DOT'S SUSPENSION AND DEBARMENT PROGRAM DOES NOT SAFEGUARD AGAINST AWARDS TO IMPROPER PARTIES

Department of Transportation

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Memorandum

U.S. Department of Transportation
Office of the Secretary of Transportation
Office of Inspector General

Subject: ACTION: Report on DOT's Suspension and Debarment Program Does Not Safeguard Against Awards To Improper Parties Department of Transportation Report Number ZA2010034

Date: January 7, 2010

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Reply to Attn. of: JA-60

To: Assistant Secretary for Administration
Federal Aviation Administrator

The Department of Transportation (DOT) is responsible for overseeing significant contract and grant obligations to meet its mission needs. These obligations averaged $56 billion annually over the last 4 years and grew under the American Recovery and Reinvestment Act of 2009 (ARRA), which added $48 billion to DOT's management responsibilities. DOT's stewardship of taxpayer dollars includes adhering to Federal suspension and debarment (S&D) regulations and policies, which permit the exclusion of parties[1] found to be unethical, dishonest, or otherwise irresponsible, from receiving contracts and grants involving Federal funds. Suspension and debarment are among the Government's strongest tools to deter unethical and unlawful uses of Federal funds because one Federal agency's S&D action is applicable Governmentwide.

On May 18, 2009, we issued an Advisory on DOT's Suspension and Debarment Program,[2] which highlighted potential management and funding risks that could impact the effective and efficient use of ARRA funds.[3] This report presents the

[1] In this report, we use the term "parties" to refer to businesses, individuals, and other entities subject to suspension and debarment. Individuals, businesses, non-profits, even state and local government entities may be suspended or debarred.

[2] ARRA and Office of Management and Budget guidance requires that Inspectors General promptly report such risks.

[3] U.S. Department of Transportation, Office of Inspector General, *ARRA Advisory – DOT's Suspension and Debarment Program*, Advisory No. AA-2009-001, May 18, 2009. All OIG reports and testimonies can be viewed on our website at: www.oig.dot.gov.

results of our audit on (1) the timeliness of Operating Administrations' (OA) S&D decisions and reporting and (2) DOT's S&D policies and oversight of OA actions to exclude prohibited parties from obtaining contracts, grants, and cooperative agreements.[4]

Our review focused on the Federal Highway Administration (FHWA), Federal Aviation Administration (FAA), and Federal Transit Administration (FTA). These OAs represented over 90 percent of DOT's S&D activity over calendar years 2005 through 2008. We performed our audit between October 2006 and October 2009 in accordance with generally accepted government auditing standards as prescribed by the Comptroller General of the United States, including tests as we considered necessary, to detect fraud, waste, and abuse. Exhibit A describes the scope of our audit and the methodology we used to achieve our objectives.

RESULTS IN BRIEF

OAs' S&D decisions and reporting have been significantly delayed, increasing the risk that DOT and other agencies will award contracts and grants to parties that DOT will ultimately suspend or debar. A recent case illustrates this risk. Specifically, in the 10 months FHWA took to make a suspension decision, the Commonwealth of Kentucky used $24 million in ARRA funds to award contracts to companies whose officials were associated with parties that FHWA ultimately suspended. On average, the OAs we reviewed took over 300 days to reach a suspension decision and over 400 days to reach a debarment decision. Several factors contribute to these delays. First, some OAs have not relied on indictment or conviction standards to establish the evidentiary basis for suspension or debarment actions; instead, they often perform extra, time-consuming tasks that are not required by applicable regulations and polices before deciding cases. Second, OAs have not assigned sufficient priority to their S&D workload. Instead, staff typically performed this work as a collateral duty, which resulted in cases being delayed. Reporting of DOT's S&D decisions was also untimely. Nearly half of the S&D decisions we reviewed were not promptly entered into the Excluded Party Listing System (EPLS)—a web-based system used to track S&D decisions and affected parties Governmentwide—within 5 days, as required by DOT. These data entry delays make it difficult for officials to confidently identify excluded parties and ensure they are not awarded new contracts or grants.

Several weaknesses in DOT's S&D policies, procedures, and internal controls make them inadequate to safeguard DOT's efforts to exclude prohibited parties

[4] For DOT, contracts and grants are the most common types of covered transactions. As a result, we will use the term "contracts and grants" to refer to all covered transactions.

from obtaining contracts and grants. First, DOT's policy does not clearly establish that OAs must suspend or propose debarment within 45 days of a suspension or debarment referral from the Office of Inspector General's (OIG) Office of Investigations or other sources. As a result, the policy has been open to interpretation, leaving some OAs to exceed the 45-day limit. Second, DOT does not provide sufficient management oversight to ensure it has an effective S&D Program. Although DOT revised its S&D policy to provide more accountability and transparency, the policy did not assign monitoring of its S&D Program to a specific office. The Office of the Secretary (OST) and DOT's nine OAs are responsible for managing their own S&D programs. Consequently, OST is not aware of many of the problems and cannot take the appropriate corrective action. Finally, DOT lacks controls needed to identify weaknesses in capturing accurate and timely data in EPLS. Incomplete and inaccurate data not only weaken Federal agencies' ability to identify excluded parties, they weaken the usefulness of DOT's annual S&D reports as an oversight tool. In fiscal year 2008 alone, the report excluded 53 pending S&D cases. These deficiencies leave DOT and other government agencies vulnerable to doing business with irresponsible parties.

To address these Program weaknesses, we recommend that the Office of Senior Procurement Executive (OSPE) revise DOT's S&D Order to strengthen its internal controls and modify its corresponding data systems. We also recommend actions be taken by FAA to strengthen its S&D Program.

BACKGROUND

In fiscal year 2008, the Federal Government's contract obligations exceeded $500 billion to over 160,000 contractors. To protect this significant investment, agencies are permitted to suspend or debar parties that are found to be unethical, dishonest, or otherwise irresponsible. Suspensions and debarments, however, cannot be used as punishment for past misconduct or a leverage to resolve criminal, civil, or administrative matters. (See table 1 for key S&D elements.)

In 2005, DOT revised its policy, *Governmentwide Debarment, Suspension and Ineligibility* (Order 4200.5D), in part, after learning that it awarded a contract to a company that was under our investigation against which it could have initiated a suspension action. The revisions aimed to strengthen DOT's S&D policies and add accountability to the S&D Program by, for example, establishing deadlines for making S&D decisions, reporting them to the General Services Administration (GSA), and requiring an annual report on all S&D actions to be used as an oversight tool. At the 2006 National Fraud Prevention Conference, the Secretary explained these revisions as a "zero-tolerance policy for those who try to short-change the American people" and urged DOT administrators to enforce it vigorously.

Table 1. Summary of Key Elements of Federal Suspension and Debarment Policies

Suspension	Debarment
Overview	
• Action that temporarily prevents a party from participating in most government-funded procurement and nonprocurement[5] transactions[6] pending completion of an investigation or legal proceedings.	• A final determination that a party is not presently responsible and thus ineligible to participate in federally funded contracts or grants.
Standards of Evidence/ Causes	
• Adequate evidence that there may be a cause of debarment; an indictment for criminal conduct constitutes adequate evidence. • Immediate need for action to protect Federal business interests.	• Preponderance of evidence that the party warrants debarment; a conviction of criminal conduct or a civil judgment constitutes a preponderance of evidence. • Agency may consider remedial measures and mitigating factors when determining party's present responsibility.
Prior Notice	
• None required.	• At least 30 days.
Timeframe for OAs to Take Action under DOT Order	
• Within 45 days of notification of an indictment or other referral.	• Within 45 days of notification of a conviction or other referral.
Period of Ineligibility	
• Usually not to exceed 1 year.	• Usually not to exceed 3 years.
Entitlement To Contest	
• After notice from the agency's suspension official, but a suspension is effective immediately.	• If a party contests the debarment during the notice period, the debarment is not effective until the suspension and debarment official issues a written decision.

Source: DOT Order 4200.5D, Governmentwide Debarment, Suspension and Ineligibility, 2 CFR, Part 180, OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement), and FAR, Subpart 9.4.

Agencies are required to report excluded parties in EPLS, a web-based system maintained by GSA to track S&D decisions Governmentwide. EPLS includes

[5] Nonprocurement includes any transaction, other than a procurement contract, including but not limited to grants, cooperative agreements, loans, and loan guarantees.

[6] A suspended or debarred party may not participate in "covered transactions." Covered transactions include contracts, grants, cooperative agreements, direct loans or contracts or subcontracts under them. During an assessment the suspending official may examine the basic documents, including grants, cooperative agreements, loan authorizations, contracts, and other relevant documents are also covered transactions. For DOT, contracts and grants are the most common types of covered transactions. As a result, we will use the term "contracts and grants" to refer to all covered transactions.

information on entities that have been debarred, suspended, proposed for debarment, or otherwise declared ineligible from receiving Federal contracts, certain subcontracts, and certain Federal assistance and benefits. Such information includes the contractor's name, address, and identification number; the cause for suspension or debarment and the associated period of exclusion; and the name of the agency that took the action. While GSA maintains EPLS, individual agencies are responsible for reporting accurate data within 5 working days of the action's effective date.

In February 2009, the House Committee on Oversight and Government Reform convened a hearing on the effectiveness of the Federal Government's attempts to prevent ineligible parties from receiving Government contracts.[7] The Government Accountability Office testified that parties excluded for serious offenses—ranging from national security violations to tax fraud—improperly received Federal contracts and other funds due, in part, to deficiencies in Federal information systems used to track suspended and debarred parties.[8]

DELAYS IN DECIDING AND REPORTING CASES HINDER THE EFFECTIVENESS OF DOT'S S&D PROGRAM

OAs often do not meet DOT's deadlines for deciding and reporting S&D cases. Delays are largely due to unnecessary and lengthy reviews before deciding cases, a lack of priority assigned to DOT's S&D workload. Also, DOT's Order requires S&D actions be entered into EPLS within 5 working days after an action's effective date. However, a lack of OSPE documentation and staff causes these actions to be entered untimely. Not only do these delays put DOT and other Federal agencies at risk of awarding contracts or grants to parties who should be suspended or debarred, but they also create funding risks that could impact the effective and efficient use of funds—especially those awarded under ARRA.

FHWA's Untimely Suspension Failed To Prevent the Award of Recovery Act Funds to Parties Under Indictment

Over the past 2 years, we have reported on the need for DOT to improve the timeliness of its S&D decisions and reporting.[9] The disbursement of ARRA funds escalated the need to promptly decide and report cases against parties that

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[7] U.S. House of Representatives, Committee on Oversight and Government Reform, hearing entitled "How Convicts and Con Artists Receive New Federal Contracts," February 26, 2009.

[8] U.S. Government Accountability Office, *Excluded Parties List System, Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds*, GAO-09-419T, February 26, 2009.

[9] DOT-OIG, *DOT's Fiscal Year 2009 Top Management Challenges*, PT-2009-005, November 17, 2008.

defrauded the Government—a finding we reported in March 2009[10] and again in our May 2009 ARRA Advisory to DOT.[11] According to the Secretary of Transportation, accountability and monitoring all aspects of Recovery Act funding is one of DOT's highest priorities.

Despite this increased attention, between June and August 2009, the Commonwealth of Kentucky awarded over $24 million in ARRA funds to companies that FHWA—the largest recipient of ARRA funding in DOT—could have suspended under DOT's S&D policy and Code of Federal Regulations.[12] In September 2008, OIG sent a referral to FHWA based on an indictment charging company officers and a state government official with bribery, conspiracy, and theft from a government agency receiving Federal funds, and obstruction of justice. These individuals allegedly bribed state officials to obtain confidential state documents to determine bid estimates. In July 2009, approximately 10 months after OIG's referral, FHWA suspended the individuals cited in the referral, two of whom were associated with the companies awarded ARRA contracts.[13] Figure 1 highlights the consequences of not expeditiously processing S&D actions.

Figure 1. Timeline for FHWA's Suspension

September 2008

- DOT's OIG Office of Investigations forwarded to FHWA's Chief Counsel a referral notification for suspension. The referral was supported by a U.S. District Court indictment.
- FHWA advised the OIG it would consider taking an administrative action against the parties after it received an additional referral from FHWA's Division Administrator, as prescribed in FHWA's procedures.

July 2009

- Approximately 10 months after the OIG's referral, FHWA suspended three individuals indicted for violating U.S. law.
- FHWA did not suspend companies affiliated with these individuals, who later received ARRA contracts.

August 2009

- An OIG Office of Investigations' case agent's review of Recovery Act Projects found that ARRA funds were awarded by the Commonwealth of Kentucky in contracts for highway projects to companies whose principals FHWA suspended in July 2009.
- FHWA provided OSPE with input for these individuals in EPLS, 45 days after the suspension and debarment official's decision was effective.

[10] DOT-OIG, *American Recovery and Reinvestment Act of 2009: Oversight Challenges Facing the Department of Transportation*, MH-2009-046, March 31, 2009.

[11] DOT-OIG, *American Recovery and Reinvestment Act of 2009: DOT Issues Advisory on Department's Suspension and Debarment Program*, AA-2009-001, May 18, 2009.

[12] The Code of Federal Regulations states that persons are affiliates of each other, or with companies, if direct or indirect control can be established.

[13] On August 21, 2009, FHWA listed these individuals in EPLS.

Source: OIG analysis of DOT information.

With better communication between FHWA and Kentucky's Transportation Cabinet regarding the forthcoming suspensions, the awarding of the ARRA contracts may have been avoided.

Delays in OA S&D Decisions Are Largely Due to Inefficient Processes and Failure To Assign Priority to S&D Cases

Complete, accurate, and timely recording of S&D decisions help ensure that government contractors who have acted unethically do not receive additional government dollars. However, as of March 31, 2009,[14] about 70 percent of OAs' suspensions took more than the required 45 days—a deadline established to protect DOT and the Government's interests—and the average processing time was 301 days. While no time limits are put on debarment decisions, OAs are also taking too long to issue these decisions, with processing times averaging 415 days (see table 2). These lengthy delays have put DOT and other Federal agencies at risk of awarding contracts and grants to parties who should be suspended or debarred.

Table 2. Processing Times for S&D Decisions

OA	Suspensions			Debarments		
	Number of Cases	Processing Times in Days		Number of Cases	Processing Times in Days	
		Average	Longest Case		Average	Longest Case
FAA	2	10	17	7	172	663
FHWA	5	568	850	12[a]	641	1,193
FTA	4	113	149	4	165	255
Total	**11**	**301**		**23**	**415**	

[a] *Five FHWA cases are still open without a final decision by a suspension and debarment official. Their disposition is as follows: two are indefinitely suspended and awaiting the suspension and debarment official's signature on debarment letter, and three are not covered by suspension or debarment and have been waiting for a suspension and debarment official decision for up to 1,193 days.*

Source: OIG analysis of DOT data, June 2005 – December 2008.

Some cases have been pending for several years without action because OAs lack follow-up procedures to provide closure to these open cases. For example, FHWA, acting as the lead agency in a joint investigation with the Environmental Protection Agency (EPA),[15] did not take timely action to suspend a contractor that it knew had been indicted for conspiracy, bribery, and unlawful storage of

[14] OIG analysis was conducted on data collected through December 2007. For additional information on methodology, see exhibit A.

[15] According to 2 CFR, 180.620, when more than one Federal agency has an interest in a suspension or debarment, agencies may consider designating one agency as the lead agency for making the decision.

hazardous materials.[16] In May 2005, the company pleaded guilty. However, for more than 2 years, FHWA's debarment action remained "pending." Ultimately, EPA took action to debar the company and its principals in mid-2007. According to an FHWA suspension and debarment official, the case "slipped through the cracks," and FHWA needed to reevaluate supporting information to close the case. In September 2009—27 months after EPA's debarment—FHWA administratively revised its records to show this case was closed.

Two factors contribute to these delays. First, OAs often review cases after receiving investigative referrals. However, Federal regulations and DOT's Order both state that an indictment is adequate evidence to support a suspension, and a conviction or civil judgment is adequate evidence to support a debarment. Despite these criteria, OA staff frequently performed extra time-consuming steps in deciding their S&D cases, such as researching and gathering additional information on the case, analyzing the competitive impact of the case on Federal-aid programs, and developing recommendations to suspend or debar the party. This lengthy review and decision process unnecessarily prolongs time sensitive suspension and debarment decisions. FHWA, which processes the majority of S&D cases in DOT, noted these additional steps allow parties—many of which are small businesses that depend solely on the Federal Government for work—an opportunity to show why they should not be suspended. However, Federal regulations provide for suspended parties to contest a suspension or take remedial measures to get the suspension lifted. Regardless, in deciding S&D cases, the primary concern should be to ensure that the Government does not give additional taxpayer funds to indicted or convicted parties. The extra steps OAs perform—generally without deadlines or monitoring—leave DOT and other Federal agencies vulnerable to doing business with fraudulent or unethical parties and do not ensure those parties will be excluded from gaining future contracts and grants.

Second, OAs have not given sufficient priority to their S&D workload. Instead, the suspension and debarment officials and support staffs assigned to do S&D work stated that such work is considered a collateral duty. Consequently, we found their S&D workload competes with their other duties and responsibilities. For example, according to these officials, attorneys responsible for S&D are pulled from their S&D duties to perform high profile litigation and other assignments their OA determined to be a higher priority. As a sign of these delays, of the 134 open cases initiated since 2002, 96 do not have documented closure in the Governmentwide and DOT tracking system for S&D open cases.

[16] The company was indicted in Oklahoma and suspended by Oklahoma's DOT from receiving state contracts in 2004.

Less Than Half of DOT's S&D Decisions Were Entered into EPLS Within the Required Timeframe

Both Federal regulations[17] and DOT's Order require that S&D actions be entered into EPLS within 5 working days after an action's effective date.[18] However, our review showed almost half of the 132 EPLS S&D entries between June 2005 and July 2008 were made after the 5-day requirement. OSPE's data entry exceeded the requirement from 3 to 864 days, and 14 cases took over 100 days (see table 3).

Table 3. Compliance with 5-Day EPLS Entry Requirement

Met standard	← Did not meet the standard →				
5 days or less	**6 – 30 days**	**31 – 55 days**	**56 – 100 days**	**101 – 365 days**	**365 days or more**
69	33	8	8	13	1

Source: OIG analysis of DOT data, June 2005 to July 2008.

We found several causes for these delays. In one case, FTA did not provide documentation on one business and four individuals it debarred in November 2006 until March 2007, when we brought it to their attention. According to FTA officials, S&D staff misplaced paperwork on these decisions, causing this delay.[19] Although we found no new contracts or grants had been awarded to the business or individuals during this period, this example highlights how DOT and other Federal agencies could be vulnerable to awarding new contracts or grants to unethical parties. In another case, FHWA's submission of required information to OSPE was delayed because, according to FHWA officials, personnel had no assigned backup while on leave or in training. One OSPE representative also noted some submissions lacked data elements required by Federal regulations and were returned to OAs for completion. Additionally, OSPE's EPLS data entries have been delayed because backup data entry staff had not been properly trained.

DOT LACKS ADEQUATE MANAGEMENT AND CONTROLS TO ENSURE S&D PROGRAM INTEGRITY

To better ensure program integrity, management controls are used to emphasize accountability, monitoring, and clear organizational roles and responsibilities.

[17] 2 CFR, Subpart E – Excluded Parties List System, 180.520(c) and FAR, Subpart 9.404(c)(3).

[18] Under DOT's Order, OSPE is responsible for entering data into EPLS, and OAs are required to promptly notify OSPE of their suspension or debarment decision.

[19] We identified this condition by comparing FTA's list of cases to EPLS and brought it to FTA's attention.

However, no one office is responsible for managing DOT's S&D Program. Instead, program management is delegated to OST and DOT's nine OAs, creating gaps in DOT's knowledge of weaknesses affecting the S&D Program that warrant corrective actions. Such weaknesses include a lack of OA understanding about the intent of DOT's 45-day policy for making S&D decisions, a failure to identify inaccurate and missing EPLS data, and the usefulness of DOT's annual S&D reports.

DOT Policy on Timeliness of S&D Decisions Has Been Open to Interpretation

DOT's Order aims to ensure accountability for DOT's S&D Program by establishing deadlines for making S&D decisions.[20] According to a former Office of General Counsel (OGC) attorney responsible for leading the revision of DOT's Order, the intent of the 45-day requirement covers the total timeframe for DOT officials to complete all needed tasks to make a final suspension decision or propose a debarment decision. However, DOT's S&D 45-day policy is unclear and open to interpretation by officials responsible for suspensions and debarments in the OAs we reviewed. For example:

- FHWA interpreted the 45-day period as the goal for its divisions to conduct research and provide an S&D recommendation to FHWA's suspension and debarment officials.

- FAA interpreted the 45-day period as the goal for its headquarters staff to make a decision after it receives a recommendation and supporting information for an S&D action from a regional office.[21]

- FTA met the intent of DOT's Order—that is, it interpreted the 45-day period as its goal to suspend or propose debarment after it receives a referral notification.

Interpreting the 45-day requirement other than how it was intended creates opportunities for delays—some significant—and ultimately puts DOT and other Federal agencies and recipients of Federal funds at an increased risk of awarding contracts and grants to unethical, dishonest, or otherwise irresponsible parties.

[20] DOT Order 4200.5D provides a 45-day timeframe for initiating suspensions and proposed debarments, but this does not clearly reference the entire process to make a final S&D decision.

[21] According to FAA officials, while not required to adhere to DOT's Order for procurement S&D decisions, they follow the 45-day requirement.

Lack of Quality Controls on EPLS Data Has Resulted in Errors That Makes it Difficult To Identify Excluded Parties

Federal regulations require contract and grant officials to check EPLS before making awards to ensure that suspended or debarred parties do not receive new contracts or grants.[22] However, data entered into EPLS were not always accurate or complete. Without comprehensive and reliable EPLS data, contracting officers cannot confidently identify excluded parties.

OSPE is required to enter a range of information provided by OAs on excluded parties into EPLS, including their DUNS number—a nine-digit identification number assigned by Dun & Bradstreet, Inc. Checking an entity's DUNS number enables agencies to more confidently determine whether a specific contractor has been excluded. However, for the 49 suspended or debarred parties that we reviewed in EPLS, 8 that were coded correctly as "firms" were missing required DUNS numbers[23] and 16 were miscoded by OSPE as "individuals." While OAs are responsible for providing DUNS numbers, OA representatives said they were not aware of the requirement, or they did not know how to find the DUNS number. An OSPE representative noted she did not want to delay entering information into EPLS to obtain the missing DUNS numbers.

We found other actions not accurately reflected in EPLS. For example:

- One business was incorrectly removed from EPLS by OSPE staff and left off for over 2 ½ years.

- Nine parties were listed more than once.

While OSPE corrected the errors we identified, there is no assurance that other errors exist or that errors will not continue because OAs and OSPE do not have an effective review process. Specifically, not all OAs retain a copy of their data submissions to OSPE, which makes reconciliation impossible. In addition, OA staffs are unclear of their responsibilities, which negatively impacts the quality of this review. Such weaknesses allow for inaccurate EPLS entries, which increases the risk that suspended or debarred businesses could be awarded new contracts or grants during a period of exclusion. The importance of DOT providing accurate information to EPLS is heightened by the fact that GSA does not verify data directly provided by agencies.

[22] 2 CFR, Subpart E – Excluded Parties List System, 180.520(c).
[23] For the EPLS database, a DUNS number is required for businesses, not individuals.

The Usefulness of DOT's S&D Annual Reports as an Oversight Mechanism Is Questionable

DOT's Order requires OSPE to prepare an annual report detailing all OA cases in which S&D actions were considered, initiated, or completed, and the status or outcome of each case.[24] However, the past four annual reports were incomplete and inaccurate. For example, the 2008 annual report excluded 53 prior years' open cases.[25] The 2005, 2006, and 2007 annual reports also excluded required written justifications documenting why an OA decided not to suspend or debar parties in nearly half (19 of 40) of the cases. Other problems with these reports included cases with incorrect action dates, missing referral dates, and duplicate entries. DOT's Order has not assigned responsibility to OSPE or the OAs for ensuring that annual report information is accurate, and the failure of OSPE and the OAs to pay sufficient attention to detail, such as verifying data when preparing the annual submissions, contributed to these errors.

According to a former DOT Deputy Assistant General Counsel involved in the development of DOT's Order, the annual report was intended to be used as an oversight tool for OGC and OIG to assess OA compliance with the Order. Given the unreliability of the annual reports, OGC and OIG have made little or no use of these reports because they did not assist in overseeing DOT's S&D Program. While OSPE replaced its paper-based reporting in 2007 with SharePoint, an electronic database intended to help track DOT's S&D caseload, SharePoint failed to improve the quality of annual S&D reporting. For example:

- The 2007 annual report excluded about one-fourth (39 of 152) of the cases that should have been listed. Also, its format—a 900-page list of raw data that OAs entered into SharePoint—was not a usable management or oversight tool. This list did not summarize the S&D Program's activities or results at the DOT or OA levels, such as referrals, the number of suspensions and debarments, pending cases, and cases where the OA took no action.

- The 2008 annual report summarized S&D Program activities; however, it excluded over 75 percent of the cases that should have been listed.

In May 2009, DOT's former Senior Procurement Executive[26] stated SharePoint is intended to be an effective tool to help track cases on a day-to-day basis, as well as for management to monitor DOT's S&D Program. Subsequently, OSPE began a SharePoint pilot program intended to allow managers to perform keyword queries

[24] OSPE prepares a Department-wide report based on OA submissions.

[25] To determine the number of missing cases, we compared the total number of cases listed in SharePoint to the number of cases listed in the annual report.

[26] As of December 17, 2009, the Senior Procurement Executive left DOT. Pending actions are being carried out by OSPE.

and generate their own summary reports. As of the date of this report, OSPE has not reported on the results of this pilot.

CONCLUSION

One of the Government's strongest defenses against contract fraud, waste, and abuse is its right to suspend and debar parties found to be unethical, dishonest, or otherwise irresponsible. However, despite DOT's revisions to its S&D Order coupled with the deficiencies we found in the S&D Program—untimely decisions, unreliable data, and inadequate oversight—the Department has not achieved the desired outcome of having a strong S&D program. Furthermore, the additional resources provided by ARRA requiring careful oversight heighten the risks of DOT awarding taxpayer money to unethical parties. Unresolved S&D cases coupled with DOT's rapid disbursement of billions of ARRA dollars creates a 'perfect storm' for contractor's intent on defrauding the Government. Until DOT takes action to ensure timely S&D decisions, complete and accurate EPLS data, and effective oversight, it will continue to risk awarding billions of taxpayer dollars to parties that have been suspended or debarred.

RECENT AGENCY ACTIONS

On May 19, 2009, in response to our ARRA Advisory, the Deputy Secretary of Transportation reported to the Inspector General that DOT has taken actions to improve its S&D Program and will maintain a continued focus in this area. Later, on May 27, 2009, the former Senior Procurement Executive issued a memorandum to DOT's suspension and debarment officials, which provided clarifying expectations to ensure that DOT does not award Federal monies to parties that have committed fraud or are otherwise known to be irresponsible and to effect more timely processing and reporting of S&D actions. For example, these expectations included deciding whether or not to take actions within a 45-day timeframe and promptly entering such decisions in the EPLS database. In addition, OSPE is revising DOT's S&D Order and plans to issue it by late January 2010.

On September 21, 2009, in FHWA's response to our ARRA Advisory, the Chief Counsel cited recent actions to improve processing of S&D cases. Some of these steps include consolidating the responsibility for processing cases to the Office of Chief Counsel, doing a comprehensive review of all pending cases, processing OIG referrals since May 2009 within the 45-day requirement, and developing an

action plan for processing high priority cases. We have not verified this information but will assess as part of our recommendation follow-up process.

RECOMMENDATIONS

While DOT's recent actions constitute steps towards improving its S&D policy, we recommend that DOT officials take the additional actions to address the S&D Program's weaknesses cited in this report:

We recommend that the Senior Procurement Executive:

1. Revise DOT Order 4200.5D, *Governmentwide Debarment, Suspension and Ineligibility* to:

    a. Assign an office oversight responsibility for monitoring DOT's implementation of the S&D Program.

    b. Require that OAs establish implementation procedures for their S&D Program roles and responsibilities.

    c. Clarify that OAs are to issue suspension or debarment notices—or make a written justification why a suspension or debarment is not warranted under the circumstances—within 45 days of notification of a referral.

    d. Require that OAs follow S&D evidence standards provided under Federal regulations—an indictment is a sufficient basis by itself for suspension, and a civil judgment or conviction is a sufficient basis for debarment—and that factors not contemplated by regulations should not be considered when determining a party's present responsibility.

2. Modify DOT's SharePoint and establish corresponding internal controls and validation processes to:

    a. Ensure the entry of accurate, complete, and timely S&D data, such as periodic reconciliations between case files and SharePoint.

    b. Upgrade SharePoint to allow queries and summary reports for the system to be used as a management oversight tool and meet the annual report requirements.

3. Improve OSPE's internal controls for the entry of accurate, complete, and timely S&D information to EPLS, such as periodic reconciliations between SharePoint and EPLS.

4. Require OAs to immediately provide OSPE a full inventory of DOT's open S&D cases.

We recommend that FAA:

5. Revise FAA's Procurement Guidance, *Debarment and Suspension* to:

    a. Assign an office oversight responsibility for monitoring implementation of FAA's S&D Program.

    b. Require the establishment of implementation procedures for their S&D Program roles and responsibilities.

    c. Clarify that FAA is to issue suspension or debarment notices—or make a written justification why a suspension or debarment is not warranted under the circumstances—within 45 days of notification of a referral.

    d. Require adherence to S&D evidence standards provided under Federal regulations, namely to (1) suspend parties upon learning of their indictment, and (2) debar parties upon learning of their conviction or receipt of a civil judgment.

6. Improve its internal controls for the entry of accurate, complete, and timely S&D information to EPLS, such as periodic reconciliations between SharePoint and EPLS.

AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE

A draft of this report was provided to the Department on October 28, 2009. On December 4, 2009, we received a consolidated response from OST and FAA, which can be found in its entirety in the Appendix of this report. OST concurred with all our recommendations. FAA concurred with recommendation 5.a., 5.b., 5.d., and 6, and partially concurred with recommendation 5.c., stating that it will clarify AMS guidance to include the 45-day goal for issuance of S&D notices or to provide a written justification on why a suspension or debarment is not issued. OST and FAA have either taken appropriate corrective actions or provided acceptable target dates, with the exception of recommendation 6. We request that FAA provide us with a target date for incorporating and conducting a review of EPLS entries into its National Acquisition Evaluation Program.

Additionally, we disagree with FHWA's comments contained in the Department's response regarding the Commonwealth of Kentucky. While FHWA stated it felt

compelled to do further research to conclude the unindicted parties were affiliates before considering a suspension action, our opinion is that sufficient legal cause existed to immediately suspend the parties as affiliates. Specifically, the FAR's definition[27] of an "affiliate" for purposes of suspension and debarment states:

> *Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (1) either one controls or has the power to control the other, or (2) a third party controls or has the power to control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment.*

The evidence available to FHWA in this case included several indicators of control specifically listed in the FAR and in our opinion, provided sufficient grounds to immediately propose suspension.

ACTIONS REQUIRED

OST and FAA's actions planned and taken satisfy the intent of our recommendations, subject to follow-up provisions in DOT Order 8000.1C. However, regarding recommendation 6, we request that FAA provide us with a target date for incorporating and conducting a review of EPLS in its National Acquisition Evaluation Program. We appreciate the courtesies and cooperation of Department of Transportation representatives during this audit. If you have any questions concerning this report, please call me at (202) 366-5225 or Anthony Wysocki, Program Director, at (202) 493-0223.

#

cc: Martin Gertel, M-1
Senior Procurement Executive, M-60
James Washington, FAA
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[27] FAR 9.403.

EXHIBIT A. SCOPE AND METHODOLOGY

We conducted this audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence that provides a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

We conducted this audit between October 2006 and October 2009. To address our objectives, we selected OAs that accounted for most of its S&D activity during calendar years 2005 and 2006. From a universe of 129 cases we obtained from DOT's 2005 and 2006 Annual Reports, we identified that the FHWA, FAA, and FTA represented 94 percent of DOT's S&D activity—or 121 cases. Table 4 provides a full account of the universe of 129 cases.

Table 4. Suspension and Debarment Actions - Calendar Year 2005 and 2006

OAs	Cases[a]		Actions	
	Total Considered	Not Acted Upon	Suspensions	Debarments
FAA	8	[b]	10	3
FHWA	97	37	70	35
FTA	16	[b]	16	2
Other [c]	8	1	2	1
Total	**129**	**38**	**98**	**41**

[a] A single case can include multiple parties including businesses, other organizations, and individuals. As a result, totals for cases and actions are not intended to equal.

[b] OA failed to provide data.

[c] Maritime Administration and Pipeline and Hazardous Materials Safety Administration.

Source: DOT's fiscal year 2005 and 2006 S&D Annual Reports.

During the course of our audit, we interviewed officials and reviewed policies; data; and information from OSPE, OGC, OAs (FHWA, FAA, and FTA), and the OIG's Office of Investigations.

To assess whether DOT's S&D policies, procedures, and internal controls are adequate to ensure that prohibited parties are excluded from obtaining contracts and grants, we reviewed applicable laws, regulations, and departmental polices and procedures. Specifically, we analyzed:

- Code of Federal Regulations provisions related to suspension and debarment (2 C.F.R. Governmentwide Debarment and Suspension).

- Federal Acquisition Regulation, Subpart 9.4 – Debarment Suspension, and Ineligibility.
- DOT Order 4200.5D, *Governmentwide Debarment, Suspension and Ineligibility*, 2005.
- OA supplements to DOT Order 4200.5D: FHWA Order 2000.2A, *FHWA NonProcurement Suspension and Debarment Process (Federal-Aid Program)*, 2000.
- OSPE's Suspension and Debarment Annual Reports, 2005–2008.

Also, we interviewed suspension and debarment officials from OSPE and the OAs to obtain their views on these policies and procedures. We worked with OIG's Office of Investigations to understand and assess their role in implementing DOT's Order, such as their processes to referring cases to OAs for suspension or debarment consideration. In addition, we interviewed officials from the EPA and the Defense Logistics Agency to obtain information on their S&D policies and procedures.

To assess whether DOT's OAs effectively implemented DOT's S&D policies and procedures, we reviewed FAA, FHWA, and FTA's internal controls, procedures, practices, and supporting databases. We interviewed suspension and debarment officials in these OAs to obtain a clear understanding of their processes and their implementation. In addition, from a list of the 186 parties suspended or debarred Departmentwide from 2005 to 2007, we judgmentally selected a sample to determine whether required information on such parties was entered in EPLS in a timely manner. Our selection criteria were preliminary determination of length of time between referral date and action date and whether the case was over a year old at the time of review. We analyzed documentation and testimonial evidence at the selected OAs to determine how each: (1) used administrative agreements, (2) coordinated and shared S&D information, and (3) collected data to monitor the S&D process. Also, we compared entries from our sample in the EPLS and Federal Procurement Database System-Next Generation to identify if any suspended or debarred businesses received a new contract during a period of suspension or debarment.

During the course of this audit, we conducted additional analysis on information collected from 2007 through 2009 in order to update data initially reviewed during the earlier part of the audit.

Exhibit B. Major Contributors to This Report

Name	Title
Anthony Wysocki	Program Director
Kenneth Prather	Program Director
Ann Wright	Project Manager
Gary Fishbein	Project Manager
Amanda Watson	Senior Auditor
Krista Kietrys	Writer-Editor
Seth Kaufman	Associate Counsel

APPENDIX. AGENCY COMMENTS

Memorandum

U.S. Department of Transportation
Office of the Secretary of Transportation

Subject: **ACTION**: Management Response to OIG Draft Report, "DOT's Suspension and Debarment Program Does Not Safeguard Against Awards to Improper Parties"

Date: DEC 4 2009

From: Linda J. Washington
Assistant Secretary for Administration

Reply to Attn. of: JA-60

To: Mark H. Zabarsky
Assistant Inspector General for
Acquisition and Procurement Audits

This review from the Office of Inspector General (OIG) provides useful, actionable information that has already served as the basis for considerable change in the way suspension and debarment cases are handled in the Department, with additional changes on the way. The information provided in the report, along with the willingness of the OIG staff on this review to directly engage management, and identify the rationale and basis for their perspectives, is extremely useful for bringing about the type of positive change this Administration has promised. Change is underway both in the Office of the Secretary (OST) and in operating administrations (OA) such as the Federal Highway Administration (FHWA) and is intended to expedite the handling of suspension and debarment cases, raise their priority for action, better track status, and ensure expectations are clearly and unequivocally enumerated, particularly with regard to responsibilities and timeframes. FHWA in particular has substantially ramped up the resources and management attention devoted to suspension and debarment cases and has already completed significant accomplishments in the area. In addition, FAA is revising its Acquisition Management System guidelines in line with the draft report's recommendations.

OST is Providing the Framework for Clear Expectations and Better Tracking

Within the Office of the Secretary, the Senior Procurement Executive is responsible for overall suspension and debarment policy. This Office also maintains situational awareness of suspension and debarment actions within DOT and serves as the single point of contact with other agencies to disseminate information about their suspension and debarment actions. Making use of the information OIG first conveyed in its May

advisory report, OST initiated a comprehensive revision of the DOT suspension and debarment order. This complex undertaking involves striking an operational balance among competing priorities and perspectives and is expected to be complete by January 29, 2010.

With regard to situational awareness, OST began requiring the use of an electronic reporting system in 2007; however, the system has proven insufficiently robust to provide the capability to maintain adequate tracking and awareness. As a result, the Office of the Senior Procurement Executive is working to complete a revised SharePoint-based system that will offer enhanced tracking and management capabilities by the second quarter of fiscal year (FY) 2010. Finally, the Office of the Senior Procurement Executive has taken action to better ensure that suspension and debarment data is entered timely and accurately into the government-wide Excluded Parties List System (EPLS). Guidance for this action was disseminated in September 2009.

FHWA Substantially Strengthened Suspension and Debarment Capabilities

Subsequent to the OIG ARRA Advisory on suspension and debarment, FHWA implemented a comprehensive review of suspension and debarment policies, processes, backlogs and resources, and has actions completed and underway to substantially improve its handling of suspension and debarment referrals. FHWA established a dedicated team within the Office of Chief Counsel to work with its debarring official. This team is responsible for identification, review and disposition of all pending suspension and matters within stated deadlines. This team includes individuals who are dedicated to working suspension and debarment issues supplemented by additional legal resources to ensure that actions are taken timely.

This team immediately set about developing and implementing a revised set of detailed case processing protocols which brought primary responsibility for action into headquarters. Notably, FHWA's revised policy calls for issuing suspension and proposed debarment orders within 45 days of notification to FHWA of an indictment from any source, or making a written justification why a suspension or debarment is not warranted under the circumstances. FHWA's actions demonstrate that its new approach to handling these cases is capable of meeting that deadline based on the two indictment referrals received from OIG since that time. FHWA also completed a comprehensive inventory of cases on hand and established a case tracking system that includes monthly status reports to management. It has achieved progress addressing that inventory. For example, of the 6 cases identified in the OIG ARRA Advisory, 3 are now closed, 2 parties have been suspended, and FHWA is pursuing information on the final case prior to final disposition.

To achieve further progress, FHWA intends to work closely with OIG to ensure that future referrals provide the full set of information necessary to move forward with suspensions. Preliminary analysis indicates that among other sources of delay, the receipt of incomplete information in the original referral document can slow the process. FHWA and OIG have already begun discussions on suspension and debarment and FHWA intends to work with the investigative side of OIG to ensure there is a full and mutual

understanding of the nature and extent of information needed to move these cases to completion. This is critical as most referrals come through the OIG and FHWA does not have its own investigatory resources. The Office of the Chief Counsel will work more closely with the OIG to obtain additional information on referred matters, including documentary evidence not otherwise available from state records, regarding ownership and control by indicted persons of companies that the OIG believes may be associated with them.

Actions Taken and Pending with Regard to the Commonwealth of Kentucky

With respect to the Commonwealth of Kentucky matter referred to in the OIG draft report, FHWA suspended each of the three indicted individuals referred by the OIG. It also suspended one company for which corporate records indicate an officer is one of the indicted individuals, although there is no information to indicate that this company is bidding, or able to bid, on highway work. Even if the company were able to bid, 2 CFR 1200.405 automatically would exclude this company by virtue of having a principal that has been suspended.

FHWA did not immediately suspend any of the other unindicted companies that the draft report maintains were associated with the indicted parties, because from its perspective, the available evidence was not legally sufficient. However, FHWA has taken a number of other steps to ensure the federal highway program is protected. First, with regard to the two Recovery Act funded contracts with the companies in question, FHWA requested that OIG staff work together with its division staff to provide additional oversight to ensure that public funds invested in these projects are used appropriately and for their intended purpose. Secondly, FHWA has issued show cause orders to the six companies sharing the same or similar address as the suspended company to provide information and documentation regarding the companies' affiliation with the suspended individuals and company. Upon receipt and review of this information, FHWA will take swift and appropriate action as warranted. Third, FHWA met with OIG staff to discuss this matter in detail to gain a comprehensive sense of the perspective and standards behind the OIG position, and has agreed to further review its processes in light of both OIG's perspective and the practices common in other government agencies. FHWA intends to continue this dialogue, particularly if any further process changes result.

Federal Transit Administration Addressed Suspension and Debarment Issues

The Federal Transit Administration (FTA) considers its suspension and debarment responsibilities to be an important component of its grant and contracting programs and procedures. FTA notes that while the information in the OIG draft report regarding the time required by FTA to process suspension and debarment actions was accurate at the time (2006-2007) for the 4 sample cases reviewed, since then, FTA has acted to improve the timeliness of these actions. Specifically, FTA filled the then-vacant position of Assistant Chief Counsel for General Law and hired a new Director of Procurement. These personnel actions, along with establishing standard operating procedures for

Suspension and Debarment processing, has increased FTA's focus on suspensions and debarment and decreased processing times.

RECOMMENDATIONS AND RESPONSES
The OIG draft report offers recommendations to both the Senior Procurement Executive within OST and FAA, as FAA operates under independent procurement authority. Responses for both sets of recommendations are included in this response, starting with those pertaining to OST.

Recommendation 1: Revise DOT Order 4200.5D, *Governmentwide Debarment, Suspension and Ineligibility* to: (a) assign an office oversight responsibility for monitoring DOT's implementation of the suspension and debarment program, (b) require that OAs establish implementation procedures for their suspension and debarment program roles and responsibilities, (c) clarify that OAs are to issue suspension or debarment notices—or make a written justification why a suspension or debarment is not warranted under the circumstances—within 45 days of notification of a referral, and (d) require that OAs follow suspension and debarment evidence standards provided under Federal regulations—an indictment is a sufficient basis by itself for suspension and a civil judgment or conviction is a sufficient basis for debarment—and that factors not contemplated by regulations should not be considered when determining a party's present responsibility.

Response: Concur. The Senior Procurement Executive is in the process of revising DOT Order 4200.5D, and expects to have it completed by January 29, 2010. The revised order accommodates each element of the recommendation. During the interim, the Senior Procurement Executive distributed clarifying guidance to appropriate officials throughout the Department. This guidance offered some clarification regarding expectations for the prompt and appropriate handling of suspension and debarment actions.

Recommendation 2: Modify DOT's SharePoint and establish corresponding internal controls and validation processes to: (a) ensure the entry of accurate, complete, and timely suspension and debarment data, such as periodic reconciliations between case files and SharePoint, and (b) upgrade SharePoint to allow queries and summary reports for the system to be used as a management oversight tool and meet the annual report requirements.

Response: Concur. Modifications to the SharePoint website are underway to provide a means to capture and document suspension and debarment actions in a more comprehensive manner than previously available. The new system has been beta tested and will be undergoing final development once the revised DOT Suspension and Debarment Order is fully stabilized. This new system is expected to be complete during the second quarter of FY 2010. Upon completion of the site and additional testing, the Office of the Senior Procurement Executive will also provide training to OA and OIG staff and provide a detailed owners manual for user assistance to help ensure appropriate usage of the system.

Appendix. Agency Comments

Recommendation 3: Improve the Office of the Senior Procurement Executive's internal controls for the entry of accurate, complete, and timely suspension and debarment information to EPLS, such as periodic reconciliations between SharePoint and EPLS.

Response: Concur. The Office of the Senior Procurement Executive recognized the need for a new process to better ensure timely and accurate EPLS reporting. In September 2009, it issued a new requirement calling for all suspension and debarment actions to be reported to a dedicated web site. These measures will remain in place until the revised Order is in place and the revised SharePoint system is fully implemented. Final revised procedures will be documented in the Order.

Recommendation 4: Require OAs to immediately provide Office of the Senior Procurement Executive a full inventory of DOT's open suspension and debarment cases.

Response: Concur. In May 2009, the Senior Procurement Executive issued a request to DOT suspension and debarment officials to provide it with updates by May 29, 2009. The OAs provided the requested updates and the Senior Procurement Executive is monitoring the program utilizing the reports submitted. Once the revised SharePoint site is fully operational, we will have the capability to continuously monitor and report on all suspension and debarment actions.

FAA RECOMMENDATIONS AND RESPONSES

Revise FAA's Procurement Guidance, *Debarment and Suspension* to:

Recommendation 5a: Assign an office oversight responsibility for monitoring implementation of FAA's suspension and debarment program.

Response: Concur. FAA will assign an office oversight responsibility for monitoring implementation of its suspension and debarment program. The assignment will be promulgated by a change to FAA's Acquisition Management System (AMS) Guidance at T3.2.2.7, Suspension and Debarment. Action is expected to be completed by April 2010.

Recommendation 5b: Require the establishment of implementation procedures for their suspension and debarment program roles and responsibilities.

Response: Concur. Procedures for FAA suspension and debarment program are established in FAA's AMS Guidance at T3.2.2.7.A.3.b.2, Debarment Procedure and T3.2.2.7.A.3.b.3, Suspension Procedure. However, FAA will review the Procedures to ascertain whether further information will be useful to the AMS audience. Action is expected to be completed by April 2010.

Recommendation 5c: Clarify that FAA is to issue suspension or debarment notices—or make a written justification why a suspension or debarment is not warranted under the circumstances—within 45 days of notification of a referral.

Appendix. Agency Comments

Response: Concur in part. FAA will clarify AMS Guidance at T3.2.2.7 to include the 45 day goal for issuance of suspension or debarment notices or to make a written justification why a suspension or debarment is not issued. Action is expected to be completed by April 2010.

Recommendation 5d: Require adherence to suspension and debarment evidence standards provided under Federal regulations, namely to (1) suspend parties upon learning of their indictment, and (2) debar parties upon learning of their conviction or receipt of a civil judgment.

Response: Concur. FAA will revise AMS to strengthen adherence to the suspension and debarment evidence standards provided under Federal regulations by using "should" in lieu of "may." T3.2.2.7.A.3.c.(2)(b) currently states that the suspending official may suspend based on an indictment, and AMS T3.2.2.7.A.3.b.(1)(a) currently states that the debarring official may debar based on a conviction or civil judgment. This is consistent with Federal regulations at 48 CFR 9 which do not require suspension or debarment based on indictment, conviction or a civil judgment. Action is expected to be completed by April 2010.

Recommendation 6: Improve its internal controls for the entry of accurate, complete, and timely suspension and debarment information to EPLS, such as periodic reconciliations between SharePoint and EPLS.

Response: Concur. FAA will incorporate a review of EPLS entries into its National Acquisition Evaluation Program (NAEP). NAEP will conduct annual reviews to ensure proper and timely entry of applicable data into EPLS.