

**Before the Committee on Oversight and Government Reform
United States House of Representatives**

For Release on Delivery
Expected at
10:00 a.m. EDT
Thursday
March 18, 2010
CC-2010-036

Weaknesses in DOT's Suspension and Debarment Program Limit its Protection of Government Funds

**Statement of
The Honorable Calvin L. Scovel III
Inspector General
U.S. Department of Transportation**



Mr. Chairman and Members of the Committee:

Thank you for inviting me here today to discuss our recent report on the Department of Transportation's (DOT) Suspension and Debarment (S&D) Program.¹ Making timely S&D decisions and promptly reporting them is critical to helping ensure that government contractors who have acted unethically do not receive additional government dollars. 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. It is imperative that DOT's stewardship of these taxpayer dollars include adhering to Federal S&D regulations and policies, which permit agencies to exclude parties found to be unethical, dishonest, or otherwise irresponsible, from receiving contracts and grants involving Federal funds.

Over the past 2 years, including our May 2009 Advisory,² we reported weaknesses in DOT's S&D Program that increase the risk of awarding contracts and grants to irresponsible contractors—a risk that escalated with the disbursement of \$48 billion to DOT under the American Recovery and Reinvestment Act (ARRA) of 2009. Today, I would like to discuss the delays in DOT's S&D decisions and reporting, and the lack of effective controls for managing and overseeing its S&D Program. My testimony is based largely on our work at the Federal Highway Administration (FHWA), Federal Aviation Administration (FAA), and Federal Transit Administration (FTA), which collectively represented over 90 percent of DOT's S&D activity from calendar years 2005 through 2008.

IN SUMMARY

Significant delays in DOT's suspension and debarment decisionmaking process have given unscrupulous contractors ample opportunity to bid for and receive contracts. On average, it took over 300 days to reach a suspension decision and over 400 days to reach a debarment decision. These delays are largely due to lengthy and unnecessary reviews conducted before deciding cases and a lack of priority assigned to DOT's S&D workload. At the same time, DOT's management controls are not adequate to safeguard the Department's efforts to exclude prohibited parties that agencies must suspend or to propose debarment. A weakness surrounding DOT's main S&D policy is its inability to clearly define that DOT needs to suspend—or propose debarment—of parties within a

¹ DOT's Suspension and Debarment Program Does Not Safeguard Against Awards To Improper Parties, ZA-2010-034, January 7, 2010. OIG reports and testimonies can be viewed on our website at: www.oig.dot.gov.

² See U.S. Department of Transportation, Office of Inspector General, *ARRA Advisory – DOT's Suspension and Debarment Program*, AA-2009-001, May 18, 2009. This includes our reports on top management challenges facing DOT, see DOT's Fiscal Year 2009 Top Management Challenges, PT-2009-005, November 17, 2008 and DOT's Fiscal Year 2010 Top Management Challenges, PT-2010-008, November 16, 2009.

required 45-day limit. DOT's S&D Program is also limited by the absence of strong program oversight. The cumulative effect of these weaknesses increases the risk that DOT and other agencies will award contracts and grants to parties that DOT will ultimately suspend or debar.

BACKGROUND

In fiscal year 2008, the Federal Government's contract obligations exceeded \$500 billion to over 160,000 contractors. Suspensions and debarments—actions taken against parties found to be unethical, dishonest, or otherwise irresponsible—are intended to protect this significant investment by excluding irresponsible parties from receiving contracts and grants involving Federal funds for a specific period of time. One agency's S&D action is applicable Governmentwide, a feature aimed at improving the strength of this tool. (See exhibit A at end of this statement for key elements of these policies.) Within DOT, the Office of the Secretary (OST) and DOT's nine Operating Administrations (OA) are responsible for managing their own S&D programs. Our Office of Investigations supports these efforts by referring information on indictments and other court actions to OAs for use in their S&D decision-making.

In 2005, DOT revised its S&D policy, *Governmentwide Debarment, Suspension and Ineligibility*, in part, after learning it awarded a contract to a company under our investigation. The revisions aimed to strengthen DOT's S&D policies and add accountability to the S&D Program by, for example, establishing a 45-day deadline for making S&D decisions, reporting decisions to the General Services Administration, and requiring an annual report on all S&D actions. In addressing our 2006 National Fraud Prevention Conference, then Secretary Mineta noted that the revised policy represented "zero-tolerance" for those who try to short-change the American people and urged DOT administrators to enforce it vigorously.

DOT is required to report excluded parties in the General Services Administration's Excluded Party Listing System (EPLS), a web-based system to track S&D decisions Governmentwide. EPLS includes information such as 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. DOT is responsible for reporting accurate data within 5 work days of the action's effective date.

LENGTHY DELAYS IN MAKING AND REPORTING S&D DECISIONS INCREASE RISK OF AWARDING CONTRACTS TO IMPROPER PARTIES

The Department's OAs generally do not meet DOT's deadlines for deciding and reporting S&D cases. Delays are largely due to unnecessary and lengthy reviews taken before deciding cases and a lack of priority assigned to DOT's S&D workload. Reporting of

DOT's S&D decisions was also untimely. Nearly half of the S&D decisions we reviewed exceeded the Department's 5-day requirement for entering such decisions into EPLS. These delays not only put DOT at risk of awarding contracts or grants to parties who should be suspended or debarred, but they create funding risks that could impact the effective and efficient use of funds—especially those awarded under ARRA. This risk extends to other Federal agencies as well because agency S&D decisions apply Governmentwide.

Lengthy Decision Process Poses Significant Risks

About 70 percent of DOT's suspensions we reviewed took more than the required 45 days, and the average processing time was 301 days. Debarment decisions were also untimely and took on average 415 days. The risks posed by these delays are illustrated by the following examples:

- **Recovery Act funds were awarded to parties under indictment:** In the 10 months after FHWA received our September 2008 referral, the Commonwealth of Kentucky used ARRA funds to award contracts to companies whose officials were affiliated with parties that FHWA ultimately suspended. Specifically, between June and August 2009, the Commonwealth of Kentucky awarded \$24 million in ARRA funds to companies that FHWA—the largest recipient of ARRA funding in DOT—could have immediately suspended under DOT's S&D policy and Code of Federal Regulations. Our September 2008 referral to FHWA was based on an indictment charging company officers and a state government official with bribery, conspiracy, theft from a government agency receiving Federal funds, and obstruction of justice. In July 2009, FHWA eventually suspended the individuals cited in our referral, two of whom were affiliated with the companies awarded ARRA contracts.
- **Delayed debarment action prompted the Environmental Protection Agency (EPA) to assume FHWA's lead in joint investigation:** FHWA and EPA conducted a joint investigation of a contractor who had been indicted in 2004 and then pled guilty in 2005 to conspiracy, bribery, and unlawful storage of hazardous materials.³ While FHWA acted as the lead agency, it did not take timely action to suspend the indicted contractor. For more than 2 years after the company pled guilty, FHWA's debarment action remained "pending." Ultimately, EPA debarred 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. DOT OAs generally lack follow-up procedures to provide closure to their open cases.

³ 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.

Unnecessary Reviews and Insufficient Prioritization Contribute to Untimely S&D Decisions

Federal regulations and DOT's Order provide clear criteria for DOT to move swiftly on investigative referrals. The criteria state an indictment is adequate evidence to support a suspension, and a conviction or civil judgment is adequate evidence to support a debarment. However, OAs frequently perform extra reviews 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. These reviews are generally conducted without deadlines or monitoring. According to FHWA, which processes the majority of S&D cases in DOT, the additional reviews 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. Yet Federal regulations provide for suspended parties to contest a suspension or take remedial measures to get the suspension lifted. By unnecessarily prolonging time-sensitive suspension and debarment decisions, FHWA makes other DOT and Federal agencies vulnerable to doing business with fraudulent or unethical parties.

Insufficient prioritization of S&D workload can further prolong S&D decisions. Officials and support staffs assigned to do S&D work told us such work is performed as a collateral duty, which competes with their other duties and responsibilities. For example, 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.

Fewer Than Half of S&D Decisions Met DOT's and Federal Reporting Requirements

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

Several factors contributed to these delays, which affect OAs as well as DOT. 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 this condition to the attention of FTA officials, they stated that the delay was due to staff misplacing paperwork on these decisions. Although 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. One DOT representative also noted some submissions lacked data elements required by Federal regulations and were returned to OAs for completion.

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

A lack of strong management controls—those that emphasize accountability, monitoring, and clear organizational roles and responsibilities—has further weakened DOT’s S&D Program. Such weaknesses include differing OA interpretations of DOT’s 45-day policy for making S&D decisions and a lack of reliable EPLS data. In addition, delegation of S&D program management to OST and the nine OAs has created gaps in DOT’s knowledge of program weaknesses that warrant corrective actions. While DOT has taken measures to close these gaps, they have proven ineffective.

DOT Policy on Timeliness of S&D Decisions Has Been Subject to Interpretation and Action

DOT’s Order aims to ensure accountability for the Department’s S&D Program by establishing a 45-day deadline for DOT officials to complete all needed tasks to make a final suspension decision or propose a debarment decision. However, the 45-day S&D policy has been interpreted differently by officials responsible for suspensions and debarments in the OAs we reviewed, as shown in the following table.

OA’s Varying Interpretation of 45-day Requirement in DOT’s S&D Order

OA	Interpretation of goal of the 45-day requirement
FHWA	Divisions are to conduct research and provide an S&D recommendation to FHWA’s suspension and debarment officials.
FAA	Headquarters staff are to make a decision after it receives a recommendation and supporting information for an S&D action from a FAA regional office.
FTA	Suspend or propose debarment after receiving a referral notification.

Source: OIG analysis of OA practices.

These varying interpretations create opportunities for delays—some significant—and ultimately put DOT and other Federal agencies and recipients of Federal funds at an increased risk of awarding contracts and grants to irresponsible parties.

Unreliable EPLS Data Hinders DOT’s Ability To Identify Excluded Parties

DOT’s contract and grant officials are required to check EPLS before making awards to ensure that suspended or debarred parties do not receive new contracts or grants. DOT is required to enter a range of information provided by OAs on excluded parties into EPLS,

including an entity's DUNS number,⁴ enabling agencies to more confidently determine whether a specific contractor has been excluded. However, data entered into EPLS are not always accurate or complete, and therefore contracting officers cannot confidently identify excluded parties. For example, from a universe of 49 suspended or debarred firms we identified in EPLS, 16 were miscoded by DOT as "individuals," and 8 were missing required DUNS numbers. OAs are responsible for providing DUNS numbers; however, OA representatives said they were not aware of the requirement, or they did not know how to find the DUNS number.

Other actions not accurately reflected in EPLS included a business that was incorrectly removed from EPLS by DOT staff and left off for over 2 ½ years, and nine parties were listed more than once. The importance of DOT providing accurate information to EPLS is heightened by the fact that the General Services Administration does not verify data directly provided by agencies.

Incomplete S&D Annual Reports Do Not Help Close Oversight Gaps

DOT is required 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. The annual report was intended to be used as an oversight tool for Office of General Counsel and OIG to assess OA compliance with the Order. However, past annual reports were incomplete and inaccurate. For example, the 2008 annual report excluded 53 open cases from prior years. 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 DOT or its OAs for ensuring that annual report information is accurate, and the failure of DOT and its OAs to pay sufficient attention to detail, such as verifying data when preparing the annual submissions, contributed to these errors.

SharePoint Use Has Not Improved DOT's Management of S&D Information

DOT replaced its paper-based reporting of S&D cases in 2007 with SharePoint, an electronic system. According to DOT's former Senior Procurement Executive, SharePoint is intended to help OAs track cases on a day-to-day basis, as well as for management to monitor DOT's S&D Program. DOT began a SharePoint pilot program in June 2009 to allow managers to perform keyword queries and generate their own summary reports. DOT has not yet reported on the results of the pilot.

⁴ DUNS numbers are unique nine-digit identification numbers for companies and individuals assigned by Dun & Bradstreet, Inc.

Conclusion

The persistent problems we have identified in DOT's S&D Program significantly weaken one of the Department's strongest deterrents against contract fraud, waste, and abuse. Despite DOT's 2005 revision to its S&D Order, deficiencies in the S&D Program have left the Department unable to achieve the desired outcome of having a strong S&D Program. In our January report, we recommended several actions to strengthen DOT's internal controls and oversight of its S&D process and to close the significant gaps in the process. (See exhibit B at end of this statement for a list of our recommendations.) Until such actions are taken, DOT will continue to risk disbursing billions of dollars, including ARRA funds, to parties intent on defrauding the Government.

I would like to take this opportunity to thank the Department for its continuing efforts in reviewing its S&D Order. However, since our comprehensive review of DOT's suspension and debarment process is ongoing, we do not feel it would be appropriate to comment on the proposed Order until our formal recommendation follow-up process is completed.

Mr. Chairman, this concludes my statement. I would be happy to address any questions you or other Members of the Committee may have.

**EXHIBIT A. SUMMARY OF KEY ELEMENTS OF FEDERAL
SUSPENSION AND DEBARMENT POLICIES**

SUSPENSION ACTIONS	DEBARMENT ACTIONS
Overview	
<ul style="list-style-type: none"> Temporarily prevents a party from participating in most government funded procurement and nonprocurement^a transactions^b pending completion of an investigation or legal proceedings. 	<ul style="list-style-type: none"> Final determination that party is not presently responsible and thus ineligible to participate in federally funded contracts or grants.
Standards of Evidence / Causes	
<ul style="list-style-type: none"> 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. 	<ul style="list-style-type: none"> Preponderance of evidence that party warrants debarment; a conviction of criminal conduct or a civil judgment constitutes a preponderance of evidence. Agency must consider remedial measures and mitigating factors when determining party's present responsibility.
Timeframe for OAs to Take Action under DOT's Order	
<ul style="list-style-type: none"> Within 45 days of notification of indictment or other referral. 	<ul style="list-style-type: none"> Within 45 days of notification of conviction or other referral.
Prior Notice	
<ul style="list-style-type: none"> None required 	<ul style="list-style-type: none"> At least 30 days
Period of Ineligibility	
<ul style="list-style-type: none"> Usually not to exceed 1 year 	<ul style="list-style-type: none"> Usually not to exceed 3 years
Entitlement To Contest	
<ul style="list-style-type: none"> After notice from the agency's suspension official, but a suspension is effective immediately. 	<ul style="list-style-type: none"> 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), FAR, and AMS.

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

^b 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.

EXHIBIT B. DOT-OIG SUSPENSION AND DEBARMENT REPORT RECOMMENDATIONS

Recommendations to DOT's Senior Procurement Executive (SPE):

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 DOT'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 DOT a full inventory of DOT's open S&D cases.

Recommendations to the Federal Aviation Administration (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.