



October 15, 2008

## **Myths about a Federal Contractor Responsibility Database**

The government is shirking its mandated requirement to only do business with responsible contractors. The Project On Government Oversight (POGO) is concerned that pre-award contractor responsibility determinations have fallen by the wayside. Federal agencies appear more concerned with awarding contracts quickly rather than ensuring that the government gets the best goods or services at a fair and reasonable price from responsible contractors. The responsibility database should be used by government officials to make better-informed contracting decisions and to weed out risky contractors through a more active suspension and debarment system by providing a more comprehensive history of the contractors' past conduct and performance. Additionally, a publicly available database will increase transparency and openness, resulting in a more effective contracting system.

Since the inception of POGO's Federal Contractor Misconduct Database (FCMD) in 2002, critics of contractor accountability have provided false impressions or "myths" about our intent and the current state of government contracting. With the signing of the Duncan Hunter National Defense Authorization Act (S. 3001) today, which mandates the creation of a database of information regarding the integrity and performance of federal contractors, POGO wants to dispel many of those myths.

**MYTH 1: Existing contractor responsibility systems are adequate** – *Currently, contractor information is too disparate and inadequate. The responsibility database will save time and money for federal officials.* Before this Act, there was no central government repository for federal contractor responsibility information. The Department of Homeland Security<sup>1</sup> compiled a list of over 30 public and private systems of contractor performance information. The General Services Administration's Excluded Parties List System only includes suspended or debarred individuals and contractors, but it does not document a contractor's overall performance or responsibility track record. Additionally, the government's Past Performance Information Retrieval System (PPIRS) provides information on contractors' past performance for use in making responsibility

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<sup>1</sup> Letter to Rep. Carolyn Maloney from Department of Homeland Security Chief Procurement Officer Elaine Duke, August 7, 2007 - <http://pogoarchives.org/m/co/fcmd/dhs-database-compilation-20070807.pdf>

determinations, but it is not publicly available. The DOD Inspector General<sup>2</sup> has also raised concerns about the reliability and timeliness of that data.

**MYTH 2: Contractor misconduct is inevitable** – *POGO has not found any instances of misconduct for 25 of the top 100 contractors in the FCMD. The fact that one quarter of the government’s top 100 contractors have no known instances of misconduct belies the myth that any company big enough to do business with the government will inevitably have multiple instances of wrongdoing.* Fourteen of the contractors only have one instance in the database, which means that 39 of the top 100 government contractors do not show a pattern of misconduct. In other words, contractor misconduct is not an inevitable cost of doing business.

**MYTH 3: Every \$500 OSHA violation will be included in a contractor misconduct database** – *POGO does not include small fines incurred through OSHA violations in the FCMD database. For the government database, the resulting fine, penalty, or settlement must be greater than \$5,000 to be included.* It is not the intent of either database to punish contractors who incur small fines, but rather to provide government officials with evidence of patterns of behavior so that taxpayer dollars are not placed at risk.

**MYTH 4: Five years is too long to look back at civil, criminal, and administrative infractions** – *The government and the courts often take longer than three years to resolve an allegation of misconduct.* Five years of coverage will ensure that government officials have relevant information to make responsibility determinations and genuinely evaluate a contractor’s responsibility track record.

**MYTH 5: Only instances of misconduct in the context of a federal contract are germane**– *Although the new government database will only include instances of misconduct involving federal and state contracts and grants, POGO’s database includes all instances including private, local, and international jurisdictions.* POGO believes if a contractor violates any other jurisdiction’s laws, the federal government should be aware of that information to ensure federal dollars are not at risk. Contracting officials still have discretion to determine what role this information has in award decisions.

**MYTH 6: The database will slow down the already lengthy acquisitions process and poses a financial burden on the government and contractors** – *The government already collects contractor responsibility certifications (FAR Subpart 52.209-5) of civil, criminal, and administrative misconduct for a period of three years.* The requirement to report and review an additional two years of information is neither burdensome, nor out of line with current practices. By decreasing the chances of fraud and other misconduct, the database offers significant potential savings for the taxpayers.

**MYTH 7: Contracting officers will have to make complex legal determinations that they are not trained to make** – *Contracting officers already are required to make*

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<sup>2</sup> “Contractor Past Performance Information.” DoD Inspector General Report No. D-2008-057, February 29, 2008. <http://www.dodig.osd.mil/Audit/reports/fy08/08-057.pdf> (Downloaded October 14, 2008).

responsibility determinations as governed by FAR Subpart 9.104-1, including determinations involving a contractor's "satisfactory record of integrity and business ethics." The government already collects contractor responsibility certifications. Therefore, a more comprehensive list of civil, criminal, and administrative misconduct will not alter existing policies and practices or require any additional complex legal findings.

**MYTH 8: The database is a blacklist and will result in de facto debarment** – *The law does not state that one instance of misconduct should bar a contractor from being considered for a contract award.* Moreover, acquisitions officials have waived official findings that a contractor should be debarred when they found that competition would be impacted by not allowing that contractor to participate. The database provides a comprehensive record that allows government officials to see patterns of contractor misconduct, if any, and to inquire further about a contractor's subsequent remedial measures and current level of responsibility. Government officials should review the database and consider each contractor's five-year responsibility track record on a case-by-case basis.

**MYTH 9: A contractor responsibility database implicitly finds contractors guilty of misconduct by including unresolved cases and settlements not involving an admission of guilt or liability** – *A vast number of civil and administrative cases end without any finding or admission of guilt, fault, or liability.* POGO recognizes that there are many factors that might cause a contractor to settle a case, but that action should not prevent the government from keeping a watchful eye on contractors with multiple settlements.

**MYTH 10: Instances lack "context" and fair and objective criteria to make a determination of contractor responsibility** – *Nearly every instance in POGO's FCMD includes a summary and more detailed information that is sufficient to make a responsibility determination, including links to the government or company primary source documentation.* POGO also approaches contractors to give them the opportunity to respond to each instance of misconduct, and publishes their response on the FCMD. Additionally, POGO supports proactive measure by government officials to get more detailed information or the contractor's side of the story.

**MYTH 11: Public access to the database will lead to punishing or intimidating contractors** – *Hundreds of contractors regularly compete for government contracts, despite the fact that government officials' decisions are already public, albeit not easily accessible.* POGO's FCMD demonstrates that information on contractors can be readily obtained by inspecting federal and state agency press releases and reports, court documents, company press releases, law firm announcements, and media reports.

The old saying is that "sunshine is the best disinfectant." POGO agrees and hopes that ultimately the government's new database will also be made publicly available. Given that there are already more than 30 existing public and private contractor databases that

include information about a contractors' performance and accountability, it would be a good idea to compile that information, possibly in USAspending.gov, so that government officials and the public have a comprehensive resource to oversee how taxpayer dollars are being spent. In this information age, the contractor responsibility database should be available to the government, the media, and the public.