

***FEDERAL CONTRACTING:  
DO POOR PERFORMERS KEEP WINNING?***

**STATEMENT OF  
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**BEFORE THE  
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,  
ORGANIZATION, AND PROCUREMENT OF THE  
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM**

**UNITED STATES HOUSE OF REPRESENTATIVES  
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Chairman Towns, Ranking Member Bilbray, and Members of the Subcommittee, thank you for this opportunity to appear before you to discuss the Department of Homeland Security (DHS) acquisition program and our contracting procedures as they relate to responsibility determinations, our process by which we seek to award our contracts only to responsible contractors. I am the Chief Procurement Officer (CPO) for the Department of Homeland Security. I am a career executive and I have spent most of my 23 years of public service in the procurement profession.

Before addressing responsibility determinations, I would like to convey my top three priorities, which are essential elements to enhancing DHS' ability to procure from responsible contractors.

- First, to build the DHS acquisition workforce.
- Second, to make good business deals.
- Third, to perform effective contract administration.

As the CPO, I provide oversight and support to eight procurement offices within DHS – Customs and Border Protection (CBP), Federal Emergency Management Agency (FEMA), Immigration and Customs Enforcement (ICE), Transportation Security Administration (TSA), United States Coast Guard (USCG), United States Secret Service (USSS), Federal Law Enforcement Training Center (FLETC), and the Office of Procurement Operations (OPO). As the CPO, my primary responsibility is to manage and oversee the DHS acquisition program. I provide the acquisition infrastructure by instituting acquisition policies and procedure that allow DHS contracting offices to operate in a uniform and consistent manner.

Mr. Chairman, I know that you are very interested in ensuring that DHS and its Components procure goods and services on behalf of the American taxpayer from responsible contractors. I can assure you that we share your interest and take seriously our obligation to award only to responsible prospective contractors.

Not just at DHS, but throughout Federal agencies, there is an emphasis on conducting business with responsible contractors. The Federal Acquisition Regulation (FAR) provides the guiding principles, processes, and procedures the acquisition community uses to ensure that Federal agencies procure goods and services only from responsible contractors. When making their responsibility determinations, Contracting Officers are required to consider various sources of information such as:

- The Excluded Parties List System (EPLS);
- Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices;
- The prospective contractor-including their submitted bid or proposal information, questionnaire replies, financial data, information on production equipment, and personnel information;
- Commercial sources of supplier information of a type offered to buyers in the private sector;
- Preaward survey reports (if determined necessary);
- Other sources such as publication; suppliers, subcontractors, and customers of the prospective contractor, financial institutions, Government agencies, and business and trade associations; and
- Contractor performance evaluation reports.

At DHS, our Homeland Security Acquisition Regulation, the HSAR, and our Homeland Security Acquisition Manual, the HSAM, supplement the FAR guidance and reiterate the requirement that our Contracting Officers are to perform responsibility determinations prior to making a new contract award. DHS Components use DHS Form 700-12 to guide the responsibility determination process. The list of factors required by the form expands upon those required by FAR 9.104 and 9.105 to include drug free workplace, small business subcontracting compliance, equal employment opportunity, and environmental/energy considerations.

Our Contracting Officers' assessments with respect to determining a contractor's responsibility are based on a number of inputs, ranging from information collected in response to a specific procurement to centrally available information. For example, when assessing financial responsibility, a DHS Contracting Officer may review and evaluate the latest company financial statements. Other considerations may include how long the company has been in business, any bankruptcies declared by the company, the bond rating by Moody's or Standard and Poor's, etc. Since April of 2003, DHS has had a memorandum of understanding in place with the Defense Contract Audit Agency that makes available their expertise in determining financial responsibility of prospective contractors.

A more expanded pre-award survey may be conducted if the Contracting Officer has reason to believe that one or more of the responsibility standards I mentioned earlier is in doubt, or if information is not readily available. Of course, there are instances where during the course of a responsibility determination, the Contracting Officer becomes aware of serious systemic problems or a single serious breach that warrants suspension and debarment based on actions under a single contract; but, generally, responsibility determinations are confined to a single

award scenario and focus on answering the question: Does the contractor have the integrity, past performance record and resources to meet the Government's requirement?

The record of performance on previously awarded contracts is regarded as an important measure of a company's future performance. The FAR requires that Contracting Officers consider this record of performance when awarding a contract. Pointedly, the FAR states that, "*the currency and the relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered.*" Thus, if a Contracting Officer finds that a company has a record that includes negative information, he/she must assess its relevance to the requirement being competed. Is the work similar? How recent was the poor performance? Was the effort performed by the same division of the company? And, while a prospective contractor cannot be determined non-responsible solely based on a lack of relevant performance history, it is also true that for some negotiated procurements, a contractor's record of performance can be the deciding factor in the award decision.

Contracting Officers at DHS are required to use the Past Performance Information Retrieval System, known as "PPIRS", to obtain and assess information on contractor past performance. PPIRS is a Government-wide data warehouse which contains information on past performance of contractors with whom the Government does business. DHS Contracting Officers and Contracting Officer Technical Representatives (COTRs) use a feeder system to input information on DHS contractor performance into PPIRS. The feeder system, the Contractor Performance System (CPS) is managed by NIH, and allows us to input performance information on our DHS contract actions. This data then feeds into the PPIRS data warehouse.

Prior to making an award, the Contracting Officer also reviews the web-based Excluded Parties List System (EPLS) operated by the General Services Administration to ascertain whether the contractor is debarred or suspended from Government contracting; those on the list are excluded from doing business with the Government. EPLS and the Government's debarment and suspension procedures are well-established and well-understood within the Government and by companies who do business with the Government. EPLS provides the single comprehensive list of individuals and firms excluded by Federal Government agencies from receiving Federal contracts or subcontracts. A single agency's suspension or debarment decision, with limited exceptions, precludes all other agencies from doing business with an excluded party.

An overall responsibility determination also is dependent on contractor representations and certifications – "*reps & certs*" as they are known. Contractors provide these FAR- required statements by using the Online Representations and Certifications (ORCA) system. As part of the submission, the contractor certifies, to the best of its knowledge and belief, whether it and/or any of its principals, within a three-year period preceding the offer, have been convicted of or had a civil judgment rendered against them for the following: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, State or local Government contract or subcontract; violation of Federal or State antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion,

or receiving stolen property. The Contracting Officer is responsible for reviewing the “*reps and certs*” prior to award to ensure that the company does not present information that would prevent an affirmative finding of contractor responsibility.

Mr. Chairman, a responsibility determination is required for each contract award; however, Contracting Officers use their discretion when evaluating the information before them. What I mean by this is, our acquisition professionals must make decisions based on the information available to them and the facts specific to the situation before them so that when applying the rules, there may be a different outcome in different situations. As you consider whether additional guidance, tools and Government-wide processes should be added to our existing approaches to determining responsibility and avoiding awards to poor performers, it is important to maintain this discretion. Our contracting professionals are able to make appropriate business decisions based on the particular facts of each given situation.

Additionally, it is critical that we maintain certain very important presumptions and considerations that are built into our current processes and procedures for responsibility. Where any small business has been determined "non-responsible" in reference to the award of a contract, our contracting officers refer those small businesses to SBA for a Certificate of Competency determination in accordance with the provisions of FAR Subpart 19.6. We strive to be fair, to be reasonable, to be aware of privacy concerns, to ensure due process is afforded where appropriate, and to craft regulations that allow for those that may not have been model citizens in the past to be rehabilitated such that they are eligible for Government contracts. To be sure there are competing interests at play when we are making our determinations, but in the end, we should be mindful that we have a very real responsibility to balance these competing interests. After all, the consequences of our actions with regard to responsibility determinations ultimately may mean that we are depriving an individual of their livelihood.

The rapid growth of Federal contracting has given rise to concerns Government-wide that contracts are being awarded to poor performers - and to unethical contractors. To that end, within the last six months, the FAR Secretariat published two FAR cases specifically related to responsibility matters. A proposed FAR rule, entitled *Contractor Code of Ethics and Business Conduct*, was published in the Federal Register in February. The rule, initiated by members of my OCPO staff, establishes a clear and consistent policy regarding contractor code of ethics and business conduct, and responsibility to avoid improper business practices. Additionally, the proposed rule requires contractors to provide their employees with information on contacting the appropriate Inspector General to report potential wrongdoing to include posting this information on company internal websites and prominently displaying hotline posters. The second proposed FAR rule, *Representations and Certifications -Tax Delinquency*, published in the Federal Register for public comment in March, proposes to amend the FAR clause governing offerors’ “*reps and certs*” to specifically address delinquent Federal or State tax obligations within a three year period.

Another new FAR case, currently under consideration and not yet published, would amend Federal regulations to address updates to Past Performance procedures. The Office of Federal Procurement Policy’s (OFPP) Best Practices Guide, last published in May of 2000, is also presently being updated as directed by OFPP through the Chief Acquisition Officers’ Acquisition Committee for E-Gov (ACE), which has established an interagency working

group to review regulations, policies, and guidance associated with contractor performance information.

In response to the central question of this hearing – *Do poor performers keep winning?* - The vast majority of DHS contract awards are **not** made to poor performers. That said, there have been instances where poor performers have received an award. And, that is unfortunate. But to put those relatively small number of instances in perspective, at DHS so far this fiscal year, our eight operational Components have executed over 59,000 contract actions representing total obligated dollars of over \$6.5B involving approximately 12,000 vendors.

The role Past Performance plays in DHS negotiated best value procurements is receiving increased attention. Just last month, my office issued an extensive *Practical Guide to Source Selection* to all Components. The guide stresses the requirement for evaluation of past performance for all negotiated competitive acquisitions above the simplified acquisition threshold. The guide recommends that for major acquisitions, a specific team be established within the Source Selection Evaluation Board to focus exclusively on the evaluation of past performance information and includes an exhibit with a suggested adjectival system for assigning ratings.

At the Department level as well, we are increasingly emphasizing and monitoring Component adherence to the processes and mechanics of the contracting process. For example, very recently, the Under Secretary for Management issued a memorandum to all members of the DHS acquisition community for the purpose of enhancing the robustness of DHS Component collection and use of contractor performance information. The memorandum highlights key policy objectives relative to Component compliance with FAR and HSAR requirements to evaluate contractor performance. The essence of the USM memo is:

- Contractors provide mission essential services to DHS and that properly documented performance information improves the outcome of our DHS source selections;
- The DHS Acquisition Community, including members of contracting, program and technical offices, as well as users, need to partner better to increase their participation in the collection of performance data in the electronic collection system; and
- Contracting Officers must consider performance data in the source selection process.

The memorandum provides on-line links to contractor performance information guidebooks, highlights training opportunities currently available, and advises of additional training development now underway.

We at DHS are making concerted efforts to improve contractor accountability and minimize those instances where a poor performer receives a DHS contract award. The following are examples of where we have taken action to ensure that contract performance is managed throughout the term of our contracts while meeting the agency's critical mission challenges.

#### **Enterprise Acquisition Gateway for Leading-Edge Solutions (EAGLE)**

The EAGLE contract is an enterprise wide procurement vehicle which allows our Components to place task orders for IT services. The contract award phase and planned administration of these contracts demonstrate our focus on contractor performance. Each of the fifty-three DHS

EAGLE contract awardees was subjected to a full responsibility review during the proposal evaluation phase. This review focused on the following:

- Offeror's accounting system;
- Financial viability (liquidity, debt, gross profit margin);
- Satisfactory performance record, based on review of NIH Contractor Performance System and discussion with individual Contracting Officers;
- Excluded Parties List System verification (to include confirmation there were no pending or current legal actions); and
- Offeror's organization, experience and technical skills.

All offerors were subjected to an extensive past performance review coupled with the responsibility determination, to assist in assessing the firm's capability and capacity to deliver high quality solutions within the proposed Functional Category. Specifically, offerors' performance on two recent efforts was evaluated, with a focus on the size, scope and complexity of the efforts, the relevance to the Function Category and the DHS mission, and the application of and results from performance measures and service level metrics. Past performance was the most heavily weighted non-price factor impacting the award decisions.

In addition, Contracting Officers assess the past performance of the offerors responding to individual task order solicitations under EAGLE. They review general recent past performance on efforts of similar size and scope. And, both during the term of the order and at completion, performance is evaluated. As more activity occurs on our EAGLE vehicle, and more EAGLE past performance data is accumulated, greater emphasis can be placed on EAGLE contractors' performance on future EAGLE efforts.

### **Executive Transportation Services**

Using lessons learned on a previous transportation services contract for DHS Headquarters, we initiated a strategically sourced acquisition in an effort to meet mission needs and enhance performance. In late November 2006, DHS' Office of Procurement Operations (OPO) issued a small business set-aside solicitation for a strategically sourced transportation services contract for DHS and its components in the Washington D.C. Area. I note that this type of strategic sourcing has added value to the DHS investment review process, generated Department-wide savings on commodities such as aviation, boats, information technology, uniforms, weapons and office supplies. Since FY 2004, DHS has seen \$201M in price savings and \$9M in cost avoidance for a total of \$210M in strategic sourcing program savings to date.

Since the Department-wide solicitation for transportation services was published, there have been two pre-award bid protests filed with the Government Accountability Office (GAO) and a complaint lodged with the U.S. Court of Federal Claims. GAO denied both protests, and the Court of Claims recently ruled in favor of DHS. While these legal proceedings have impacted the award time line, the Department is proceeding with the procurement process and OPO anticipates multiple awards for these services in August 2007.

### **eMerge2**

When we determine that a contractor's poor performance can not be remedied, we initiate corrective action. Our experience with BearingPoint is one such example. eMerge2, the

Department's Electronically Managing Resources for Government Efficiency and Effectiveness project, undertaken to consolidate DHS' finance, accounting, procurement, asset management, and travel systems, was competitively awarded to BearingPoint. By aggressively tracking performance and applying increased management of the initial two task orders to BearingPoint, DHS recognized that the successful completion of the contract was unlikely. The first of two orders issued established a total ceiling of \$20M for the development of an eMerge2 solution and conference room pilot testing. After several failed contractor efforts to perform or move forward, DHS directed BearingPoint to suspend its efforts and submit a settlement proposal to close the task order. The final negotiated settlement of \$6M, based on the work that was satisfactorily completed by BearingPoint, was 64% less than BearingPoint's initial proposed settlement amount. The contract was subsequently allowed to expire with no additional expenditures.

### **Wackenhut Successor Contract**

In April 2006, DHS awarded a contract for guard services for our Nebraska Avenue Complex. The predecessor Wackenhut contract, a legacy Navy base-operations contract vehicle, was for a significantly less robust security requirement; in addition to the Wackenhut contract security guards, the Navy relied on armed active duty Navy personnel. Our new DHS contract to Paragon Systems incorporated lessons-learned from DoD and established more stringent requirements including: mandatory employee Federal Protective Services training and certification and required security clearances ranging from Secret to Top Secret/SCI. Additionally, the contract is managed by an on-site Program Manager with a bachelor's degree who possesses a minimum of ten years of experience.

### **USCG Deepwater and ICGS - Fast Response Cutter A (FRC-A)**

This project is another example of corrective action taken as a result of monitoring and managing performance. During the design of the proposed Fast Response Cutter A (FRC-A), the U.S. Coast Guard (USCG) identified technical issues with the original composite hull design and deferred the FRC-A's critical design review. The USCG then procured the services of an independent 3rd party to complete a Business Case Analysis (BCA) and a Technology Readiness Assessment (TRA) of the original hull design of the class, to determine its suitability. The analysis found that the initial composite design was not ready to meet USCG's requirements. While the "cost to own" for the FRC-A was reasonable, the risks associated with the composite hull represented a "high" risk to the USCG. The USCG, with DHS concurrence, released a request for proposal to procure a replacement craft, the FRC-B class, based on commercially proven designs requiring minimal modifications to meet USCG's mission requirements. The FRC-B craft contract will be awarded via a full and open competition.

### **Booz Allen Hamilton (BAH) "Recompetes"**

DHS must balance mission accomplishment with prudent contracting strategies which on occasion may entail using sole source bridge contracts until re-competitions can be accomplished. A prominent example of this bridge strategy was employed for program office support with Booz Allen Hamilton (BAH). When the scope of work expanded significantly on legacy contracts from its predecessor organizations due to DHS' growing and dynamic mission, a deliberate decision was made to issue a sole source bridge contract vehicle to BAH. The bridge, which was scoped for minimum requirements, enabled the Department to

restructure the requirement into six unique requirements that were then competed. Although the competitions resulted in award of the six task orders to BAH, DHS went from a complete sole source environment for program requirements to an environment where competition was solicited for multiple program requirements.

Future long term acquisition strategy and planning by OPO is for these support services and other Headquarter organization requirements to result in “*multiple-awards*” contracts for various areas of DHS Headquarters business operations. Our current goal is to award a single program management support contract, multiple award Intelligence services contracts, multiple award training contracts, and multiple award studies/assessments contracts. For each multiple award contract, we intend to award three contracts. This strategy is designed to maximize competition, promote the use of small business, and ensure that the program benefits from competition throughout the life of the contracts.

### **Individual Assistance-Technical Assistance Contracts (IA-TAC)**

In the immediate aftermath of Hurricane Katrina in 2005, sole source Individual Assistance-Technical Assistance Contracts were awarded to Bechtel, CH2M Hill, Fluor, and Shaw. The IA-TAC I requirements supported the disaster relief housing mission. The prime contractors performing under the IA-TAC I contracts were not Small or local businesses themselves; however, their subcontracting accomplishments to Small and local businesses were significant. Small Business utilization by the prime contractors ranged from 66.5% to almost 82%, and use of local business firms ranged from 44.8% to 78%.

This extensive use of subcontracting to Small Business and local subcontractors has provided qualified subcontractors with the opportunity to mature their skills in each mission area and build capacity to support future FEMA needs. As a result of these subcontracts, FEMA now has a much larger pool of highly-qualified local, 8(a) and Small Businesses that will be able to compete directly for future prime contracts and support its future disaster response efforts. To illustrate the success of the subcontracting relationships formed under IA-TAC I, many of the former subcontractors are now meeting requirements in the Gulf Coast as prime contractors under new contracts.

No additional IA-TAC I requirements currently exist, and these four large contracts are in a close-out phase. Follow-on competitively awarded efforts are now being supported using local Small Businesses, several of which were former subcontractors under IA-TAC I. These requirements include: (1) Trailer Maintenance and Deactivation; (2) Grounds Maintenance; (3) Mississippi Blocking, Leveling, and Anchoring of Travel Trailers; and (4) Security.

In keeping with my top three objectives I iterated earlier in my testimony, I have been growing both the size and capability of my staff, both in operations and in my policy, training, and oversight cadre. This is allowing us to approach our oversight responsibilities both on the front end of the procurement cycle and the post-award back end. We are developing a robust training program for acquisition professionals. Our Excellence in Contracting Training Series for DHS Headquarters and Component personnel is designed to enhance the acquisition workforce’s understanding of contracting regulations and policies. Recent topics have included Contracting by Negotiations, Contract Financing, the SAFETY Act, and Strategic

Sourcing. Future topics include Time & Material contracting and use of the Contractor Performance System. The growth in the number of talented and experienced acquisition professionals in OCPO to serve as Desk Officers will enhance our ability to work closely with the Components on their specific acquisition issues, and the growth in the size of my Oversight group is already enabling OCPO to perform more structured procurement management reviews of the Components' acquisition programs.

Ethical behavior is a core DHS value. OCPO recently developed additional on-line ethics training, beyond what is required annually, which highlights ethical acquisition practices for our Government acquisition professionals Department-wide. To date, over 700 acquisition personnel within the Department who participate in DHS acquisitions have completed the online training.

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee about DHS contracting procedures. I am glad to answer any questions you or the Members of the Subcommittee may have for me.