

HOLD UNTIL RELEASED BY THE
COMMISSION ON WARTIME CONTRACTING

WRITTEN STATEMENT OF

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BEFORE

THE COMMISSION ON WARTIME CONTRACTING
IN IRAQ AND AFGHANISTAN

ON

ENSURING CONTRACTOR ACCOUNTABILITY:
PAST PERFORMANCE AND SUSPENSION & DEBARMENT

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STATEMENT BY MR. FIORE

Chairman Shays, Chairman Thibault, distinguished members of the Commission:
Thank you for the opportunity to provide testimony before you here today on the important issue of contractor accountability.

I serve as the Director, Soldier & Family Legal Services, Office of The Judge Advocate General, Department of the Army. In that capacity, I am responsible for policy and oversight of legal services provided to Soldiers and their families, including legal assistance and claims services, with particular emphasis on legal support to Soldiers undergoing Medical Evaluation Boards and Physical Evaluation Boards in the Army Physical Disability Evaluation System.

Since October 2, 2008, I also serve as the Department of Army Suspension and Debarment Official (SDO).

Army Suspension and Debarment Practices

The Army follows the suspension and debarment regulatory process set forth in the Federal Acquisition Regulation (FAR) Subpart 9.4. Pursuant to that regulation, an agency may suspend, debar, or otherwise declare ineligible certain contractors in order to protect the interests of the Government on behalf of the public. Suspension and debarment are prospective remedies, in which past misconduct or unsatisfactory performance provides the context and an insight to the contractor's present and future responsibility. Contractors suspended, proposed for debarment, or debarred, are excluded from receiving contracts from the Government. Further, agencies may not solicit offers from, award contracts to, or consent to subcontracts with debarred or suspended

contractors. Debarment and suspension are discretionary actions taken to ensure agencies contract with responsible contractors only and “... not for the purposes of punishment.” (FAR 9.402(b)). Discretion in suspension and debarment decisions is not unfettered; however, and may be challenged in U.S. District Court under the Administrative Procedure Act standard for abuse of discretion, alleging that they are arbitrary, capricious, or contrary to law.

For a suspension, the evidentiary burden is “adequate evidence,” which is similar to “probable cause.” For debarment, the standard is “a preponderance of the evidence.” A contractor can be suspended when there is an indictment, and proposed for debarment and debarred when there is a criminal conviction or civil judgment for fraud or a similar offense. In these “judicially-based” actions, the underlying judicial action – indictment, conviction or civil judgment – is deemed sufficient to meet the evidentiary standard, but is subject to rebuttal with evidence of present responsibility. A contractor also can be suspended or proposed for debarment for serious misconduct that affects the contractor’s present responsibility that is not addressed by a judicial action, including willful failure to perform or a history of unsatisfactory performance. These “fact-based” actions do not have the presumptive sufficiency of judicially-based actions and are more complex and resource intensive to investigate, develop and prepare.

An agency also can enter into an administrative agreement as an alternative to suspending or debarring a contractor, when the contractor can demonstrate that notwithstanding the potential basis for suspension or debarment, the contractor is presently responsible and the Government’s interests can be protected without suspension or debarment. An administrative agreement usually involves remedial measures to

address related personal, organizational and systemic failures; prospective measures, such as ethical codes and training to inculcate an ethical culture; and oversight by the Government or independent monitors to scrutinizing ongoing contractor operations and implementation of remedial and prospective measures. The goal of an administrative agreement is to cultivate a culture corporate ethics and integrity within the contractor's operations and ensure a responsible contractor.

Pursuant to FAR Subpart 9.403, suspension and debarment authority is vested in the agency head or a designee authorized by the agency head to act as SDO. As the Army SDO, I am the decision authority for all Army suspension and debarment cases, including those cases arising in the Iraq and Afghanistan theaters of operation. In Europe and the Republic of Korea, because of the long-term Army stationing and to take advantage of expertise in host nation law and languages, the Army has further delegated overseas suspension and debarment authority for contractors located within those geographic areas of responsibility to officers in those locations.

As the Army SDO, I am an independent decision-maker and I report directly to The Judge Advocate General. I do not supervise the Army attorneys in the Procurement Fraud Branch (PFB) who monitor and develop procurement fraud, waste and abuse investigations and prepare and present suspension and debarment cases. I receive their recommendations, provide them guidance, and render decisions on the disposition of those cases.

The Army Procurement Fraud Branch, part of the Contract and Fiscal Law Division, United States Army Legal Services Agency (USALSA), is the single, centralized organization within the Army to coordinate and monitor criminal, civil,

contractual and administrative remedies in procurement fraud cases. PFB has a staff of five attorneys who work closely with investigators, primarily from Army Criminal Investigation Division (CID) and its Major Procurement Fraud Unit (MPFU). PFB also works with the Defense Criminal Investigation Service (DCIS), which is part of the DoD Office of the Inspector General (DoDIG), and other military criminal investigative agencies on cases within their investigative jurisdiction for which the Army has the lead for suspension and debarment purposes. PFB attorneys also coordinate on and monitor cases referred or under investigation by the Department of Justice (DoJ) for criminal and civil action. In addition, over 250 Army Procurement Fraud Advisors (PFAs), attorneys located in the legal offices of commands and installations worldwide, assist PFB attorneys in coordination with their local contracting and investigative offices.

The Army structure for debarment and suspension provides a separation of duties between investigation, program administration, and adjudication, which provides for thorough review, development and analysis of investigative evidence, as well as for due process for contractors.

Army Suspensions and Debarments over the Past Four Years and Current Caseload

For the past several years, the Army has been at or near the top of DoD in the number of suspensions and debarments. During Fiscal Year (FY) 2010, the Army had 133 suspensions, 170 proposed debarments, and 125 debarments, for a total of 428 actions. In FY09, the Army had 151 suspensions, 115 proposed debarments, and 124 debarments, for a total of 390 actions. In FY 08, the Army had 111 suspensions, 113 proposed debarments and 77 debarments for a total of 301 actions. In FY 07, the Army

had 112 suspensions, 94 proposed debarments, and 122 debarments for a total of 328 actions. Since 2005, the Army has taken over 350 suspensions, proposed debarments, and debarment actions against contractors and individuals in cases arising from Iraq and Afghanistan.

PFB has a current caseload of over 1000 cases. Included are over 270 arising from Iraq and Afghanistan. These cases are referred to PFB by law enforcement, CENTCOM Contracting Command, the Headquarters, International Security Assistance Force and other organizations assigned the mission of oversight of contractor performance in theater. In addition to receiving information from these organizations, PFB actively coordinates with them and provides feedback to ensure that suspension and debarment actions that I take fit into the COMISAF COIN Contracting guidance and COIN Contractor guidance described by Mr. Ginman in his earlier testimony. This reach-back support for suspension and debarment expertise is an important element in the Army's efforts to combat fraud and corruption in the CENTCOM AOR. The result is an active suspension and debarment program that provides timely subject matter expertise to the warfighter in theater

Thank you again for this opportunity to appear before you today and for the support Congress and the Members of this Committee have provided for our Soldiers, Sailors, Airmen, and Marines.

I am happy to answer any questions you may have.