

HOLD UNTIL RELEASED BY THE
COMMISSION ON WARTIME CONTRACTING

WRITTEN STATEMENT OF
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CHAIR, INTERAGENCY SUSPENSION AND DEBARMENT COMMITTEE

BEFORE

THE COMMISSION ON WARTIME CONTRACTING
IN IRAQ AND AFGHANISTAN

ON

ENSURING CONTRACTOR ACCOUNTABILITY:
PAST PERFORMANCE AND SUSPENSION & DEBARMENT

FEBRUARY 28, 2011

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Chairman Thibault, Chairman Shays, and members of the Commission, I also appreciate the opportunity to appear here today to discuss how the Interagency Suspension and Debarment Committee (ISDC) can foster contractor responsibility and accountability through the suspension and debarment process. Created in 1986 pursuant to Executive Order 12549, the ISDC was tasked with implementing the creation of a government-wide system of suspension and debarment for non-procurement matters. This system was intended to mirror the system of suspension and debarment for procurement matters created by OMB's Office of Federal Procurement Policy in 1982. In 1989, Executive Order 12689 was issued to require that an agency suspension or debarment of participants in procurement activities under the Federal Acquisition Regulation (FAR) and participants in non-procurement activities under Executive Order 12549 be given government-wide effect. In other words, agencies were required to prohibit parties debarred, suspended, or otherwise excluded from participation in any procurement or non-procurement activity by other agencies from participating in that agency's procurement or non-procurement activities. Subsequently, Congress passed the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) which provided for issuance of regulations imposing a government-wide regime for both procurement and non-procurement suspensions and debarments. The section was enacted to remedy the situation where exclusions from the two systems did not have reciprocal effect. For the procurement world, the FAR was amended in 1994 to implement the requirements of the OFPP Policy Letter and amend FAR 9.401 to require that any debarment, suspension or other Government-wide exclusion under the non-procurement rule be recognized and effective for all Executive Branch agencies as though it were an action under the FAR. The revision to the non-procurement rule similarly provided for reciprocal government-wide effect for exclusions regardless of whether taken under the

procurement or non-procurement regulations. Section 873 of the FY09 National Defense Authorization Act (Public Law 110-417) strengthened the role of the ISDC by codifying certain enumerated functions the ISDC was to perform.

Representatives of member agencies of the ISDC meet monthly to discuss, on a non-attribution basis, topics of interest in government-wide suspension and debarment. These topics have included how to strengthen and energize the ISDC's 2004 "lead agency" coordination process, assisting the General Services Administration (GSA) in the administration of the Excluded Parties List System (EPLS) and its Cause and Treatment (CT) codes, the suspension of elected offices and the issues such actions raise, the incorporation of Administrative Agreements in the Federal Awardee Performance Integrity and Information System (FAPIIS), Parallel Proceedings with the Department of Justice, and Department of the Army's use of fact-based exclusions of contractors in Iraq and Afghanistan.

Originally comprised of 16 member agencies at its creation in 1986, the ISDC now has approximately fifty member agencies. All fifteen of the Executive Department agencies are members, as well as nineteen independent agencies and government corporations. Some clarification, as usual, is required with numbers. The Department of Defense is one Executive Department, but it is composed of numerous components, including the military departments and defense agencies. Each of the three military departments (Air Force, Army, and Navy) is a member of the ISDC and sends separate representatives to attend ISDC meetings. Additionally, defense agencies such as Defense Logistics Agency (DLA), Defense Contract Management Agency (DCMA) and the Office of the Secretary of Defense attend ISDC meetings as separate components. The Department of Homeland Security and the Department of Agriculture are

examples of similar Executive Branch agencies that attend ISDC meeting and actively participate in its activities.

As noted by Mr. Gordon, not all ISDC members have been as active as others. Recent audits by agency Inspector Generals have prompted some member agencies to re-examine their suspension and debarment programs to determine what can be done to make them more effective in ensuring that the agency conducts business only with responsible contractors and grantees. Some, like the Department of Interior, have taken aggressive steps to strengthen their suspension and debarment programs. The Department hired two new full-time positions in 2009 to revitalize its program. From 2000 to 2008, the Department took few suspension and debarment actions. In 2009, the Department of Interior Suspending and Debarring Official (SDO) took 81 exclusion actions, including the first oral presentations by respondents of matters in opposition and the first use of administrative agreements to resolve exclusions while providing the Department with effective oversight over a contractor's performance. The new program has developed and implemented enhanced program practices and procedures for case initiation and resolution and created an electronic case management tracking system for tracking suspension and debarment actions. The SDO's office now works much more collaboratively with the Department's Office of Inspector General to develop and process cases from referral to final SDO action. The Department of Interior issued new acquisition policy to require agency contracting officers to consult the EPLS "immediately prior to award" to ensure awards are not mistakenly made to listed firms. It also issued an acquisition policy requiring agency contracting officers to refer to the SDO for consideration all contractors whose contracts were defaulted or terminated for cause. These new employees have also embarked upon a training program within the agency to train contracting and award officials on suspension and debarment.

The Department of Interior is not the only agency to incorporate such enhancements. Other agencies have taken steps to strengthen their suspension and debarment processes and have experienced similar improved programs. The Small Business Administration has employed full-time personnel to work suspension and debarment exclusively. The Department of Homeland Security's Immigration and Customs Enforcement (ICE) program has been revitalized and a program has now been established at the DHS Federal Emergency Management Agency (FEMA). The 2010 ISDC annual suspension and debarment survey received 37 responses this year compared with only 24 in 2009. As noted by Mr. Ginman, the OSD DPAP Deputy, overall there was a 34% increase in suspension and debarment actions within the Department of Defense in fiscal year 2010 compared with the previous year.

It is the ISDC position that current suspension and debarment regulations and authorities for both procurement actions and non-procurement actions are adequate. The ISDC believes that additional legislative mandates or requirements are not necessary. The individual agency SDO needs the discretion and flexibility to fashion a just result based upon the individual facts and circumstances of each case that is brought before her or him. That discretion insulates the suspension and debarment system from legal challenges by excluded parties that may no longer be available if more stringent and arbitrary standards are enacted. Parties appearing before an SDO are assured administrative due process which might be reduced if additional standards are enacted. The current suspension and debarment system is appropriate. What is required is the will to use it. Part of what the ISDC attempts to do is to discuss topics of interest to its membership at its monthly meetings designed to strengthen that will. I will be glad to answer any questions the Commissioners may have.