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Project On Government Oversight

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Good afternoon. My name is Neil Gordon, and I am an investigator at the Project On Government Oversight, also known as POGO. POGO is an independent nonprofit organization committed to achieving a more accountable and transparent federal government. As such, POGO has a keen interest in federal contracting issues, particularly contractor responsibility.

The Chemical Safety and Hazard Investigation Board (CSB) has presented its findings on the April 2011 explosion and fire at the Waialeale storage bunker in Hawaii that killed five people handling illegal fireworks seized by federal authorities. The five men were performing this work for a Treasury Department subcontractor, Donaldson Enterprises, Inc.

Tragic incidents like this remind us of the government's excessive reliance on contractors to perform an increasing range of services. It also underscores the need for the government to periodically review the regulations that enable it to effectively hire and oversee its contractors, and, when necessary, make adjustments to those regulations.

One of those regulations imposes a standard of fitness on vendors who want to do business with the federal government. Before awarding a contract, the government first must make a determination that the prospective contractor is responsible. Subpart 9.104-1 of the Federal Acquisition Regulation, or the FAR, lists several criteria that must be present in order for a contractor to be deemed responsible. Among the criteria is whether the contractor has "the necessary organization, experience, accounting and operational controls, and technical skills." Although this provision lists "safety programs" as one of several examples, POGO believes that a contractor's record of environmental and workplace safety compliance should be accorded greater weight in responsibility determinations.

In 2010, the Government Accountability Office found that almost 40 percent of the 50 largest OSHA fines imposed during fiscal years 2005 through 2009 involved companies that received federal contracts in fiscal year 2009. In light of the Waialeale tragedy, and other recent serious instances of contractor environmental and workplace safety violations too numerous to mention (but which POGO catalogues in our Federal Contractor Misconduct Database), contractor safety compliance programs and violation history should be among the first things a contracting officer checks when making a responsibility determination.

Of course, for the government to be able to review relevant contractor responsibility data, it must have it close at hand in a convenient, easy-to-use, and centralized database. The government currently has such a database in the Federal Awardee Performance and Integrity Information System, or FAPIIS, which became operational in April 2010. FAR subpart 9.104-6 requires contracting officers to check FAPIIS before awarding any contract that exceeds the simplified acquisition threshold.

While it is unlikely that FAPIIS could have prevented this tragic incident in Hawaii, contracting officers now have at their fingertips a powerful resource that could help prevent future similar incidents. They will certainly now be more informed about the background of Donaldson Enterprises, which will have to report in FAPIIS any state or federal civil, criminal, or administrative sanctions resulting from the disaster. However, contractors are not required to report environmental or workplace safety violations if they are not connected with the award or performance of a contract or grant.

Fortunately, the statute creating FAPIIS—section 872 of the fiscal year 2009 National Defense Authorization Act (P. L. 110–417)—permits the FAR Council to expand the scope of information reported in FAPIIS. In the final rule implementing FAPIIS, the FAR Council stated its willingness to “further enhance the utility of FAPIIS by...expanding the current scope of reporting to include other violations of laws, as opposed to violations only in the context of Federal contracts and grants.” POGO supports expanding both the responsibility determination requirement in FAR Subpart 9.104-1 and the FAPIIS reporting requirement in 52.209-7.

In conclusion, POGO is grateful for this opportunity to highlight the need for the government to improve the way it evaluates contractor responsibility, integrity, and performance. We hope that this will be among the lessons learned from the Waikale incident.

Thank you for your time.