



Department of Homeland Security Office of Inspector General

DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors





Homeland
Security

February 2, 2010

Preface

The Department of Homeland Security (DHS) Office of Inspector General (OIG) was established by the *Homeland Security Act of 2002* (Public Law 107-296) by amendment to the *Inspector General Act of 1978*. This is one of a series of audit, inspection, and special reports prepared as part of our oversight responsibilities to promote economy, efficiency, and effectiveness within the department.

This report identifies areas where improvements can be made in the department's process for evaluating poorly performing contractors for potential suspension and debarment actions. It is based on interviews with employees and officials of relevant agencies and institutions, direct observations, and a review of applicable documents.

The recommendations herein have been developed to the best knowledge available to our office, and have been discussed in draft with those responsible for implementation. We trust this report will result in more effective, efficient, and economical operations. We express our appreciation to all of those who contributed to the preparation of this report.

A handwritten signature in cursive script that reads "Richard L. Skinner".

Richard L. Skinner
Inspector General

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Abbreviations

DHS	Department of Homeland Security
FAR	Federal Acquisition Regulations
C.F.R.	Code of Federal Regulations

OIG

*Department of Homeland Security
Office of Inspector General*

Executive Summary

We reviewed the Department of Homeland Security's procedures and practices to suspend and debar poorly performing contractors. The objective of our review was to determine whether the department has suspension and debarment policies and procedures in place and is appropriately applying the policies and procedures to protect the government's interest.

The Department of Homeland Security has suspension and debarment policies and procedures in place. However, the department is reluctant to apply the policies and procedures against poorly-performing contractors. Department procurement officials characterized the suspension and debarment process as being too resource intensive, punitive, and as negatively impacting the size of the contractor pool. The procurement officials prefer to use other administrative remedies to address poor contractor performance. We identified 23 instances where contracts were terminated for default or cause but were not reviewed to determine whether a suspension and debarment referral was warranted. Reluctance to pursue suspension and debarment could put the department and the government at risk of continuing to conduct business with poorly performing contractors and may result in decreased productivity and increased cost.

The department is also not recording pertinent contract performance data for poorly performing contractors. We identified 21 instances where contracts were terminated for default, the reasons for which were not recorded in government-wide databases. As a result, there is an increased risk the government could unknowingly contract with entities that have a history of unsatisfactory performance.

The report contains two recommendations to improve the effectiveness of the department's suspension and debarment program. The Under Secretary for Management concurred with the recommendations and outlined plans and actions to improve suspension and debarment policies and procedures.

Background

The Department of Homeland Security spends an estimated 40% of its annual congressional appropriation through contracts and grants. The department's FY 2009 appropriation was \$43 billion, of which an estimated \$17 billion is expected to be spent through federal contracts and grants.

Federal Acquisition Regulations Regarding Suspension and Debarment

Federal Acquisition Regulations (FAR) require agencies to solicit offers from, award contracts to, and consent to subcontracts only with responsible contractors. Suspensions and debarments are discretionary actions that agencies implement to protect the federal government by excluding contractors who commit fraud, behave unethically, or willfully fail to perform or have a history of failure to perform according to the terms of a contract from conducting business with the federal government.¹

Suspensions are temporary in nature and are used to protect the federal government until investigations and any ensuing legal proceedings that could lead to debarment actions are completed. In no event may a suspension extend beyond 18 months, unless legal proceedings have been initiated within that period. Causes for suspension actions include, among others, adequate evidence of the following:

- Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or state contract;
- Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receiving stolen property;
- Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor; or

¹ 48 C.F.R. § 9.402(b), "The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for the purposes of punishment."

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- Any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor.

Debarments, on the other hand, generally do not exceed 3 years but can be extended if it is determined that it is in the government's best interest. Causes for debarment actions include, among others, the following:

- Conviction of or civil judgment for fraud, violation of antitrust laws, embezzlement, theft, forgery, bribery, false statements, or other offenses indicating a lack of business integrity;
- Violation of the terms of a government contract or subcontract so serious as to justify debarment, such as a willful failure to perform in accordance with the terms of one or more contracts or a history of failure to perform, or of unsatisfactory performance of, one or more contracts;
- Noncompliance with *Immigration and Nationality Act* employment provisions;² or
- Any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor or subcontractor.

The FAR requires agencies to list all suspended or debarred contractors in the General Services Administration's Excluded Parties List System.

DHS Suspensions and Debarments

The DHS Office of the Chief Procurement Officer has agency-wide responsibility for the suspension and debarment of contractors. Until recently, the department designated its components' Heads of Contracting Activity as the suspension and debarment officials for all component-related contracts under the *Homeland Security Acquisition Manual*. The Homeland Security Acquisition Manual was amended in October 2009 to give the DHS Chief Procurement Officer sole authority to waive suspension and debarment actions and award contracts to entities that are currently suspended or debarred

From FY 2004 through FY 2008, the department initiated 10 debarment cases as well as one suspension case pending the results

² See Executive Order 12989, as amended by Executive Order 13286.

of a supporting criminal investigation. The 10 debarment cases resulted in 23 debarment actions against the individuals, corporate entities, and their affiliates. Nine of the 10 debarment cases were initiated because of violations of the Immigration and Nationality Act and a fraud conviction. The tenth debarment case was initiated by the Coast Guard at the behest of the Defense Contract Management Agency for business integrity and contract performance-related reasons identified during a Defense Criminal Investigation Service investigation.

Recording Contractor Past Performance

The FAR requires agencies to prepare an evaluation of contractor performance for each contract that exceeds the simplified acquisition threshold (\$100,000 in most cases) when contract work is complete.³ Additionally, the FAR recommends that contractor performance information be documented on an annual basis when the contract period is for more than 1 year. Until recently, the Homeland Security Acquisition Manual required that DHS record all contractor performance evaluations in the Contractor Performance System. Effective September 1, 2009, the Contractor Performance Assessment Reporting System replaced the Contractor Performance System as the central repository for DHS contractor performance evaluations. The Contractor Performance System and the Contractor Performance Assessment Reporting System feed information regarding contractor performance into the Past Performance Information Retrieval System, a government-wide database mandated by the Office of Management and Budget. The Past Performance Information Retrieval System is a source of contractor performance information utilized by other government agencies when assessing a contractor's ability to perform a contract successfully. Department Heads of Contracting Activity are the agency officials responsible for ensuring that contractor performance evaluations are prepared and entered into the appropriate databases in accordance with agency regulations.

³ See 48 C.F.R. § 42.1502 (b)(requirement to evaluate); 48 C.F.R. § 2.101 (“simplified acquisition threshold” defined).

Results of Audit

Suspension and Debarment Policies, Procedures, and Practices

The Department of Homeland Security has suspension and debarment policies and procedures in place. However, the department is reluctant to apply the policies and procedures against poorly-performing contractors. Department procurement officials characterized the suspension and debarment process as being too resource intensive, punitive, and as negatively impacting the size of the contractor pool. The procurement officials prefer to use other administrative remedies to address poor contractor performance. We identified 23 instances where contracts were terminated for default or cause but were not reviewed to determine if a suspension and debarment referral was warranted. Reluctance to pursue suspension and debarment could put the department and the government at risk of continuing to conduct business with poorly performing contractors and may result in decreased productivity and increased cost. In our view, the department needs to develop and implement a set of policies, procedures, and internal controls to ensure that poorly performing contractors, including those whose services are terminated or considered for termination for default or cause are reviewed to determine whether a referral to a suspension and debarment official is warranted.

Suspension and Debarment Practices of Other Agencies and Departments

We reviewed the suspension and debarment practices of several other federal agencies. Their practices offer insight into ways the department could improve its suspension and debarment actions. A summary of other department and agency actions is presented below, and a more complete description of the practices is provided in appendix C.

- The United States Air Force, the United States Army, and the Department of Housing and Urban Development placed their suspension and debarment functions within their Offices of General Counsel, which have dedicated staffs with the legal expertise and training necessary to pursue, investigate, and defend suspension and debarment actions. An Air Force official also noted that this organizational placement eliminates any perceived conflict of interest.

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- The Environmental Protection Agency, the United States Navy, and the United States Air Force have a single suspension and debarment official. According to officials we interviewed, having a single suspension and debarment official who is not affiliated with the acquisition community provides a fair and unbiased platform to evaluate referrals and maintain program continuity.
 - The Department of Transportation requires annual submission to the Office of Senior Procurement Executive of a detailed list of all cases in which suspension and debarment actions were considered, initiated, or completed, along with the status or outcome of each case. The submission includes cases in which information was received, even when no suspension or debarment action was initiated. When no action was initiated, the Operating Administrations or Secretarial Office must include an explanation regarding why action was not taken.

Recording Contractor Performance Information

The department's components are not recording in federal databases, contractor performance information for contracts that are terminated for cause or default. We identified 23 instances where the department's components exercised their right to terminate a contract because of a contractor's failure to perform. However, we found no information as to the circumstances and conditions underlying the decisions to terminate 21 of the 23 contracts in either the Contractor Performance System or the Past Performance Information Retrieval System. As a result, pertinent contract performance information is not being recorded and disseminated to procurement specialists across government for use in making future source selection determinations.

With the exception of construction and architect-engineering service contracts, there is no government-wide requirement for agencies to document when a contractor had been terminated for cause or default, regardless of the circumstances or the dollar value of the contract. Despite the absence of such requirements, we believe that it is always in the government's best interest to be aware of a contractor's failure to perform. Recording the identity of poorly performing contractors and the rationale underlying termination decisions in agency and government-wide databases would increase the knowledge base of government procurement professionals, thereby reducing the risk of entering into contractual

relationships with individuals and corporate entities that have histories of not performing in accordance with contract requirements.

Amendments to the FAR have been proposed to expand the requirement for agencies to record contractor performance information for contracts that have been terminated for cause or default.⁴ However, until these changes are implemented, we believe the department should develop and implement the policies, procedures, and internal controls to ensure that all pertinent contractor performance information associated with contracts terminated for cause or default is recorded in the appropriate agency and government-wide databases.

Recommendations

We recommend that the Under Secretary for Management:

Recommendation #1: Develop and implement a set of policies, procedures, and internal controls to ensure that poorly performing contractors whose contracts that have been terminated or are being considered for termination for default or cause, are reviewed to determine whether a referral to the suspension and debarment official is warranted. The referral determination process should be fully-documented and able to demonstrate that the decision is in the government's best interest.

Recommendation #2: Develop and implement a set of policies, procedures, and internal controls to ensure that all pertinent contractor performance information is recorded in the appropriate agency and government-wide databases to be disseminated to procurement professionals across government for use in future source selections.

Management Comments and OIG Analysis

The DHS Under Secretary for Management concurred with our recommendations and provided information on plans and actions taken to improve policies, procedures, and internal controls governing the use of suspension and debarment for poorly

⁴ Federal Register, Volume 74, Number 169, September 2, 2009, "Federal Acquisition Regulation; FAR Case 2008-016, Termination for Default Reporting"

performing contractors. The Under Secretary provided clarifications and technical comments as well, which we used to update this report as appropriate. The changes made do not materially impact the message, findings, or examples we used in this audit report

Management Comments to Recommendation 1

Concur: The department has developed the policies, procedures, and internal controls intended to increase its awareness of poorly performing contractors whose contracts have been terminated or considered for termination. Contracting officers must provide the Office of the Chief Procurement Officer with a copy of the termination notice for any order exceeding \$1 million. The notice is to be accompanied by a brief discussion of the contract or order being terminated, the circumstances of the termination, and the anticipated impact. Contracting officers must also provide a copy of any determination of nonresponsibility to the suspending and debarring official when the determination is based in whole or part on the prospective contractor's:

- Lack of satisfactory performance record under DHS contracts;
- Lack of a satisfactory record of integrity and business ethics; or,
- Inability to qualify or ineligibility under applicable laws and regulations.

Finally, the department stated its intention to conduct an oversight review during the fourth quarter of FY 2010 to determine the extent to which its components are complying with Homeland Security Acquisition Manual requirements.

OIG Analysis: The actions taken satisfy the intent of this recommendation. This recommendation is resolved, but will remain open until we have evaluated the results of the FY 2010 compliance review.

Management Comments to Recommendation 2

Concur: The Under Secretary for Management concurred that all pertinent contractor performance information, as defined by statute and/or regulation, needs to be recorded in appropriate agency and government-wide databases. DHS has conducted agency-wide training for contracting personnel, contracting officer's technical

representatives, and others involved in the process. In addition, DHS has published updated guidance in the Homeland Security Acquisition Manual to prescribe policies and procedures that implement and supplement FAR guidance.

OIG Analysis: The actions taken satisfy the intent of this recommendation. This recommendation is resolved and closed.

Appendix A

Purpose, Scope, and Methodology

Our objective was to determine the extent to which DHS has policies and procedures in place and is enforcing federal suspension and debarment requirements.

We reviewed contracts that were suspended, debarred, or terminated for default during FYs 2004 through 2008 for the following DHS component agencies: Federal Emergency Management Agency, Customs and Border Protection, Immigration and Customs Enforcement, Transportation Security Administration, United States Coast Guard, and United States Citizenship and Immigration Services.

We interviewed relevant component personnel regarding the suspension and debarment process. We also interviewed officials at several federal agencies to discuss the elements of their suspension and debarment programs and associated internal controls. We selected the other agencies based on activity reported in the Excluded Parties List System and the Federal Procurement Database System.

We reviewed criteria for suspension and debarment of contractors in the Federal Acquisition Regulations, the Homeland Security Acquisition Regulations, and the *Homeland Security Acquisition Manual*. We evaluated internal controls that were pertinent to the audit objective, and we reviewed DHS suspension and debarments listed in the Excluded Parties List System for FYs 2004 through 2008. We also reviewed audit reports by other agencies.

We obtained data on the number of contracts terminated for default in FYs 2004 through 2008 from each of the components. We also identified contracts terminated for default or cause by using www.usaspending.gov, a website that provides data from the Federal Procurement Data System (FPDS). The FPDS database has been evaluated by the Government Accountability Office as a reliable source for aggregate contracting and procurement data, but it may not be reliable for specific contracting information. We followed up with the components to verify information in the Federal Procurement Data System. We compared the list of contracts terminated for default to information provided in the Past Performance Information Retrieval System. We limited our use of Past Performance Information Retrieval System to the comparison of contractor evaluations for contracts that had been identified as terminated for default by other sources.

Appendix A

Purpose, Scope, and Methodology

Additionally we interviewed suspension and debarment officials from the Department of Housing and Urban Development, United States Air Force, United States Army, the Environmental Protection Agency, the Department of Transportation, General Services Administration, and the National Procurement Fraud Task Force.

We conducted this performance audit between September 2008 and February 2009 according to generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide 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 audit findings and conclusions based on our audit objectives.

Appendix B Management Comments to the Draft Report

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

JAN 6 2010

MEMORANDUM FOR: Anne L. Richards
Assistant Inspector General for Audits

FROM:  Elaine C. Duke
Under Secretary for Management

SUBJECT: Response to Draft Report: *DHS' Use of Suspension and
Debarment Actions for Poorly Performing Contractors*

In response to your November 6, 2009, memorandum, *Draft Report: DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors*, attached are the Department of Homeland Security, Under Secretary for Management comments on the draft report. This report also includes two recommendations to the Under Secretary for Management, and the specific responses are attached.

If there are any questions, please contact Mr. David J. Capitano, Office of the Chief Procurement Officer, at (202) 447-5417 or david.capitano@dhs.gov.

Attachment

Appendix B Management Comments to the Draft Report

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Response to Draft OIG Report *DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors*

Section I. USM Response to OIG Report Recommendations

The draft OIG report includes two recommendations to the Under Secretary for Management (USM); specific responses to each recommendation are provided below.

Recommendation 1: “Develop and implement a set of policies, procedures, and internal controls to ensure that poorly performing contractors whose contracts that have been terminated or are being considered for termination for default or cause, are reviewed to determine whether a referral to the suspension and debarment official is warranted. The referral determination process should be fully-documented and able to demonstrate that the decision is in the government’s best interest.”

USM Response: USM concurs with this recommendation. The Department has already developed the policies, procedures, and internal controls in this area. On October 1, 2009, the Office of the Chief Procurement Officer (OCPO) reissued the Homeland Security Acquisition Manual (HSAM). HSAM 3049.101 now requires the contracting officer to provide a copy of any termination notice for any contract or order exceeding \$1 million to OCPO at the same time as such notice is provided to the contractor. The notice must be accompanied by a brief discussion of the contract or order being terminated, the circumstances of the termination, and the anticipated impact. Also, HSAM 3009.105-2 requires the contracting officer to provide a copy of any determination of nonresponsibility to the suspending and debarring official when the determination is based in whole or part on the prospective contractor’s:

- (1) Lack of a satisfactory performance record under DHS contracts;
- (2) Lack of a satisfactory record of integrity and business ethics; or,
- (3) Inability to qualify or ineligibility under applicable laws and regulations.

These new policies and procedures provide greater visibility and insight into contractor performance problems. They will raise awareness among the Department’s suspending and debarring officials as well as providing OCPO information needed to track the disposition. In addition, in regards to internal controls, OCPO will conduct an oversight review during the fourth quarter of FY10 to determine the extent of compliance with the HSAM requirements. We believe these actions will adequately implement the OIG recommendation.

Recommendation 2: “Develop and implement a set of policies, procedures, and internal controls to ensure that all pertinent contractor performance information is recorded in the appropriate agency and government-wide databases to be disseminated to procurement professionals across government for use in future source selections.”

Appendix B Management Comments to the Draft Report

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Response to Draft OIG Report

DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors

USM Response: USM Concur in Principle. We concur that all pertinent contractor performance information, as defined by statute and/or regulation, needs to be recorded in appropriate agency and government-wide databases.

The collection and use of Contractor Performance Information (CPI) has been an area of emphasis for DHS Acquisition for over two years. On July 16, 2007, USM issued a memorandum, "*DHS Policy for the Collection and Use of Contractor Performance Information*", which emphasized the need for collection of CPI and its use in source selection. The memorandum also emphasized the use of available training and job aid resources. Further, on October 17, 2007, OCPO sponsored a CPI training session in its *Excellence in Acquisition* series of seminars. Additionally, during FY 2008, OCPO participated in the development of revised FAR language, in FAR Case 2006-022, Contractor Performance Information, which was published as a final rule and became effective July 1, 2009.

In accordance with HSAM 3042.15, effective September 1, 2009, CPARS has replaced CPS (CPS is no longer used by DHS). As part of the transition to CPARS, DHS has conducted agency-wide training for contracting personnel, contracting officer's technical representatives, and others involved in the process. The training focuses not only on the use of CPARS, but also on CPI policy and on techniques for the preparation of substantial performance evaluations. As of December 1, 2009, over 3,000 individuals have received the training. Additional training sessions will be held in FY 2010. OCPO expects that the training and continued emphasis on this area will result in substantial improvement in the collection and use of CPI.

On October 1, 2009, DHS published updated guidance in the Homeland Security Acquisition Manual (HSAM) to prescribe policies and procedures that implement and supplement FAR guidance. Specifically, HSAM 3042.1502, Policy, prescribes the use of CPARS for completing contractor performance evaluations. CPARS assessments are transmitted electronically to PPIRS, the government-wide repository for contractor performance information, and include CPARS assessments of the contractor's performance in achieving small business goals when the contract includes a Small Business Subcontracting Plan. HSAM 3042.1503, Procedures, directs Components to establish procedures that identify officials who are responsible for preparing interim and final performance evaluations. OCPO is currently in the process of collecting and reviewing Component procedures. The HSAM includes the following additional guidance governing the use of contractor performance information:

When appropriate, obtain in writing more specific and detailed qualification, experience and past performance data (see FAR 36.602-1(a)) not provided by the SFs 330 that are needed to evaluate the firms using the established selection criteria.

Appendix B Management Comments to the Draft Report

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Response to Draft OIG Report

DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors

- HSAM 3015.304, directs that source selection officials obtain contractor performance information from PPIRS and use it for source selection purposes.
- HSAM 3036.602 directs that past performance data be obtained during the evaluation process for architect-engineer services.
- HSAM Appendix G, Justification and Approval (J&A) Guide (For Other than Full and Open Competition), stresses the need for a satisfactory record of past performance in making responsibility determinations (Page G-28).
- HSAM Appendix H, DHS Acquisition Planning Guide, paragraph B.4.(3) describes the need to use past performance data for identifying additional risks when selecting a contract type other than fixed price. It also requires the use of past performance in the acquisition planning process.
- HSAM Appendix I, DHS Market Research Guide, cites past performance in numerous places as a factor that should be considered by the Acquisition Team during the market research process.

Additionally, during FY 2008, OCPO participated in the development of revised Federal Acquisition Regulation (FAR) Government-wide policy. FAR Case 2006-022, Contractor Performance Information, was published as a final rule and became effective July 1, 2009. On July 16, 2009, OCPO Acquisition Policy & Legislation Branch published Acquisition Regulatory Advisory 09-24 which describes the FAR final rule - its applicability and a summary of Component and contracting officer responsibilities under the rule.

There are also currently two revisions to the Federal Acquisition Regulations (FAR) in process that would impact the requirements for recording contractor performance information. However, on Page 7 of the report, the IG recommends that DHS issue a "policy" prior to implementation of the FAR revisions. The report fails to recognize that DHS cannot unilaterally change the rules for recording contractor performance information. Any such changes would be subject to the regulatory process. Therefore, even if DHS decided to implement our own policy, this would require publication of a proposed rule for public comment, which would involve the same process as is currently being undertaken for the pending FAR rules. We do not believe this is an effective use of resources, since there are currently two Federal Acquisition Regulation (FAR) cases that are in process to implement Section 872 of the National Defense Authorization Act of 2009 (and establish a comprehensive database of contractor performance and responsibility information). USM does not believe it is prudent to start a separate rulemaking process that would, in all likelihood, not be complete prior to issuance of a final FAR rule(s) addressing this issue (and also possibly conflict with the final FAR language). Thus, we believe the draft report should either (a) delete this recommendation or (b) be revised to recommend that DHS implement the final FAR rules when they become effective.

Appendix B Management Comments to the Draft Report

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Response to Draft OIG Report
DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors

The public comment period on FAR Case 2008-027, Federal Awardee Performance and Integrity Information System (FAPIS), closed on November 5, 2009. This rule will require DHS and other Federal agencies to consider the information in the new FAPIS database when making a determination of responsibility prior to the award of new contracts. The database will include Past Performance Information Retrieval System (PPIRS) information on terminations for default and determinations of nonresponsibility. Public comments on FAR Case 2008-016, Termination for Default Reporting, closed on November 2, 2009. This rule will require DHS and other Federal agencies to record terminations for default in PPIRS, and so be available in FAPIS. OCPO will issue appropriate agency-specific implementing guidance when these rules are issued in final, which we believe adequately implements the OIG recommendation.

Section III. USM Comments on Report Content

The following comments are provided in accordance with the draft report sections as specified below.

1. Section entitled "Executive Summary", Page 1

Draft Report Language: Page 1, Second Paragraph of the draft report states that the "department is reluctant to apply the policies and procedures against poorly performing contractors. Department procurement officials characterized the suspension and debarment process as too resource intensive, punitive, and as negatively impacting the size of the contractor pool."

USM Comment: USM does not agree with this statement, both in terms of its characterization of reluctance and the reasons cited for it. The conclusion is not supported by information in the draft report, i.e., there is no evidence cited in the report of any contracting officer being reluctant to apply the policies and procedures against poorly performing contractors. Since the report is absent of sufficient evidential matter to support the conclusion, USM recommends that this statement be removed from the draft report.

2. Section entitled "Background," pages 2 through 4:

A. Pages 3-4: Subsection entitled: "DHS Suspensions and Debarments"

Draft Report Language: The last paragraph of Page 3 states that the Head of Contracting Activity has the authority to approve a contract with a suspended or debarred entity.

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Appendix B Management Comments to the Draft Report

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Response to Draft OIG Report *DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors*

USM Comment: As of October 1, 2009, OCPO has revised the Homeland Security Acquisition Manual (HSAM) so that the compelling reason determination is no longer delegated to the Head of Contracting Activity (HCA). The DHS Chief Procurement Officer is the approval authority. USM recommends that the report be modified to include this October 1, 2009 policy revision.

B. Page 4: Subsection entitled: "Recording Contractor Past Performance"

Draft Report Language: The OIG draft report states "DHS procedures require that contractor performance evaluations be recorded in the Contractor Performance System".

USM Comment: We recommend that the report be revised to note that during the period of FY 2004 thru FY09, DHS procedures required the use of the Contractor Performance System (CPS). However, in accordance with HSAM 3042.15, effective September 1, 2009, CPARS has replaced CPS (CPS is no longer used by DHS).

As previously noted, as part of the transition to CPARS, DHS has conducted agency-wide training for contracting personnel, contracting officer's technical representatives, and others involved in the process. The training focuses not only on the use of CPARS, but also on CPI policy and on techniques for the preparation of substantial performance evaluations. As of November 24, 2009, over 2,400 individuals have received the training. Additional training sessions will be held in FY 2010. OCPO expects that the training and continued emphasis on this area will result in substantial improvement in the collection and use of CPI.

3. Section entitled "Results of Audit," pages 4 through 7.

Pages 4-5: Subsection entitled: "Suspension and Debarment Policies, Procedures, and Practices"

Draft Report Language: Page 5, Paragraph 1 of the draft report states that, "the department is reluctant to apply the policies and procedures against poorly performing contractors. Department procurement officials characterized the suspension and debarment process as too resource intensive, punitive, and as negatively impacting the size of the contractor pool."

USM Comment: USM does not agree with this statement, both in terms of its characterization of reluctance and the reasons cited for it. This conclusion is not supported by information in the draft report, i.e., there is no evidence cited in the report of any contracting officer being reluctant to apply the policies and procedures against poorly performing contractors. USM therefore recommends that this statement be removed from the draft report.

Appendix B Management Comments to the Draft Report

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Response to Draft OIG Report

DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors

Draft Report Language: Page 5, Paragraph 1 of the draft report states that “the department needs to develop and implement a set of policies, procedures, and internal controls to ensure that poorly performing contractors including those whose services are terminated or considered for termination for default or cause are reviewed to determine whether a referral to a suspension and debarment official is warranted.”

USM Comment: As noted in our response to Recommendation #1, the Department has already developed the policies, procedures, and internal controls in Section 3049.101 of the HSAM. USM therefore recommends that the report be revised to reflect the development of these procedures. In addition, as previously noted, OCPO will conduct an oversight review during the fourth quarter of FY10 to determine the extent of compliance with the HSAM requirements.

Draft Report Language: Pages 5 and 6 of the draft report provide information relating to the organizational location of the suspension and debarment official at other Government agencies. There is a strong implication that locating the suspension and debarment official outside of the procurement chain or within OGC is better than at the HCA level, where the DHS suspension and debarment officials are currently located.

USM Comment: USM recommends that this section of the report be deleted. There is no evidence provided in the report that the organizational location of the debarment official had any impact whatsoever on the impartiality of any outcome. Furthermore, the report is selecting a few examples of organizational location, without any analysis of the predominant practice used in the Government or whether these selective examples have or have not resulted in improving the suspension and debarment process. For example, while the report portrays the Air Force organizational structure as a potential improvement, there is no discussion/analysis of how this structure has improved the process or why this structure has not been adopted throughout the Department of Defense (e.g., is there something unique about the Air Force that makes this model work, are there problems identified that are being explored)..

4. Page 6: Subsection entitled: “Recording Contractor Performance Information”

Draft Report Language: Page 7, Paragraph 1 of the report states, “However, until these changes are implemented, we believe the department should develop and implement the policies, procedures, and internal controls to ensure that all pertinent contractor performance information associated with contracts terminated for default is recorded in the appropriate agency and government-wide databases.”

Appendix C Suspension and Debarment Practices

Attachment

Response to Draft OIG Report
DHS' Use of Suspension and Debarment Actions for Poorly Performing Contractors

USM Comment: As noted in our response to Recommendation #2, we do not believe that DHS should create a new policy to address this issue, but instead should await the resolution of the pending FAR rules. As such, we recommend this statement be removed from the report.

5. *Appendix C: Suspension and Debarment Promising Practices*

Draft Report Language: This Appendix cites a number of “Promising Practices”.

USM Comment: There is no evidence provided in the report that the current practices, including but not limited to organizational location of the debarring official, had any impact whatsoever on the impartiality of any outcome. Furthermore, there is no analysis/evidence of the effectiveness of these “promising practices” or why they have not been adopted as a predominant practice within the Government. Without a cost/benefit analysis, it is not possible to determine which, if any, of these practices are potential opportunities for adoption by DHS. As a result, we recommend that the draft report be revised to eliminate the term “promising practices”, and replace it with “selective practices used by other Government agencies” to clearly reflect the contents of this Appendix.

Appendix C

Suspension and Debarment Practices

We identified the following practices at other federal agencies:

Increasing Suspension and Debarment Program Communication and Awareness

- 1. Appointed representative regularly attends Interagency Suspension and Debarment meetings.**

Department of Transportation: A departmental representative attends the Interagency Suspension and Debarment Committee meetings and is the sole conduit of information input to the Excluded Parties List System for the Department.

- 2. Provide regular procurement fraud training to Contracting Officers, Contracting Officer's Technical Representatives, and field agents, as applicable.**

United States Air Force: Initial awareness training is administered/documentated for all new employees.

- 3. A website, newsletter, or other means of communication is used to provide employees with up-to-date information regarding how to report misconduct, current administrative agreements, and detailed information regarding completed suspension and debarments.**

Department of Transportation: The Department of Transportation's website provides extensive details on the suspension and debarment program and supplements the Federal Acquisition Regulation. The website provides extensive information on the Department of Transportation's suspension and debarment program. The site contains a "Frequently Asked Questions" section where it provides guidance to agency personnel as well as to individuals who have been referred for suspension and/or debarment.

- 4. Provide Specific Guidance on the Procedures for the Investigation and Referral of Contractors by Contracting Officers**

United States Air Force: The Air Force Federal Acquisition Regulation Supplement requires that the contracting officer shall promptly notify the Secretary of the Air Force, Deputy General Counsel for Contractor Responsibility or their designate, when they become aware of issues affecting contractor responsibility. The contracting officer is required to provide all known information relating to any non-responsibility determination; any indictment, conviction, or civil judgment relating to an offeror's or contractor's lack of integrity or business honesty, regardless of whether the indictment, conviction, or

Appendix C

Suspension and Debarment Practices

civil judgment is related to a government contract; or any recommendation for a termination for default.

Taking a Proactive Approach to Protect the Government's Interest

- 1. Negligent contractors enter into Administrative Agreements, agreeing to take certain actions that will protect the government.**

General Services Administration: The General Services Administration advised that an administrative agreement is appropriate if the suspending and debarment official is convinced that it is in the best interest of the government to continue business with a contractor, but feels the contractor needs to be monitored. If the contractor agrees to implement procedures and systems that protect the government, an administrative agreement can be put in place and the contractor will be removed from the Excluded Parties List System.

- 2. Attend quarterly departmental suspension and debarment review panels. Each agency sends appointed representatives to present suspension and debarment referrals, actions, administrative compliance agreements, and/or contracts terminated for cause.**

Department of Transportation: The Office of the Senior Procurement Executive chairs a quarterly meeting for all Operating Administrations to discuss suspension and debarment within the department. All Office Administrations have to attend, in accordance with Department of Transportation directive DOT Order 4200.5D, *Government wide Debarment, Suspension, and Ineligibility*.

Using Data Management to Improve Program Oversight and Execution

- 1. The department reports and tracks suspension and debarment referrals and actions in a central database. The database has a mechanism for providing periodic reporting of status or results of suspension and debarment actions to the department.**

Department of Housing and Urban Development: The Department of Housing and Urban Development hired contractors to develop a referral tracking system that suspension and debarment analysts use to input referrals. The system allows for all pertinent data, respondent information, notes, communications, analysis, and other information to be placed in the system and tracked. The system also enables Housing and Urban Development to pull reports to identify problem areas and to print those reports.

Appendix C

Suspension and Debarment Practices

Department of Transportation: The Department of Transportation utilizes Microsoft SharePoint (2003) to track all referrals. This web-based system provides subordinate component agencies (as well as headquarters elements with a need to know) proper access to view, comment, or add pertinent data to each referral.

United States Air Force: The Air Force uses a contractor-designed database to track suspension and debarment referrals. The database is a web-based tracking system.

Appendix D
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