



U.S. DEPARTMENT OF  
TRANSPORTATION

**Federal Highway  
Administration**

# Order

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## Subject

**FHWA SUSPENSION AND DEBARMENT PROCESS**

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Classification Code	Date	Office of Primary Interest
<b>2000.2B</b>	November 7, 2014	<b>HCC</b>

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1. **What is the purpose of this directive?** To prescribe policy and guidelines for processing nonprocurement and procurement suspension and debarment (S/D) actions against participants who have an unsatisfactory record of integrity and business ethics in Federal Highway Administration (FHWA) financial assistance (including Federal-aid) programs and direct Federal procurement by the FHWA.
  2. **Does this directive cancel an existing FHWA directive?** FHWA Order 2000.2A, FHWA Nonprocurement Suspension and Debarment Process (Federal-Aid Program), dated June 19, 2000, is canceled.
  3. **What is the background of this directive?** S/D actions are discretionary administrative actions taken to protect the Federal Government by excluding certain firms and persons from participation in Federal programs. The S/D action ensures that the Federal Government does not conduct business with a person or firm that has an unsatisfactory record of integrity and business ethics. The S/D actions are administered government wide; consequently, a person or firm excluded by one Federal agency is excluded from doing business with all Federal agencies.

4. **What authorities govern this directive?**

- a. **2 CFR Part 180 and Part 1200** – Government wide Debarment and Suspension Regulation for Nonprocurement.
- b. **48 CFR Subpart 9.4** – Federal Acquisition Regulation for Governmentwide Suspension and Debarment for Procurement.
- c. **DOT Order 4200.5E** - Departmental Suspension and Debarment Procedures and Eligibility Policy.

5. **What key terms are used in this directive?**

a. The term Suspending and Debarring Official (SDO) used in this directive refers to the position delegated the authority to act as either the Nonprocurement or Procurement SDO, as relevant for the particular action being discussed.

b. For nonprocurement actions, civil judgments are defined as including a civil settlement or other disposition that creates a civil liability for the wrongful acts described in the civil complaint, or as otherwise defined by 2 CFR Part 180. For procurement actions, civil judgments are defined as any judgment or finding of a civil offense by any court of competent jurisdiction.

c. Other pertinent definitions are set forth in 2 CFR Parts 180 and 1200 and 48 CFR Subpart 9.4.

6. **What is the scope of this directive?** This Order applies to all FHWA offices. The Federal Acquisition Regulation for Procurement Suspension and Debarment at 48 CFR Subpart 9.4 applies to all FHWA offices with procurement authority. The Nonprocurement Regulation at 2 CFR Parts 180 and 1200 applies to the nonprocurement transactions for FHWA Headquarters and field offices. This Order covers all S/D actions within the meaning of 2 CFR Part 180 and 48 CFR Subpart 9.4.

- a. These regulations apply to all persons and firms that have participated, are currently participating, or may reasonably be expected to participate in transactions under Federal nonprocurement and procurement programs.
- b. Covered transactions include all nonprocurement transactions at the primary and any lower tier of subcontracting of an amount that is expected to equal or exceed \$25,000.00, and all procurement transactions at the primary tier and at any lower tier of subcontracting of an amount that is expected to equal or exceed \$30,000.00. Contracts below these amounts are not considered



covered transactions governed by the procurement and nonprocurement suspension and debarment regulations.

7. **What is the FHWA policy on suspension and debarment?** It is FHWA policy to consider action against a person or firm whenever a cause for debarment under 2 CFR Part 180 and 48 CFR Subpart 9.4 has occurred.
8. **What are the causes for debarment?** Causes for debarment action include, but are not limited to:

a. Under both the nonprocurement regulation at 2 CFR Part 180 and the procurement regulation at 48 CFR Subpart 9.4, causes to debar include but are not limited to:

(1) Conviction of or civil judgment for:

(A) Commission of fraud or a criminal offense in connection with the obtaining, attempting to obtain, or performing a public agreement or transaction, including intentional violations of the Buy America Act requirements of 23 U.S.C. 313;

(B) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(C) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice; or

(D) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person. Government contractor or subcontractor.

(2) Other evidence of a violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(A) A willful failure to perform in accordance with the terms of one or more public agreements or transactions including intentional violations of the Buy America Act requirements of 23 U.S.C. 313;

(B) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions.

(3) Any of the following causes:

(A) A procurement debarment by any Federal agency taken pursuant to 2 CFR Part 180 and 48 CFR Subpart 9.4;

(B) Knowingly doing business with an ineligible person, except as permitted under 2 CFR Part 180 and 48 CFR Subpart 9.4; or

(C) Violation of any requirement of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701).

(4) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

b. Causes for suspension and debarment under the nonprocurement regulation at 2 CFR Part 180, include but are not limited to the provisions of 8.a, and the following:

(1) Other evidence of a willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction, including intentional violations of the Buy America Act requirements of 23 USC 313.

(2) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted,

(3) Violation of a material provision of a voluntary exclusion agreement entered into under 2 CFR Part 180 or of any settlement of a debarment or suspension action;

c. Causes for suspension and debarment under the procurement regulation at 48 CFR Subpart 9.4, include but are not limited to the provisions of 8.a, and the following:

(1) Delinquent Federal taxes in an amount that exceeds \$3,000.00 as defined by 48 CFR Subpart 9.4; or

(2) Failure to comply with the Immigration and Nationality Act employment provisions as determined by the Secretary of Homeland Security or the Attorney General of United States.

**9. What are the causes for suspension?** When circumstances warrant, the SDO will take suspension action to protect the Federal Government by excluding persons and firms proposed for debarment from participation in the Federal assistance programs while the debarment action is processed.

- a. Causes for suspension for both nonprocurement and procurement actions include the SDO's determination that:
  - (1) There exists an indictment for, or other adequate evidence to suspect an offense listed for debarment by 2 CFR Part 180 or 48 CFR Subpart 4.9, or
  - (2) There exists adequate evidence to suspect any other cause for debarment listed by 2 CFR Part 180 or 48 CFR Subpart 4.9.
- b. Causes for suspension for nonprocurement actions include the SDO's determination from paragraph 9.a. and the finding that immediate action is necessary to protect the public interest.
- c. An indictment as defined by 2 CFR Part 180 or 48 CFR Subpart 4.9 to be a charging document for a criminal offense shall constitute adequate evidence for purposes of suspension actions for both nonprocurement and procurement actions.

**10. What is the suspension and debarment process?**

- a. Upon referral from the Office of the Inspector General or an FHWA Division Office, the Office of the Chief Counsel will assess the submitted package, prepare a memorandum of review, and coordinate with the SDO to ensure final action is taken on each referral.
- b. The FHWA will notify the person or firm of the S/D action by certified mail. The notice will be accompanied by a formal letter setting forth the basis for the S/D action and the person's or firm's rights under 2 CFR Parts 180 and 1200 or 48 CFR Subpart 9.4. Suspensions are effective upon signature of the FHWA Notice and letter or letters by the SDO. Depending on the circumstances, one of the following notices of S/D action will be issued:
  - (1) Notice of Suspension and Proposed Debarment may be issued when an indictment, conviction, civil judgment or other factual basis listed in 2 CFR Part 180 or 48 CFR Subpart 4.9 is the cause for the debarment action, and immediate action is necessary to protect the public interest.



(2) Notice of Suspension may be issued when immediate exclusion is warranted, based on adequate evidence of a debarment cause listed in 2 CFR Part 180 (e.g., the alleged acts indicate a threat to the integrity of the FHWA program through fraud or safety violations or other actions that would make the person or firm not responsible to conduct business with the FHWA), and, for nonprocurement suspensions, that immediate action is necessary to protect the public interest.

(3) Notice of Proposed Debarment may be issued when sufficient evidence of a debarment cause exists, as listed in 2 CFR Part 180 or 48 CFR Subpart 9.4.

- c. The respondent (the subject of the S/D action) will be given 30 calendar days from receipt of the certified letter to contest the action. The respondent may challenge the action in person, in writing, or through legal counsel to the SDO. Requests to extend the 30-calendar-day period will be reviewed on a case-by-case basis. Information must be provided in writing in order to be considered.
- d. The respondent may challenge the facts supporting the action to suspend and propose to debar, whether to impose debarment, and/or to determine the length of the proposed debarment. The SDO may decide to end the suspension and impose no debarment, or debar for a specific period of time based on the existence of any of the conditions set forth in 2 CFR Part 180.

(1) The FHWA will give respondents the opportunity to meet informally with the SDO to discuss the facts supporting the action to suspend, the action to debar, and if the facts support debarment, how long a debarment should last.

(2) If the action is based on factual evidence other than an indictment, conviction, civil judgment, or other finding by a Federal, State, or local body for which an opportunity to contest the facts was provided, and the respondent's submission claims a genuine dispute over facts, the respondent may challenge the facts upon which the action is based only if:

(a) The respondent provides a written submission that raises genuine disputes of material fact; and

(b) The respondent meets with the FHWA SDO to determine whether a genuine dispute over facts exist; and

(c) The SDO documents that a genuine dispute over facts exists.

Once the three steps above have been completed, the respondent will be given the opportunity to appear for a fact-finding proceeding to be conducted with an independent U.S. Department of Transportation (DOT) Administrative Law Judge, in order to present witnesses, submit evidence, and confront any agency witnesses. Upon request by the SDO, a DOT Administrative Law Judge will be designated by a DOT Secretarial Office or DOT Operating Administration other than FHWA. The designated DOT Administrative Law Judge will conduct the fact finding proceeding and provide a report to the SDO. The designated DOT Administrative Law Judge must be independent from the SDO, and may not participate or advise in the S/D decision for the case with the factual dispute, or for any other factually related case. The fact-finding proceeding must meet the requirements of the DOT Order 4200.5E, paragraph 8.j. and the regulation at 2 CFR Part 180 or 48 CFR Subpart 9.4, as appropriate.

(3) The SDO will issue a final decision notice via certified mail, return receipt requested, stating the SDO's decision on the S/D action. Documents provided by the respondent for any reason, including documents provided in response to the notice to suspend and propose to debar, do not close the official record. Only the SDO can issue a decision to close the official record and to resolve any disputed facts.

e. If the respondent does not contest a proposed debarment within the 30-calendar-day period, the SDO will issue a decision based on the available information for the case.

f. Length of S/D actions:

(1) **Suspension:** Suspension actions are taken for a temporary period, pending the completion of the debarment process.

(a) Generally, suspensions will not exceed 12 months.

(b) If a criminal, civil, or administrative proceeding is initiated at the time of, or during a suspension, then the suspension may continue until the conclusion of those proceedings. Proceedings are generally concluded when a finding of guilt or other facts occurs. The SDO may extend the conclusion of the suspension until



sentencing or other relevant circumstances of the proceedings resolve the case. These circumstances may include, but are not limited to, criminal sentencing, court actions regarding a deferred prosecution or non-prosecution type of agreement, or court actions to complete resolution of a civil court action.

(c) When the suspension is based only on facts other than those presented by a criminal, civil or administrative proceeding, the SDO may extend this 12 month limit if an Assistant Attorney General, a United States Attorney, or other responsible prosecuting official requests an extension in writing, in which case it may be extended for an additional 6 months. In no event will such a suspension be extended beyond 18 months, unless a legal proceeding is initiated, which precludes lifting the suspension. The SDO must notify the appropriate officials, including the United States Department of Justice, described in this paragraph of an impending termination of a suspension without a debarment continuing the exclusion at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.

(2) **Debarment:** Generally, debarment periods are limited to 3 years; however, if circumstances warrant, a longer debarment period may be imposed. The SDO may reduce the typical 3-year debarment period commensurate with the seriousness of the cause and any mitigating evidence presented. The SDO may increase the typical 3-year debarment period based on the seriousness of the cause and any aggravating evidence. If preceded by suspension, the debarment period will begin retroactively from the effective date of the suspension.

## 11. How are suspension and debarment actions implemented?

- a. The General Services Administration (GSA) is required to compile, maintain, and make available a list of excluded parties. This information is available to members of the public and the government through the System for Award Management which is available electronically at <https://www.sam.gov>. The FHWA sends information on each action that must be entered into SAM.gov to the DOT's Office of the Senior Procurement Executive. That office enters the information into SAM.gov on behalf of FHWA.



**b. Verification of suspended or debarred status.**

(1) Nonprocurement requirements: All participants, including both recipients and contractors, in FHWA contracts, including the Federal-aid program, are required to certify their current status regarding S/D actions, ineligibility, voluntary exclusion, and convictions and/or civil judgment and to verify the status of all lower-tier recipients and contractors. The verification by recipients and contractors of the status of all lower-tier recipients and contractors may occur by searching the SAM.gov website for all lower-tier recipients and contractors, or by collecting a certification from all lower-tier recipients and contractors, to ensure that no participant in a federally-funded covered transaction is excluded by suspension or debarment from participating in that transaction. This verification is required on all FHWA nonprocurement transactions from any FHWA office. Additional detail for the Federal-aid nonprocurement requirements is provided below:

(A) The State DOTs are required to agree to use Federal-aid funds only on projects where the State has determined that contractors are not excluded from contracting by suspension or debarment, as required by 23 CFR Part 630. The State DOTs and all subrecipients of Federal-aid, and contractors and suppliers at all tiers of contracting must make a determination that Federal-aid contractors are not suspended or debarred from federal contracting, as required by 2 CFR 180.335. To make this determination, all of these entities should check the SAM.gov database and obtain certification from prime and lower tier contractors as soon as the information is available to ensure that the participants in the project are not presently excluded by suspension or debarment from participating in Federal-aid nonprocurement federally-funded contracts.

(B) The State DOTs must annually certify to the FHWA Division for that State as to the current eligibility status of their principals, defined to include the State DOT as a unit of government and the individuals employed by the State DOT to substantially influence the handling of Federal funds in a nonprocurement covered transaction. By signing an annual Federal-aid certification document, the State agrees to provide certification for its principals as required in 23 CFR Part 630.

(C) The State DOT should provide the FHWA Division Office with contractor or person name, any related DUNS number(s), address, the reason for the action, and the dates

an exclusion begins and ends when the State suspends or debars a contractor, person, or entity.

(D) As part of each Federal-aid highway contract bid proposal and consultant agreement, prime contract bidders, lower-tier bidders, suppliers, and consultants are required to certify to the next higher tier of contracting, both their own current eligibility status and that of their principals. In addition, prime contractors should search SAM.gov for each lower-tier company and principal officer, including supplier companies and their principal officers, awarded a contract at a lower tier to the prime contract. These obligations exist for all tiers of contractors on Federal-aid projects, under the requirements at 2 CFR Part 1200.

(E) The Federal-aid Highway Division Offices (Division Offices) have the following obligations under this Order:

(i) The Division Offices will receive updates from Headquarters on FHWA suspension and debarment actions. Division Offices are required send information updates containing the information in these updates to the State DOTs on a periodic basis to update those recipients about FHWA suspension and debarment actions.

(ii) When Division Offices retain approval authority for contract concurrence and award, the Division Offices must check SAM.gov for any recipients and contractors included in the contract, to ensure that no suspended or debarred recipient or contractor receives Federal-aid funding.

(iii) Division Offices shall encourage State DOTs and Local Public Agencies to use best practices to ensure that no suspended or debarred recipient or contractor receives approval for Federal-aid contract awards, including:

(AA) encouraging State DOTs and Local Public Agencies to use SAM.gov to check for any recipients and contractors included in the contract, and

(BB) encouraging State DOTs and Local Public Agencies to agree in their Federal-aid agreements to check SAM.gov for any recipients and contracts included in the contract, before the State DOTs and Local Public Agencies use their authority for concurrence and award of Federal-aid contracts.



The Division Offices should contact the FHWA Office of the Chief Counsel regarding any concerns or problems with any of these obligations.

(iv) Division Offices shall request that when State DOTs suspend or debar a contractor, person, or entity, the State DOTs provide the FHWA Division Office with the contractor or person name, any related DUNS number(s), address, the reason for the action, and the dates an exclusion begins and ends. Once that information is provided to the Division Office, the Division Office must send this information promptly to the FHWA Office of the Chief Counsel.

(2) Procurement requirements: The verification requirements of this Order apply to all FHWA offices with procurement authority, including the FHWA Headquarters and the Federal Lands Highway Division Acquisition Offices. These offices shall ensure no suspended or debarred contractor is allowed to have a bid accepted on a federally funded project or to be awarded a contract or subcontract, by reviewing SAM.gov:

- (A) once when receiving bids, quotes, or any other offer; and
- (B) again immediately prior to award.



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