supply the majority of the goods and services purchased by the government each year.

According to the fiscal year 2009 Council of the Inspectors General on Integrity and Efficiency (CIGIE) report to the President, there were 4,485 suspensions or debarments.<sup>20</sup> There were zero suspensions against any of the top contractors in FY 2009.<sup>21</sup> As with criminal and civil proceedings, large contractors bring their substantial legal resources to bear in suspension and debarment actions. The possibility of delays, litigation, and reductions in competition can mean the difference between the maximum penalty and a lesser sanction that allows the company to keep doing business with the federal government.

Even when suspension or debarment are used against large contractors, we have seen numerous cases in which the government still fails to provide true accountability. For example, the Air Force issued multiple waivers in order to continue doing business with Boeing in 2003 after it was revealed that Boeing unlawfully possessed and used of a competitor's proprietary documents in connection with the competition for the Air Force Evolved Expendable Launch Vehicle (EELV) contract. Additionally, IBM's, and more recently GTSI's, suspensions lasted only a matter of days before being lifted.<sup>22</sup> MCI/WorldCom's suspension was lifted only three days before the expiration of the government's long-distance telephone contract with the company.<sup>23</sup> When POGO asked about the reasons for these questionable decisions, government officials told us that such actions were necessary in order to promote competition.

Last year's massive oil spill in the Gulf of Mexico led to discussions about whether to debar British oil giant BP. Even before the Gulf disaster, BP was on thin ice with Environmental Protection Agency (EPA) suspension and debarment officials due to safety and environmental compliance problems at its drilling and production facilities.<sup>24</sup> But BP is also a main supplier of

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<sup>20</sup> Council of the Inspectors General on Integrity and Efficiency (CIGIE), *A Progress Report to the President: Fiscal Year 2009*, pp. 11, 16. <http://www.ignet.gov/randp/fy09apr.pdf> (Downloaded February 22, 2011) (Hereinafter *A Progress Report to the President: Fiscal Year 2009*)

<sup>21</sup> For more information on the suspension and debarment system, please visit POGO's investigative report, *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, May 10, 2002. <http://www.pogo.org/p/contracts/co-020505-contractors.html>

<sup>22</sup> GSA's Excluded Parties List System. <https://www.epls.gov/>

<sup>23</sup> Project On Government Oversight, "GSA's Deal with WorldCom: Bad Business for Taxpayers," January 8, 2004. <http://www.pogo.org/pogo-files/alerts/contract-oversight/co-fcm-20040108.html>

<sup>24</sup> For more information visit BP's page in POGO's Federal Contractor Misconduct Database. <http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=61&ranking=48>.

fuel to U.S. military operations in the Middle East,<sup>25</sup> and when the EPA considered debarring BP in 2009, pressure from DoD caused the EPA to back off.<sup>26</sup>

The government's inability to hold all contractors accountable begs the question: Is the government so reliant on large contractors that bad actors are required for preserving legitimate competition and mission accomplishment? This might be the contracting version of "too big to fail."

The answer to the contractor accountability question was supposed to be answered, in part, by the Interagency Suspension and Debarment Committee (ISDC). Pursuant to Public Law 110-417, Sec. 873(a)(7), the ISDC was required to submit to Congress an annual report of the progress in the suspension and debarment system, agency participation in the ISDC, and agency summaries of "activities and accomplishments in the Governmentwide debarment system." Despite multiple requests to ISDC Chairman Willard Blalock in 2010, POGO hasn't seen the report or received a reply from the ISDC as to its status.<sup>27</sup> This is extremely troubling considering the sharp decline in suspensions and debarments,<sup>28</sup> and a congressional inquiry into the Department of Justice's (DOJ) possible interference in suspension and debarment proceedings.<sup>29</sup>

## Recommendations

POGO offers the following recommendations to improve the contractor performance and responsibility system:

1. Contracting data must be made public. All paperwork produced during the contracting process, including contracts, task and delivery orders, price and cost information, proposals, solicitations, award decisions and justifications, audits, and performance and responsibility data, should be posted on a public website.

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<sup>25</sup> For information on BP contracts visit BP's "Prime Award Spending Data" on USAspending.gov. <http://www.usaspending.gov/search?query=&searchtype=&formFields=eyJJSZWNpcGllbnROYW1ITGNhc2UiOlsiQnAgUC5sLmMull19> (Downloaded February 23, 2011)

<sup>26</sup> Kim Chipman, "EPA May Prohibit BP From Getting Government Contracts After Gulf Oil Spill," *Bloomberg News*, May 21, 2010. <http://www.bloomberg.com/news/2010-05-21/epa-may-prohibit-bp-from-getting-government-contracts-after-gulf-oil-spill.html> (Downloaded February 22, 2011)

<sup>27</sup> Letter from Scott Amey, Project On Government Oversight, to Willard D. Blalock, Interagency Suspension and Debarment Committee, May 27, 2010. <http://www.pogo.org/pogo-files/letters/contract-oversight/co-ca-20100527.html>

<sup>28</sup> According to the CIGIE, there were 4,485 suspension and debarments in FY 2009, which was down from a peak of 9,900 in FY 2005. *A Progress Report to the President: Fiscal Year 2009*. Joint Report by the President's Council On Integrity And Efficiency and the Executive Council On Integrity And Efficiency, *A Progress Report to the President: Fiscal Year 2005*. <http://www.ignet.gov/randp/fy05apr.pdf> (Downloaded February 22, 2011)

<sup>29</sup> On May 19, 2010, House Committee on Oversight and Government Reform Chairman Edolphus Towns wrote a letter to Attorney General Eric Holder expressing concerns that criminal and civil settlements between DOJ and federal contractors are preventing federal agencies from suspending or debarring poorly performing contractors. 112<sup>th</sup> Congress, House Committee on Oversight and Government Reform, "Chairman Towns Questions Effectiveness of DOJ's Contractor Settlements," May 19, 2010. [http://democrats.oversight.house.gov/index.php?option=com\\_content&task=view&id=4938&Itemid=49](http://democrats.oversight.house.gov/index.php?option=com_content&task=view&id=4938&Itemid=49). (Downloaded February 22, 2011)



2. Increase the scope of misconduct cases included in FAPIIS. Cases should include all types of civil, criminal, and administrative proceedings resulting in the payment of monetary fines, penalties, reimbursement, restitutions, damages, or settlements of \$5,000 or more to the government, even when there is no admission of guilt, fault, or liability.
3. Require that all administrative agreements be shared among agencies and made publicly available.
4. Enhance acquisition workforce training to improve the quality of data in FAPIIS, EPLS, PPIRS, CPARS, etc., and develop and integrate a unique identifier system and search capabilities so that government officials are aware of a contractor's complete performance and responsibility record.
5. Mandate that an offeror or bidder that falsifies a certification regarding responsibility be immediately debarred.
6. Consider the use of background checks for companies and principals, especially for contracts involving classified or sensitive information.
7. Strengthen the ban on subcontracting with suspended or debarred companies and individuals.

We would do well to heed the warning of former Senator Russell Feingold (D-WI), who used the term “agency capture” to describe the government’s growing subservience to the companies it does business with or regulates:

An agency should never be in a position where it is so dependent on a contractor to perform certain functions that it cannot take appropriate actions to suspend or debar that contractor... I do not believe we should let corporations become ‘too big to fail,’ and I think the same should be true for our contractors. If they can’t be trusted to run their businesses with integrity and to use U.S. taxpayer dollars honestly, then they should not be eligible to receive new contracts. We need to hold government contractors to a high standard.”<sup>30</sup>

Thank you for inviting me to testify today. I look forward to working with the Commission to further explore how contracting officers, suspension and debarment offices, Inspectors General, and the Justice Department can hold contractors accountable.

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<sup>30</sup> Statement of the Honorable Russell D. Feingold, Senate Judiciary Subcommittee on Administrative Oversight and the Courts on *Protecting the Public Interest: Understanding the Threat of Agency Capture*, August 3, 2010. [http://judiciary.senate.gov/hearings/testimony.cfm?id=4746&wit\\_id=4083](http://judiciary.senate.gov/hearings/testimony.cfm?id=4746&wit_id=4083) (Downloaded February 22, 2011)