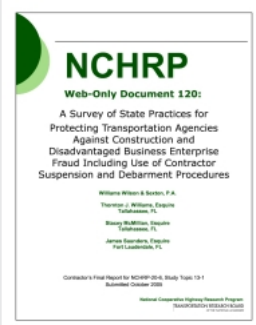

A Survey of State Practices for Protecting Transportation Agencies Against Construction and Disadvantaged Business Enterprise Fraud Including Use of Contractor Suspension and Debarment Procedures

DETAILS

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FOREWORD

This study was initiated to gain a better understanding of state departments of transportation practices involving the areas of highway construction contracting: false claims, disadvantaged business enterprise fraud, and contractor suspension and debarment. The idea was to collect data that would permit a broad assessment of the magnitude of false claims, and disadvantaged business fraud and the steps that states are taking to detect and protect against such practices; and also, to determine whether states are using the contractor suspension and debarment procedures effectively as a tool for protection from unscrupulous contractors.

Initially, the committee determined that the extent of false claims against state agencies in general and state departments of transportation in particular has not been precisely determined. However, recent multi-million judgments in false claim cases have focused more attention on this issue; the General Accounting Office (GAO) has confirmed that the extent of fraud in DBE programs is unknown, but it is widely accepted that DBE fraud falls into two categories: (1) ineligible businesses are certified and obtain contracts based on inaccurate or misleading information and (2) eligible business engage in questionable activity, and today's public owners face difficult decisions in deciding whether to work with contractors who do not meet clearly defined standards of responsibility. The effective use of suspension and debarment tools would greatly enhance their ability to do so.

Therefore, one purpose of this study topic was to determine whether enough information could be collected to be helpful in these areas. Given the data collection and retention practices in the 50 states, there was an awareness that data sufficient to show trends or from which interpolations could be made may not exist.

These survey instruments were sent to the 50 states seeking specific information on these topics: specific data on the extent of false construction contract claims; incidents of fraud in the DBE programs; and the number of contractor suspensions and debarments. The data collection process is further explained throughout the report.

We appreciate that some states responded to the questionnaires by providing such information that their respective states collect and retain. Nevertheless, the responses did not yield sufficient data from which trends could be noted, construction fraud estimated, incidents of DBE fraud determined, or the number of contractors suspended or debarred. Because of the lack of data and the heavy reliance on non-primary sources, the NCHRP 20-6 Committee, Legal Aspects of Highway Programs, decided not to publish the study as a Legal Research Digest. Instead, the Transportation Research Board staff decided to make this report available as a Web-Only Document,. This will enable the reader to determine the usefulness of the information knowing that the data is non-scientific and only applicable to the respondents.

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I. Introduction

Nationally, transportation is a multi-billion dollar industry. Each year, billions of dollars are spent on road, highway, bridge, and public transit projects. In Fiscal Year (FY) 2005, the United States Department of Transportation (USDOT) had total budget resources of $114 billion, an increase of 6.5% from FY 2004 levels of $107 billion.[1] Congress, through the 1998 Transportation Equity Act for the 21st Century (TEA-21), set aside more than $200 billion for transportation projects (approximately $35 billion per year), which was passed on to the states through the U.S. Department of Transportation.[2] State and local governments provide yet another major source for transportation project funding. [3] Unfortunately, the potential for fraud in an industry with a fiscal impact of this magnitude is substantial unless closely monitored. For the USDOT, fraud is likely to cause the diversion of critical funds from infrastructure programs, thus subverting the efforts of regulators and undermining the integrity of important public policy.[4] Additionally, when allocated funding is lost to fraudulent activities, there are fewer resources available for programmed transportation projects. To provide governmental agencies with tools to combat fraud, Congress, in 1863, enacted the False Claims Act (FCA). It has been asserted that the FCA is the single most important tool U.S. government and taxpayers have to recover the billions of dollars stolen through fraud by U.S. government contractors every year.[5]

The *qui tam*[6] action is the primary FCA method of enforcement. The 1986 amendments to the FCA strengthened *qui tam* actions by creating incentives for private citizens with evidence of fraud to commit their time and resources to accompany the government's efforts.[7] By doing

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[1]The Department of Transportation's Performance and Accountability Report for Fiscal Year 2005, *available at* http://www.dot.gov/perfacc2005/mdanda.htm - about.

[2] *Rich Stolz,* Transportation Planning & Its Relationship to Community, *PCJ, No. 45, Article 238*, *Winter 2002.*

[3]See Statistical Abstract of the United States, U.s. Census Bureau, 2007. Table 425, p. 272.

[4] Supra. Note 2.

[5] Taxpayers Against Fraud (TAF) Education Funds - What is the False Claims Act?, *available at* http://www.taf.org/whyfca.htm (lasted visited May 1, 2007)

[6] *Qui Tam* is short for the Latin phrase '*Qui Tam pro domino rege quam pro se ipso in hac parte sequitur*,' which means 'who pursues this action on our Lord the King's behalf as well as his own,' Vermont Agency of Natural Resources v. US ex rel. Stevens, 529 US 765, 769, 120 S. Ct. 1858, 1860, 146 L. Ed. 2d 836 (1999) n.1 (2000) (*citing* 3 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 160 (768)). A "Qui Tam" action is an action brought under a statute that allows a private person (informer or relator) to sue for a penalty, part of which the government or some specified public institution will receive or share with the relator. Under the FCA, the Attorney General will investigate the claim and take one of three courses of action: (1) join the government to the suit as a party; (2) decline to join and allow the private party to continue; or (3) decline to join and block the suit. 31 USC § 3730.

[7] False Claims Act Amendments of 1986, Pub. L. 99-562, 100 Stat. 3153, October 27, 1986.

so, Congress created a powerful public-private partnership for uncovering fraud.[8] From 1987 to 2002, the federal government successfully recovered over $6 billion using FCA *qui tam* actions. Moreover, the General Accounting Office (GAO) has estimated that the FCA has deterred over $300 billion in potentially fraudulent contracts from 1986 to 1998.[9] Total recoveries since the 1986 amendments are now in excess of $17 billion, with nearly $1 billion recovered in the first quarter of FY 2006.[10] Most states, in realizing the importance of controlling fraudulent activities, have taken notice of the federal FCA and have adopted their own False Claims Act.

Similarly, Disadvantaged Business Enterprise (DBE) fraud is a growing concern in the transportation industry. The State Departments of Transportation (DOTs) have primary responsibility for the certification of DBEs, pursuant to the DBE Regulations.[11] One example of DBE fraud occurs when companies and owners that do not qualify as eligible DBEs use false statements to obtain certification.[12] Another example is where the contractors create forged documents and may be inappropriately certified as Small and Disadvantaged Business Enterprises (SDBEs).[13] Likewise, many SDBE-eligible firms reportedly have served as fronts for ineligible firms.[14] Fraudulent activities have also occurred when prime contractors used

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[8] Taxpayers Against Fraud (TAF) Education Funds - What is the False Claims Act?, *available at* http://www.taf.org/whyfca.htm (lasted visited May 1, 2007).

[9] US Department of Justice, *Fraud Statistics-Overview: October 1, 1986 – September 30, 2004, available at* http://www.taf.org/fcastatistics2006.pdf. The recoveries were received from 3,954 Qui Tam actions. Further, this amount does not include $276 million received in Qui Tam actions where the US declined to intervene.

[10] *Id*.

[11] 49 CFR 23 and 49 CFR 26.

[12] *See* 49 CFR part 26, app. A (2002).

[13] Andre Savvides of NY, owner and officer of EXCEL, Mineola, NY, was charged in U.S. District Court in Islip, NY with conspiring with Disadvantaged Business Enterprise (DBE) subcontractors to create false DBE documentation for submission to the NYS Metropolitan Transportation Authority (MTA). The MTA awarded EXCEL a $37.9 million federally funded project to rehabilitate the Broadway/East New York Subway Complex based on the false documentation. Subsequent to receiving the award, Savvides allegedly created additional false documentation in an effort to uphold the appearance of meeting its DBE requirements. This investigation was conducted by the Federal Construction Task Force, Long Island, NY, which includes OIG. On April 26, 2007, Savvides plead guilty to money laundering conspiracy. As a part of the plea agreement he forfeited $393,576 to the government. See *U.S. v. Andre Savvides*, Case No. 2:2005cr00356SJ, N.Y.E.D.., (filed May 5, 2005).

[14] DOT Inspector General recently reported that Irving Walston, of Riverhead, NY, owner of Ego Spirit, Inc. (Ego), a certified DBE firm in Cambria Heights, NY was sentenced in U.S. District Court, Central Islip, NY to three years probation and over $15,000 in fines and back taxes. Walston pled guilty in July 2003 to conspiracy to commit mail fraud in connection with tax returns which allegedly improperly documented income and expenses on fraudulent DBE contracts valued at about $1.4 million and with Davis-Bacon Act violations. Watson also was alleged to have used Ego as a 'front' DBE, receiving payments from other firms which actually performed the work under DOT-funded construction contracts Ego held. Debarment of Walston by FHWA is under consideration. This investigation was conducted jointly with the Federal Construction Fraud Task Force, Long Island, NY. Also, L&K Electric Supply Company of Birmingham, AL, and company President Adriene Balton were sentenced in U.S. District Court in Norfolk, VA, to pay $228,056 in fines, restitution, and assessments for falsifying four applications submitted to

companies that were not eligible DBEs to receive government funding and reach contract goals. From FY 2000 to FY 2004 USDOT has had 131 indictments, 96 convictions, and over $73 million in fines, restitution, and other recoveries of DBE fraud.[15]

Lastly, in order to curb fraud, waste, and abuse in federal programs, and to increase agency accountability, and ensure consistency among agency regulations concerning debarment and suspension of participants in Federal programs, Executive Order 12549 (February 18, 1986)[16] and Executive Order 12689, (August 16, 1989)[17] both entitled, "Debarment and Suspension," were established. These orders provide guidance for agency suspension and debarment activities. Additionally, the U.S. Department of Transportation's (USDOT) implementing regulations in 49 CFR, Part 29 adopted a government-wide system of debarment and suspension for DOT non-procurement activities.[18] The Government debarment and suspension procedures are intended to prevent poor performance, waste, fraud and abuse in federal procurement and non-procurement actions. The General Services Administration (GSA) maintains the list of parties that are debarred, suspended, or excluded from doing business with the federal government. [19]

As stated by USDOT Inspector General Kenneth Mead at the 2004 National Fraud Awareness Conference, "Today, fraud in highway and transit programs is increasingly sophisticated and crosses geographic boundaries, which is precisely why effective prevention, detection, and prosecution is achievable only through a well-coordinated, multi-disciplined, and intergovernmental approach."[20]

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the Virginia Department of Transportation for disadvantaged business enterprise (DBE) certification. In September, Balton admitted she and her company committed fraud in order to win a $14.7 million contract that counts toward the state's DBE contract goal. L&K is barred from participating in the DBE program for five years. The case was investigated by OIG and the FBI. See *U.S. v. Watson*, Case No. 2:2003cr00184, N.Y. E.D. (December 16, 2004)(This case is sealed, but the DOT/OIG summary is available at http://www.oig.dot.gov/item.jsp?id=1459 (last visited 6/18/2007)

[15] Remarks of Department of Transportation Inspector General Kenneth M. Mead, National Fraud Awareness Conference: Highway Construction and Surface Transportation, June 8, 2004, available at http://www.oig.dot.gov/item.jsp?id=1342 (push link "full document') (last visited 6/19/2007).

[16] 51 FR 6370, February 18, 1986,, 3 CFR 1986, Comp. p.189.

[17] 54 FR 34131, August 18, 1989, 3 CFR 198 Comp. p. 235.

[18] 49 CFR Part 29, §29.100. It also provides for reciprocal exclusion of persons who have been excluded under the Federal Acquisition Regulation, and provides for the consolidated listing of all persons who are excluded, or disqualified by statute, executive order, or other legal authority. This part satisfies the requirements in section 3 of Executive Order 12549.

[19] http://www.epls.gov.

[20] Remarks of Department of Transportation Inspector General Kenneth M. Mead, National Fraud Awareness Conference: Highway Construction and Surface Transportation, June 8, 2004, available at http://www.oig.dot.gov/item.jsp?id=1342 (push link "full document') (last visited 6/19/2007).

This study is a survey of practices used to protect transportation departments against construction contract and DBE fraud. This study will examine the activities of states and federal agencies in the false claims arena and will identify various forms of DBE fraud and the related scope of remedies used by state and federal governments to prevent and detect it. This study sought information to identify how state and federal governments handle indicted, investigated or convicted contractors (i.e., legal devices, tactics, and techniques). This study, however, is narrow in scope in that it is limited to construction contracts and does not focus on issues such as bid rigging, price fixing and market allocation, antitrust, conspiracies in restraint of trade, honest services act, mail fraud and other similar illegal tools that may be utilized to restrain competition.

II. Construction Contract Fraud

There are five main types of regulatory schemes used by federal and state government to combat fraudulent activities—the Federal Civil False Claims Act[21], the Criminal False Claims Act,[22] the Civil and Criminal Racketeer Influenced and Corrupt Organizations Act (RICO),[23] False Statements Under Title 18 USC §1001, and state False Claims Acts. To better understand how the federal government and states utilize these measures, we will briefly look at their statutory schemes.

A. Federal Civil False Claims Act

As mentioned earlier, the federal FCA utilizes the *qui tam* action as its main mode of enforcement. In compensation for the risk and effort of filing a qui tam case, the citizen "informer", "whistleblower," or "relator" may be awarded a portion of the funds recovered, typically between 15 and 25 percent.[24] Most states have taken notice of the success of the federal FCA and have adopted their own False Claims Acts. In fact, twenty-three (23) states, along with New York City and Chicago, have their own version of a False Claim Act or some form of a general False Claim Statute. See Appendix A for examples of state False Claim Statutes.

1. Establishing Liability

The civil FCA generally holds any person liable who knowingly presents or conspires to present a false or fraudulent claim to the United States for payment or approval or knowingly

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[21] 31USC §§3729-3731.

[22] 18 USC §287.

[23] 18 USC §§1961-1968.

[24] False Claims Act Amendments of 1986, Pub.L. 99-562, 100 Stat. 3153, (October 27, 1986). See Taxpayers Against Fraud (TAF) Education Funds - What is the False Claims Act?, *available at* http://www.taf.org/whyfca.htm (lasted visited May 1, 2007).

makes or uses a false record or statement to obtain payment or approval of a false or fraudulent claim.[25]

Other bases for FCA violations include:

- possession, custody, or control of property or money used with intent to defraud the government;
- willful concealment of property and delivery of less property than the amount for which the person receives a certificate or receipt;[26]
- authorization to make or deliver a document which certifies receipt of property used by the government with intent to defraud the government, and/or to make or deliver the receipt without completely knowing that the information on the receipt is true;[27]
- knowingly buy or receive a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property;[28]
- knowingly make or use a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.[29]

A critical component of liability under the FCA is a person's submission of a false claim. A claim is broadly defined as any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient, if the U.S. government provides any portion of the money or property which is requested or demanded, or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property requested or demanded.[30]

In order for a false statement to be actionable under the FCA, the claim must be false or fraudulent. The FCA attaches liability to the fraudulent claim for payment, rather than the underlying fraudulent activity or the government's wrongful payment.[31] The demand or request

[25] 31 USC § 3729.

[26] 31 USC § 3729(a)(4).

[27] 31 USC § 3729(a)(5).

[28] 31 USC § 3729(a)(6).

[29] 31 USC § 3729(a)(7).

[30] 31 USC § 3729(a)(7)(c). In *US v. Neifert-White Co.*, 390 US 228, 88 S. Ct. 959, 19 L.Ed 2d 1061 (1968), the Supreme Court held that the FCA reaches beyond claims which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money. *See also Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999) ("The phrase false or fraudulent claim in the FCA should be construed broadly."); and *US v. Incorporated Village of Island Park*, 888 F. Supp 419 (E.D.N.Y. 1995).

[31] 31 U.S.C.A. § 3729 *et seq.*

is sufficient to trigger liability under the definition; the government does not have to have actually paid the sum requested or have directly received the claim.[32] Examples of when a false claim is established include: when a contractor seeks payment for a product not delivered or for work not performed;[33] when a request for payment is made but the work for which the contractor seeks payment does not comply with the contract specifications; and when there is a failure to meet technical requirements that focus on performance of environmental laws, wage and hour regulations, and Occupational Safety and Health Administration (OSHA) regulations. A contractor can be liable even if the noncompliance results in a product with the same basic performance characteristics as those specified in the contract and the government both inspected and accepted the contractor's work.[34]

In addition, liability for an alleged false claim must be material, resulting in a likely impact on the government's decision to pay. Government knowledge can impact the materiality of the liability for a false claim. If the government knew of the falsity of the claim, but paid the claim, it can signify that the government's decision to pay was not affected by the falsity of the claim, thus precluding FCA liability.[35] However, courts have held that while the Government's knowledge is relevant, it is not an absolute defense.[36]

Finally, under the False Claims Act, the government has the burden of proving, by a preponderance of the evidence, that the defendant knowingly presented a false claim to the

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[32] *US v. Killough*, 848 F.2d 1523, 1533-34 (11th Cir. 1988); *US v. Bornstein*, 423 U.S. 303, 308-309, 96 S.Ct. 523, 527-528, 46 L. Ed. 2d 514, 521 (U.S. 1976); *See* S. Rep. No. 99-345, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5275 ("a false claim is actionable although the claims or false statements were made to a party other than the government, if the payment thereon would ultimately result in a loss to the United States."); *Pickens v. Kanawha River Towing*, 916 F. Supp. 702 (S.D. Ohio 1996); *US v. Inc. Village of Island Park*, 888 F. Supp. 419(E.D.N.Y. 1995). S. Rep. No. 99-345, at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5286 ("In 1986, Congress lowered the FCA's scienter requirement to include not only actual knowledge, but also reckless disregard and deliberate indifference, in order to include within the FCA's scope "what has become known as the 'ostrich' type situation where an individual has 'buried his head in the sand' and failed to make simple inquiries which would alert him that false claims are being submitted."); *See also US v. NHC Healthcare Corp*., 115 F.Supp.2d 1149 (W.D.Mo. 2000).

[33] *See e.g. US ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376 (3rd Cir. 1999); *US ex rel. Eberhardt. v. Integrated Design & Construction, Inc.*, 167 F.3d 861 (4th Cir. 1999*); Commercial Contractors, Inc. v. US*, 154 F.3d 1357, 1364 (Fed. Cir.,1998); *Stacy & Witbeck, Inc. v. City & County of San Francisco*, 47 Cal.App. 4th 1 (1996) (California False Claims Act).

[34] *US ex*. rel. *Varljen v. Cleveland Gear Co.,* 250 F.3d 426, 430 (6th Cir. 2001); *Commercial Contractors*, 154 F.3d at 1364.

[35] *US ex rel. Costner v. US*, 317 F.3d 883 (8th Cir. 2003); *US ex rel Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999).

[36] *US ex rel. Butler v. Hughes Helicopters, Inc*., 71 F.3d 321 (9th Cir. 1995); *US ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993); *US ex rel Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991).

government,[37] and that the defendant knowingly made a false statement to get a claim he knew was false, paid or approved.[38] Liability is established when the contractor has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information.[39] Liability may also be grounds for debarment from entering into future government contracts.[40]

2. Types of Fraud Prosecuted Under the FCA

The USDOT and state DOTs are seeing a wide variety of fraudulent schemes occurring, ranging from false claims for work never performed, false certification by contractors, kickbacks between contractors, bid-rigging to DBE fraud.[41] To assist in identifying fraudulent activity, the Taxpayers Against Fraud Education Fund (TAF) have compiled the following list which provides an outline of the false claims on the Government that have been uncovered to date.[42]

- Billing for goods and services that were never delivered or rendered.
- Billing for marketing, lobbying or other non-contract related corporate activities.
- Submitting false service records or samples in order to show better-than-actual performance.
- Presenting broken or untested equipment as operational and tested.
- Billing for work or tests not performed.
- Billing for premium equipment but actually providing inferior equipment.
- Defective testing - Certifying that something has passed a test, when in fact it has not.
- Double billing - Charging more than once for the same goods or service.
- Phantom employees and doctored time slips: Charging for employees that were not actually on the job, or billing for made-up hours in order to maximize reimbursements.
- Yield burning - skimming off the profits from the sale of municipal bonds.
- Falsifying natural resource production records -- Pumping, mining or harvesting more natural resources from public lands that is actually reported to the government.

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[37] In *U.S. ex rel. Totten v. Bombardier*, 380 F.3d 488 (C.A.D.C.,2004), the D.C. Circuit Court of Appeal held that a claim had to be presented to a federal officer or employee, not merely to a federal grantee such as Amtrak, for there to be liability under the False Claims Act (FCA).

[38] 31 U.S.C. § 3729(a)(1, 2).

[39] *Id.*; *U.S.ex rel. Plumbers & Steamfitters*, 183 F.3d 1088, 1092.

[40] FAR 9.406-2(a)(1) (48 CFR Pt. 9).

[41] Remarks of Department of Transportation Inspector General Kenneth M. Mead, National Fraud Awareness Conference: Highway Construction and Surface Transportation, June 8, 2004, *available at* http://www.oig.dot.gov/StreamFile?file=/data/pdfdocs/2004nfac.pdf. (last visited 6/23/2007)

[42] http://www.taf.org/about.html. TAF is a nonprofit public interest organization dedicated to combating fraud against the Federal Government through the promotion and use of the federal False Claims Act and its *qui tam* provisions.

- Being over-paid by the government for sale of a good or service, and then not reporting that overpayment.
- Misrepresenting the value of imported goods or their country of origin for tariff purposes.
- False certification that a contract falls within certain guidelines (i.e. the contractor is a minority or veteran).
- Billing in order to increase revenue instead of billing to reflect actual work performed.
- Failing to report known product defects in order to be able to continue to sell or bill the government for the product.
- Billing for research that was never conducted; falsifying research data that was paid for by the U.S. government.
- Winning a contract through kickbacks or bribes.

3. Defenses to the FCA

There are several defenses that can be raised to the FCA. The alleged violator may assert affirmative defenses, including a statute of limitations defense,[43] which applies to all FCA actions, and public disclosure or prior action, which applies only to *qui tam* actions.[44] The statute of limitations provision of the FCA bars actions (a) more than six years after the violation is committed or (b) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.[45]

Another defense that can be raised to *qui tam* actions is the public disclosure exception. Under this defense, no court shall have jurisdiction over an action based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or GAO report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.[46] The public disclosure exception deprives courts of jurisdiction to hear *qui tam* actions based upon the public disclosure of the allegations or transactions stated above. FCA actions brought directly by the state or federal government are not barred.[47] Additionally, if the relator is the original source of the information, if the relator is an individual who has direct and independent knowledge of the information on which the

[43] 31 USC §3731(b).

[44] 31 USC §§ 3730(e)(3), (4).

[45] 31 USC §3731(b). However, the courts are split over the application of the three year tolling rule to cases brought by Qui Tam relators: *US ex rel. Hyatt v. Northrop Corp.,* 91 F.3d 1211 (9th Cir. 1996); *US ex rel. Colunga v. Hercules, Inc.*, 1998 No. 89-CV-954B (D. Utah March 6,1998).

[46] 31 USC §3730(e)(4)(A).

[47] *Id*.

allegations are based, or if the relator has voluntarily provided the information to the government before filing an action that is based on such information, he is not barred from bringing a *qui tam* action under the FCA.[48]

Finally, prior action can be used as an affirmative defense to the FCA. The prior action bar prevents *qui tam* relators from bringing actions based upon allegations or transactions that are the subjects of a civil suit or an administrative civil money penalty proceeding in which the government is already a party[49] or actions based on the facts underlying another pending *qui tam* action.[50]

4. Penalty, Costs, and Alternative Remedies

Violators of the FCA are subject to penalties and costs associated with fraud committed against the government. A civil penalty of no less than $5,000 and no more than $10,000, plus three (3) times the amount of damages the government sustains because of the act of that person will be the penalty imposed for violation of the FCA.[51] A court may lessen the damage award to two (2) times the amount of the damages where the violator either provides all information to officials 30 days after first obtaining such information; cooperates with any government agencies' investigation of such violation; furnishes the information at a time that no criminal prosecution, civil action, or administrative action had commenced and the violator did not have knowledge of the existence of an investigation into such violation.[52] The violator will also be responsible for court costs incurred to recover penalties or damages.[53] However, consequential damages, such as lost profits, are not recoverable under the Act, and in most jurisdictions, prejudgment interest is also not recoverable.[54]

Moreover, a relator is not required to prove that the federal government suffered monetary harm to state a claim under the FCA. The plaintiff may recover the penalty even if no

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[48] 31 USC §3730(e)(4)(A), (B).

[49] 31 USC §3730(e)(3).

[50] 31 USC §3730(b)(5). This defense has been narrowly considered by courts where the action is essentially identical to the prior, pending action. *US ex rel. S. Prawer & Co. v. Fleet Bank*, 24 F.3d 320 (1st Cir. 1994); *US ex rel. LaCorte v. SmithKline Beecham Clinical Lab*., 149 F.3d 227 (3rd Cir. 1998).

[51] 31 USC § 3729(a)(7)

[52] *Id*.

[53] *Id*.

[54] *See BMY-Combat Systems Div. of Harsco Corp. v. US*, 44 Fed. Cl. 141 (1999); *US v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972); *US v. Foster Wheeler Corp.*, 447 F.2d 100 (2d Cir. 1971). B*ut see US v. Cooperative Grain & Supply Co.*, 476 F.2d 47 (8th Cir. 1973).

damages were caused by the false submission.[55] Likewise, the government may elect to pursue alternative remedies available, including suspension and debarment.[56]

B. Criminal False Claims Act (FCA)

In addition to the civil FCA, there is also a criminal FCA. Under the criminal FCA, a person who presents a false claim to the government knowing it to be false may be imprisoned and subject to fines.[57] Under the criminal FCA, a person may also be liable and thus subject to criminal penalties for causing an intermediary to submit a false claim.[58] Unlike the civil FCA, the required level of proof for violation of the criminal FCA is "beyond a reasonable doubt." Such violation requires the violator to actually know that the claim is false in order for culpability to be established.[59] In turn, only the Department of Justice may bring an action under the criminal FCA. If found liable for criminal false claims, a contractor may be imprisoned for up to five years and fined up to $10,000 per false claim.[60]

C. Civil and Criminal Racketeer Influenced and Corrupt Organizations (RICO) Actions

Similar to the FCA, the civil and criminal Racketeer Influenced and Corrupt Organizations (RICO) Act assists in combating fraud. Although it originated as part of the Organized Crime Control Act of 1970 as a weapon in the fight against organized crime, RICO has become a hybrid statute in which the same misconduct gives rise to both civil and criminal liability in fraud.

The civil RICO suit, with its ultra-potent remedies—treble damages and attorney's fees—has dramatically transformed private litigation in many commercial contexts. Section 1961(1) Title 18 U.S.C. specifically enumerates a long list of felonies under both state and federal law constituting "racketeering activity." Every RICO claim must be based upon a violation of one of

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[55] 31 USC 3731(c); *US ex rel. Varljen*, 250 F.3d 426, 429 (6th Cir. 2001); *Bly-Magee v. California*, 236 F.3d 1014 (9th Cir. 2001); *Harrison v. Westinghouse Savannah River*, 176 F.3d 776, 785; *Commercial Contractors, Inc. v. US*, 154 F.3d 1357 (Fed. Cir. 1998); *but see Young-Montenay, Inc. v. US*, 15 F.3d 1040 (Fed. Cir.1994); *US ex rel. Stinson v. Provident Life & Accident Inc. Co.*, 721 F. Supp. 1247 (S.D. Fla. 1989); *see also Hammond v. Northland Counseling Ctr., Inc.*, 218 F.3d 886 (8th Cir. 2000); 31 US § 3729 (a). Notwithstanding, under FCA, the US is required to prove all essential elements of the cause of action, including damages.

[56] 31 USC §3730(c)(5); *US ex rel. Barajas v. US*, 258 F.3d 1004 (9th Cir. 2001).

[57] 18 USC §287.

[58] *US v. Gumbs*, 283 F.3d 128 (3rd Cir. 2002).

[59] *Id*., at 131; *US v. Catton*, 89 F.3d 387 (7th Cir. 1996); *US v. Barker*, 967 F.2d 1275(9th Cir. 1991).

[60] 18 USC §287.

the crimes listed in 18 U.S.C. § 1961(1).[61] While few of these are of concern in the civil arena, the predicate acts of greatest interest are those mentioned in the opening paragraph--mail, wire, and securities fraud, which accounted for 79 percent of the pre-1985 cases surveyed by the American Bar Association (ABA). The far-reaching use of RICO in the civil context is mostly attributable to the addition of mail and wire fraud as predicate acts.[62] Because mail, wire and securities fraud can be classified as "racketeering activity," what formerly would have constituted no more than "garden variety fraud," may now become federalized into actionable "racketeering" under the RICO statute.

The Supreme Court case of *Sedima, S.P.R.L. v. Imrex, Co., Inc.*,[63] is a clear example of how the view of RICO as a criminal law having little or nothing to do with commercial transactions has been altered. Sedima's federal court suit for breach of contract asserted RICO claims against Imrex and two of its officers, alleging predicate acts of mail and wire fraud,[64] The district court dismissed the RICO counts for failure to state a claim, and the Second Circuit affirmed. It held that Sedima's complaint was defective in two ways: it failed to allege a racketeering injury "different in kind from that occurring as a result of the predicate acts themselves . . . ."[65] Second, the court held the complaint defective in failing to allege that the defendants had already been criminally convicted of the predicate acts of mail and wire fraud, or of a RICO violation. The U.S. Supreme Court granted certiorari and reversed. In an opinion by Justice White, the Court held that a civil RICO claim did not require the two elements added to the statute by the court of appeals. In the Court's view, neither the language of the statute nor its legislative history could support the restrictive approach of the appeals court. The Supreme Court concluded that RICO should be interpreted broadly.

In turn, the Supreme Court confronted the Second Circuit's distress at the "extraordinary, if not outrageous" uses to which civil fraud had been allowed. The Second Circuit argued that instead of being used against mobsters and organized criminals, the Act had become a tool for everyday fraud cases brought against "respected and legitimate enterprises."[66] Justice White noted that in enacting the RICO Act, Congress wanted to reach both legitimate and illegitimate enterprises, and the former should not have immunity from its fraudulent actions and the subsequent consequences. [67] Undoubtedly, the *Sedima* decision opened the floodgates to civil

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[61] Jeff E. Grell, RICO IN A NUTSHELL, *available at* http://www.ricoact.com/ricoact/nutshell.asp, (last visited 6/23/2007)

[62] *Id*.

[63] 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)

[64] 28 U.S.C. §§ 1341, 1343.

[65] *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482, 496 (2d Cir. 1984)

[66] *Id.* at 487.

[67] Sedima, v. Imrex, Co., Inc., 473 U.S. 479, 105 S. Ct. 375, 87 L. Ed. 2d 346 (1985).

RICO cases.[68] Before RICO, U.S. Attorneys were the only ones that could enforce mail and wire fraud statutes. However, when Congress included mail and wire fraud as predicate acts under RICO, every attorney in the country could now utilize the mail and wire fraud statutes. RICO's inclusion of mail and wire fraud federalized state common law claims of fraud in the business context.[69]

Unfortunately, RICO claims are among the most difficult violations to establish. Every RICO claim must be based on a criminal violation or, as the statute states, an "act of racketeering," listed in section 1961(1) of the RICO Act. For there to be a RICO violation, elements such as racketeering, pattern, enterprise, operation and management, must be proven.[70] A civil plaintiff must not only prove that the defendant engaged in acts of racketeering, but must also prove that these acts constituted a "pattern" as well as all of the other elements of a civil RICO claim.[71]

The burden of proof is by a preponderance of evidence that the defendant violated the RICO Act versus the higher standard of beyond a reasonable doubt for criminal RICO charges. In turn, if a plaintiff succeeds in establishing a civil RICO claim, the monetary damages awarded are three times the actual damages established at trial plus the plaintiff's attorneys' fees and costs. In a criminal RICO claim, the defendant goes to jail.[72]

While the mail and wire fraud statutes are broad, most federal courts have an aversion toward RICO claims predicated only on mail and wire fraud violations. This often is the main limitation on a plaintiff's ability to convert a common law fraud claim into a RICO claim predicated on the federal mail and wire fraud statutes. Even if the plaintiff has shown a pattern of mail and wire fraud violations, courts may still view the RICO claim as beyond the intended scope of the RICO Act and avoid application of the RICO Act for what they see as a simple claim of common law fraud.[73] These limitations may account for why of the states we surveyed (see Table 1 below), only Delaware was found to have a RICO statute and none of the states reported bringing a case in the false claims and fraud context under RICO.

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[68] Arthur F. Mathews, Andrew B. Weissman, *Report of the Ad Hoc Civil Rico Task Force,* 1985, A.B.A. SEC. BANKING and BUS. L. 417.

[69] Jeff E. Grell, RICO IN A NUTSHELL, , *available at* http://www.ricoact.com/ricoact/nutshell.asp, (last visited 6/23/2007)

[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] *Id*.

D. False Statements Under Title 18 USC §1001

Similar to the FCA, false statements, as opposed to false claims made to the government, may also be prosecuted. False statements are pursued under US Code Title 18 U.S.C. §1001, 74 which provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title (not more than $10,000) or imprisoned not more than five years, or both.

By its very terms, Title 18 U.S.C. §1001 covers "any" false statements and the courts have consistently construed it in that manner.[75] The false statement statute also empowers

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[74] *See also* 18 USC § 1346, Definition of "scheme or artifice to defraud", which states, "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *See also* 18 USC § 1342, Fictitious name or address:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Postal Service, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined under this title or imprisoned not more than five years, or both.

See also 18 USC § 666, Theft or bribery concerning programs receiving Federal funds:

> Whoever being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that is valued at $5,000 or more, and is owned by, or is under the care, custody, or control of such organization, government, or agency; or corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more shall be fined under this title, imprisoned not more than 10 years, or both. The circumstance of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

[75] *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 1035, 137 L. Ed 2d 132, 138 (1997)

governmental agencies with the authority to indict violators for federal felonies and provides for a lower burden of proof.[76] Since 1934, the statute has prohibited the making of "any false or fraudulent statements or representations...in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder."[77]

E. State False Claims Law

While the federal FCA remains an available tool to combat construction fraud, many states have enacted individual statutory schemes and approaches to combat false claims in their states. A false claim occurs when any person or entity improperly receives from the government money or property through fraudulent means. Most state FCAs prohibit:

- Knowingly presenting, or causing to be presented to the Government a false claim for payment;
- Knowingly making, using, or causing to be made or used, a false record or statement to get a false claim paid or approved by the government;
- Conspiring to defraud the Government by getting a false claim allowed or paid;
- Falsely certifying the type or amount of property to be used by the Government;
- Certifying receipt of property on a document without completely knowing that the information is true;
- Knowingly buying Government property from an unauthorized officer of the Government, and;
- Knowingly making, using, or causing to be made or used a false record to avoid, or decrease an obligation to pay or transmit property to the Government.[78]

The most commonly used of these provisions are the making of false claims and the presentation of false records to the states or government in order to get a false claim paid.[79] The 1986 amendments to the federal FCA helped to strengthen the Act and provide states

[76] *See* William J. Schwartz , *Fairness In Criminal Investigations Under the Federal False Statement Statute*, 77 Colum.L.Rev. v.2 316, 325-326 (1977), "Since agents may often expect a suspect to respond falsely to their questions, the statute is a powerful instrument with which to trap a potential defendant. Investigators need only informally approach the suspect and elicit a false reply and they are assured of a conviction with a harsh penalty even if they are unable to prove the underlying substantive crime."

[77] Act of June 18, 1934, ch. 587, §35, 48 Stat. 996. Congress separated the false claims from the false statements provisions in the 1948 recodification, *see* Act of June 25, 1948, §§287, 1001, 62 Stat. 698, 749, and made unrelated substantive changes in 1996, *see* False Statements Accountability Act of 1996, Pub. L. 104- 292, 110 Stat. 3459.

[78] *See* generally, Taxpayers Against Fraud, Model State False Claims Act, *available at*, http://www.taf.org/modelstatefca.pdf (last viewed 6/24/2007).

[79] *Id*.

with real guidance as to implementing their own false claim statutes. The 1986 amendments provided for:

- The elimination of the "government possession of information" bar against *qui tam* lawsuits;
- The establishment of defendant liability for "deliberate ignorance" and "reckless disregard" of the truth;
- Restoration of the "preponderance of the evidence" standard for all elements of the claim including damages;
- Imposition of treble damages and civil fines of $5,000 to $10,000 per false claim;
- Increased rewards for *qui tam* plaintiffs of between 15-30 percent of the funds recovered from the defendant;
- Defendant payment of the successful plaintiff's expenses and attorney's fees, and;
- Employment protection for whistleblowers including reinstatement with seniority status, special damages, and double back pay.[80]

As you will see in the below tables, states differ as to the statutory scheme and approach they utilize to fight fraud. Not every state has adopted a FCA, and those that have do not utilize all the same components as the federal FCA.

A False Claim Survey was sent to all fifty states addressing specific questions such as whether their state had implemented a statute for prosecution of false claims in construction projects; had abuse been detected; and had they encompassed procedures to detect and investigate false claims in construction contracts. A copy of the survey is attached as Appendix A. The graph below provides an overview of the laws utilized by the states to detect fraud. [81]

Table 1: States with False Claim, False Statement, and Other Fraud Statutes

STATES	General False Claims Statutes	Other False Claims Statutes	False Statement	RICO	Qui Tam Action	Criminal Penalties Included in the Statutes	Civil Penalties Included in the Statutes	Construction Related False Claims Included in the Statutes
Alabama			X			X		
Alaska	X						X	
Arizona	X		X				X	
Arkansas		X (medical)					X	
California	X				X		X	X
Colorado			X			X		

[80] *Id.*

[81] Due to the lack of response by the states, we are unable to draw definitive conclusions as to the extent of false claim construction fraud in the states. However, research suggests that most states do have a mechanism in place to combat fraud, whether through False Claims or False Statement statutes, or other civil or criminal penalties included in statute. The data compiled would suggest that states, while not reporting significant fraud, are concerned with fraudulent activity occurring and have mechanisms in place to combat fraud when it does occur.

NCHRP 20-6, STUDY TOPIC 13-1

A SURVEY OF STATE PRACTICES FOR PROTECTING TRANSPORTATION AGENCIES AGAINST CONSTRUCTION AND DISADVANTAGED BUSINESS ENTERPRISE FRAUD INCLUDING USE OF CONTRACTOR SUSPENSION AND DEBARMENT PROCEDURES

STATES	General False Claims Statutes	Other False Claims Statutes	False Statement	RICO	Qui Tam Action	Criminal Penalties Included in the Statutes	Civil Penalties Included in the Statutes	Construction Related False Claims Included in the Statutes
Connecticut		X (medical)				X	X	
Delaware	X			X	X		X	X
D.C.	X				X		X	X
Florida	X				X		X	
Georgia			X			X	X	X
Hawaii	X				X		X	
Idaho		X (wages & other comp.)				X	X	
Illinois	X		X		X		X	
Indiana	X							
Iowa			X				X	
Kansas		X (medical)						
Kentucky			X (advertising)			X		
Louisiana		X (medical)			X		X	
Maine	X		X			X	X	
Maryland			X				X	
Massachusetts	X						X	X
Michigan		X (medical)				X	X	
Minnesota	X	X(medical)				X	X	
Mississippi	X		X			X	X	X
Missouri		X(medical)	X			X		
Montana	X						X	X
Nebraska			X(insurance employee)			X		
Nevada	X		X				X	X
New Hampshire	X						X	X
New Jersey			X			X		
New Mexico		X (medical)			X		X	
New York			X			X	X	
N. Carolina	X						X	
N. Dakota			X			X		
Ohio	X		X			X		
Oklahoma	X					X		
Oregon		X(medical)				X		
Pennsylvania			X			X		
Puerto Rico		X(insurance)				X		
Rhode Island			X			X	X	
S. Carolina			X			X		
S. Dakota		X (theft by deception)	X			X		
Tennessee		X (medical)					X	X
Texas		X (medical)					X	
Utah	X		X			X	X	

STATES	General False Claims Statutes	Other False Claims Statutes	False Statement	RICO	Qui Tam Action	Criminal Penalties Included in the Statutes	Civil Penalties Included in the Statutes	Construction Related False Claims Included in the Statutes
Vermont	X		X			X		
Virginia		X (taxpayer)	X				X	X
Washington	X							X
W. Virginia		X (taxpayer)	X				X	X
Wisconsin			X			X		
Wyoming	X					X		
TOTALS	23	16	26	1	8	27	32	13

Most states have some type of statutory mechanism in place to address fraud. As stated earlier, twenty-three (23) states have some version of a general false claim statute. (See Appendix B for examples of state false claim statutes). False claim statutes vary significantly from state to state, especially in regard to civil and criminal penalties assessed, who investigates the violation, who can file suit, the standard of proof required, damages awarded, and the statute of limitations. The one common factor among most states is that the violator has to knowingly make, cause, present, or conspire to make false or fraudulent claims or statements. Unfortunately, some states have no FCA enforcement measures in place to combat construction fraud.

Additionally, sixteen (16) states have other false claim statutes that refer to medical, insurance or taxpayer fraud. Reports of significant false claims include use of materials that did not meet specifications, use of non-minority crews to perform DBE work, non-minorities claiming DBE compliance rates, and an overall filing of general false claims.

Similarly, twenty-six (26) states have false statement statutes. For example, Missouri has indicated that while they do not have a state FCA, false construction claims would have to be prosecuted as stealing by deceit, executing a false affidavit under Sections 575.050, Missouri Revised Statutes, or making a false statement under Section 575.060, Missouri Revised Statutes. Additionally, while they have not filed any state false claims, there have been three federal false claims filed in the last five years. The US Department of Justice has prosecuted cases in Missouri involving federal-aid construction contracts under 32 USC §3729.

In addition, one (1) state (Delaware) has a RICO statute that deals with fraud and eight (8) states retain *qui tam* actions. Thirteen (13) states have false claim statutes that specifically address construction fraud.

Finally, most states include some civil or criminal penalty in their fraud statute. Thirty-two (32) states have civil penalties included in their fraud statutes and twenty-seven (27) states have criminal penalties included in their fraud statutes.

We did not receive a large response from states as to the internal procedures they utilize to detect fraudulent activities in their state. The responses we did receive are outlined below in Table 2.

Table 2: False Claim Survey—Examples of State Responses to False Claim Abuses, Procedures and Legal Tactics to Detect Fraud, and Improvements Needed[82]

REPORTING STATES	Procedures in Place to Detect and Investigate False Claims in Construction Contracts	False Claim Abuses that Have Occurred in Construction Contracts in Your State	Legal Devices, Tactics, or Techniques Used to Prosecute False Claims in Construction Contracts	Improvements to Your Fraud Prevention Protocols Needed and/or Recommended	Recommendations to Improve This Area
Iowa	No formal procedures in place	None	There have been no known false claims	N/A	None
Maryland	N/A	No answer	No answer	Revision of Bid Affidavits to clarify which criminal convictions must be disclosed	No answer
Missouri	When informed of potential false claims, Audits and Investigations opens an investigation and seeks assistance from applicable federal agencies when appropriate	Contractors using material that did not meet specifications, contractors using non-minority crews to perform DBE work but claiming contract rates.	Through investigation and cooperation with federal agencies.	Various items are now under consideration, including discontinuing the practice of making public the plan holders list, requiring prime contractors to declare who their large subcontractors are at the time of bidding; and changing the non-collusion certification in the standard contract to make it more obvious. Missouri DOT is also scheduling fraud awareness training.	Strengthen criminal sanctions and make fraud detection training a higher priority.
Virginia	N/A	N/A	N/A	N/A	None
West Virginia	1. West Va. Div./Highway Contract Administration and District personnel monitor and refer to Management and Legal Division 2. West Va. Div./Highways Auditing Division also	No answer	No answer	More vigorous auditing	None

[82] *Due to the lack of response to the False Claim Survey, we are unable to draw definitive conclusions as to the extent of false claim construction fraud in the states.*

REPORTING STATES	Procedures in Place to Detect and Investigate False Claims in Construction Contracts	False Claim Abuses that Have Occurred in Construction Contracts in Your State	Legal Devices, Tactics, or Techniques Used to Prosecute False Claims in Construction Contracts	Improvements to Your Fraud Prevention Protocols Needed and/or Recommended	Recommendations to Improve This Area
	reviews project records and performance 3. If fraud appears, there is a referral to the West Va. Dept./Admin.-Purchasing Division and/or to the County Prosecutor and/or to the Legislature's Commission on Special Investigations 4. If F.A. project, monitoring by and referral to FHWA and OIG 5. After consultation with FHWA and USDOT-OIG, referral to the US District Attorney				

While the majority of states that responded to the False Claim survey did not provide recommendations on how to improve fraud detection and prevention, Missouri did recommend the need to strengthen criminal sanctions and make fraud detection training a higher priority. Other states such as West Virginia responded to internal improvements needed and recommended more vigorous auditing of construction contracts.

Additional research examples of methods to address fraud that were provided by USDOT Inspector General Kenneth Mead at the 2004 National Fraud Awareness Conference uncovered:

- The Connecticut DOT has a good model for federal-state cooperation. Its engineering bureau makes timely referrals of irregularities to internal audit, whose probes have become the cornerstone for a successful federal prosecution.
- The Illinois DOT has mechanisms to improve project oversight, which include an independent oversight entity.
- The Florida DOT has a Dispute Resolution Process, which is designed to promptly resolve contractor disputes to reduce cost overruns and claims.
- The Oklahoma DOT has a dedicated investigative unit that is aggressively investigating fraud in partnership with the USDOT and other federal law enforcement agencies.
- Maryland and Virginia have taken a proactive approach to oversight of projects on a number of fronts, including periodic audits to ensure invoice changes are valid and reasonable.

- The Washington State DOT's Cost Estimating Validation Process is drawing favorable attention in a number of quarters.[83]

III. Disadvantaged Business Enterprise Fraud

The allegations of widespread Disadvantaged Business Enterprise (DBE) fraud present another challenge to the transportation construction contracting community. A DBE is a for-profit small business concern --

1. That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
2. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it. [84]

DBE fraud occurs when companies that do not meet the above requirements engage in fraudulent conduct and activity against the government, under the pretext of being a DBE. Because this type of fraud is of such concern to the USDOT, its Office of Inspector General (OIG) has established and maintains a fraud hotline to facilitate the reporting of allegations of fraud in the DBE Program. [85]

To better understand the nature of the fraud in the DBE program, this section will describe the components of DBE fraud, provide state perspectives and the procedures put in place to detect and investigate DBE fraud, and review the remedies available to federal and state governments and agencies to combat such fraud.

For more than 20 years, the USDOT has had in effect a policy of helping small businesses owned and controlled by socially and economically disadvantaged individuals, including minorities and women, to participate in contract opportunities created by USDOT financial assistance programs.[86] The USDOT distributes in excess of $20 billion annually to help finance thousands of projects across the country. Approximately 85% of the assistance dollars is for construction, with the major portion allocated to state highway and transportation agencies for highway construction.[87] The USDOT's DBE program is one of the projects that

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[83] Remarks of Department of Transportation Inspector General Kenneth M. Mead, National Fraud Awareness Conference: Highway Construction and Surface Transportation, June 8, 2004, *available at* http://www.oig.dot.gov/StreamFile?file=/data/pdfdocs/2004nfac.pdf. (last visited 6/23/2007)

[84] 49 CFR §26.5, Revised as of October 1, 2003.

[85] http://www.oig.dot.gov/Hotline .

[86] Office of Small and Disadvantaged Business Utilization, About OSBDU, *available at* http://osdbu.dot.gov/(follow DBE link in first paragraph) (last visited 6/18/2007).

[87] *Id*.

provide a vehicle for increasing the participation by Minority Business Enterprises (MBEs) in state and local procurement.[88]

The USDOT's DBE program is "intended to ensure nondiscrimination in the award and administration of USDOT-assisted contracts in the Department's highway, transit, airport, and highway safety financial assistance programs. The goals of the program are to remedy past and current discrimination against disadvantaged business enterprises, ensure a 'level playing field' in which DBEs can compete fairly for USDOT-assisted contracts, improve the flexibility and efficiency of the DBE program, and reduce burdens on small businesses."[89] DBE fraud undermines the integrity of the program because legitimate DBEs lose work, and legitimate contractors who seek to work with true DBEs do not get contracts through fair competition.[90]

The integrity of the USDOT's DBE program depends to a large extent upon the establishment of systematic procedures to ensure that only bona fide small disadvantaged business firms are certified to participate in USDOT federally assisted programs. The USDOT Disadvantaged Business Enterprise Regulations, 49 CFR Part 23 and 49 CFR Part 26, place primary responsibility for the certification process upon state transportation agencies, which are tasked with ensuring that only legitimate disadvantaged firms are certified.[91] To be certified as a DBE, a firm must be a small business, owned and controlled by socially and economically disadvantaged individuals.[92] In addition, the TEA-21 - Transportation Equity Act for the 21st Century**,** was enacted by Congress in 1998, in a series of federal transportation statutes providing for race- and sex-based contracting preferences.[93] It ensured that minority- and women-owned businesses had continued opportunity to participate in transportation projects. The statute provided that at least 10% of the amounts made available for any Federal-aid highways, mass transit, and transportation research and technology program is expended with certified DBEs[94].

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[88] *Id*.

[89] US Department of Transportation Office of Civil Rights, *available at* http://www.dotcr.ost.dot.gov/asp/dbe.asp (last visited 6/24/2007).

[90] See, statement by Jennifer L. Dorn, Federal Transit Administration Administrator, COMTO Conference Plenary Session, Cleveland Ohio, July 0, 2004, available at www.fta.dot.gov/printer_friendly/news_events_405.html.

[91] US Department of Transportation Office of Civil Rights, *available at* http://www.dotcr.ost.dot.gov/asp/dbe.asp (last visited 6/24/2007).

[92] Office of Small and Disadvantaged Business Utilization, About OSBDU, *available at* http://osdbu.dot.gov/(follow DBE link in first paragraph) (last visited 6/18/2007).

[93] TEA-21 replaced the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub.L. No. 102-240, § 1003(b), 105 Stat.1914, 1919-21. ISTEA was preceded by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. No. 100-17, § 106(c), 101 Stat. 132, 145, and the Surface Transportation Assistance Act of 1982, Pub.L. No. 97-424, § 105(f), 96 Stat.2097, 2100.

[94] TEA-21 Fact Sheet, available at, http://www.fhwa.lot.gov/tea21/factsheets/dbe.htm, (last visited 6/24/ 2007).

Today, reauthorization of the DBE program is through Section 1101(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.[95] As a general rule, except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act and section 403 of title 23, United States Code, shall be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals.[96] The legal authority for the FAA component of the program is continuing and does not require periodic 5 or 6-year reauthorization.[97]

In June 2001, the United States General Accounting Office (GAO) reviewed the federal DBE Program as performed at the state departments of transportation, giving particular attention to changes in the Program since 1999, characteristics of DBEs and non-DBEs that receive USDOT assisted contracts, discrimination and other factors that may limit a DBE's ability to compete for USDOT assisted contracts, and the impact of the USDOT Program on costs, competition, and job creation.[98]

The GAO also conducted a nationwide survey of 50 state departments of transportation, the District of Columbia, Puerto Rico, and select transit authorities. Unfortunately, the GAO was unable to determine the characteristics of DBE participants because of a lack of information. "Without this information, it is impossible to define the universe of DBEs, compare them with the transportation contracting community as a whole, or gain a clear understanding of the program impacts. USDOT does not systematically track information on discrimination complaints filed by DBEs. Although USDOT receives written discrimination complaints filed by DBEs, it could not provide the total number of such complaints, the total number of investigations launched, or the outcomes of the investigations."[99] The primary reason cited by

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[95] On August 10, 2005 the President signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144 (2005). With guaranteed funding for highways, highway safety and public transportation totaling $244.1 billion, SAFETEA-LU represents the largest surface transportation investment in our Nation's history.

[96] Additionally under Section 1101(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, the term ``small business concern'' has the meaning that term has under section 3 of the Small Business Act (15 U.S.C. 632) except that the term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals, which has average annual gross receipts over the preceding 3 fiscal years in excess of $19,570,000, as adjusted annually by the Secretary for inflation. The term ``socially and economically disadvantaged individuals'' has the meaning that term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations issued pursuant to that Act, except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

[97] 49 USC 47113.

[98] U.S. GEN. ACCOUNTING OFFICE. DISADVANTAGED BUSINESS ENTERPRISES: CRITICAL INFORMATION IS NEEDED TO UNDERSTAND PROGRAM IMPACT. REPORT TO CONGRESSIONAL COMMITTEES, GAO 01-586 (2001).

[99] *Id*.

states and transit authorities for their inability to provide this information was that the information was not in an electronic database and therefore would be too difficult and time consuming to compile.[100]

It must be mentioned that because of the limited DBE data available, it was difficult to compare those firms participating in the DBE program with the rest of the transportation contracting community. Most of the information located was not in any systematic electronic database and states have sporadically collected personal net worth and annual gross receipts.[101] Moreover, states did not effectively track the information necessary to calculate DBE participation rates in subcontracts.[102]

Finally, many of the studies reviewed by GAO consistently overstated the number of qualified, willing and able firms or understated the firms utilized in transportation contracts. Additionally, USDOT did not systematically track information on the discrimination complaints filed by DBEs, making it difficult to determine the amount of discrimination occurring against DBEs.[103] Moreover, many states surveyed do not collect or analyze any type of information identifying other factors that may limit the ability of DBEs to compete for USDOT assisted contracts, including lack of working capital, limited access to bonding, contract consolidation or bundling and prequalification requirements.[104]

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[100] *Id*.

[101] *Id.* The GAO could not calculate the total number of certified DBEs nationwide because of duplication in state DBE directories. In addition, about 95% of the survey responders could not provide information on the annual gross receipts of DBEs or their personal net worth of those individuals who own and control DBEs.

[102] *Id.* According to the GAO data, DBEs received about 7 percent of the prime contracts awarded and 2 percent of the federal dollars awarded for prime contracts in FY2000. In comparison, about 70 percent of the survey respondents could not provide both the number and value of subcontracts awarded to DBEs and non-DBEs. The lack of subcontracting data prevents a complete understanding of DBEs' participation in transportation contracting. The GAO report revealed that, despite the sufficiency of the federal DBE program, many states are misplaced in their reliance on disparity studies. However, it should be noted that while the GAO report finds fault with disparity studies, they can be beneficial to support state DOT implementation of the federal DBE program "as applied." In *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) which is legally binding in the nine states of Washington, California, Oregon, Alaska, Arizona, Idaho, Montana, Nevada and Hawaii., the Court noted that both statistical and anecdotal evidence of discrimination are relevant in identifying the existence of discrimination. They also agreed with the Eighth Circuit that it is necessary to undertake an as-applied inquiry into whether a state's DBE program is narrowly tailored and therefore concluded that the district court erred when it upheld Washington's DBE program simply because the State complied with the federal program's requirements.

[103] 81% of the survey responders reported that they received no written complaints filed by DBEs during 1999 and 2000. 19% of the survey responders reported that they received 31 written discrimination complaints from DBEs. Of the 31 complaints, 29 were investigated and four of the investigations resulted in findings of discrimination.

[104] Evident from the survey responses, there is some disagreement whether these factors are attributable to discrimination.

A. DBE Fraud Survey Results

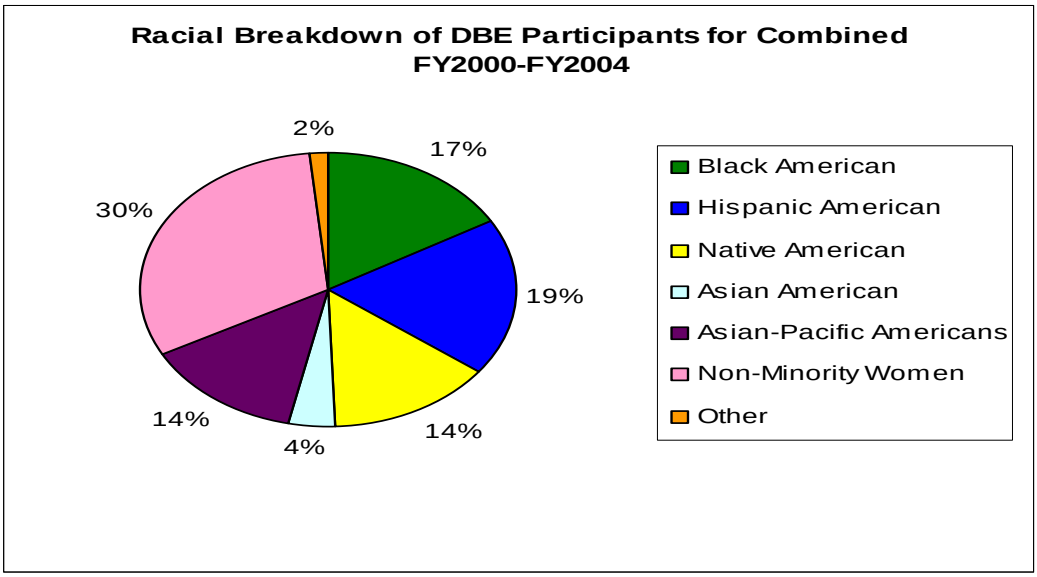
As a part of this study a DBE Fraud Survey was sent to all fifty states. The survey solicited background information necessary to provide a comprehensive statistical overview of DBE participants and the number and dollar value of construction contracts awarded to both DBE contractors and subcontractors to show the significant impact that fraud in DBE programs can have on the transportation industry (See Appendix C). Nineteen (19) states responded to the DBE survey: Arkansas, Florida, Georgia, Hawaii, Idaho, Maine, Maryland, Massachusetts, Mississippi, Missouri, Minnesota, New York, Pennsylvania, Puerto Rico, South Dakota, Texas, Virginia, Washington, and Wyoming.

Additionally, the survey addressed specific questions such as what abuses have occurred in each state's current DBE program; what procedures are utilized to detect and investigate DBE fraud in construction contracts; and what devices or tactics are being used to prosecute DBE fraud. Among the responding jurisdictions, over half indicated the reporting or routine investigation of DBE fraud occurrences. However, while many of the responding states indicated that DBE fraud was sufficiently detected and investigated, few to none of the efforts reported resulted in the finding of actual abuses within the last five (5) years. The types of DBE fraud abuses indicated by the surveys include non-DBE contractors used as DBE prime contractors and subcontractors, DBE subcontractors performing less than the percentage of work claimed; falsification of financial statements; and other types of misrepresentation.

B. DBE Statistical Tables

The graph below provides a breakdown of DBE participants based on survey responses. The largest group of participants in the DBE program are non-minority women, at thirty (30%) percent. Hispanic Americans account for nineteen (19%) percent of DBE's, while Black Americans account for seventeen (17%) percent of DBEs. Both Native Americans and Asian-pacific Americans account for fourteen (14%), with Asian Americans at four (4%) percent participation in DBE programs.

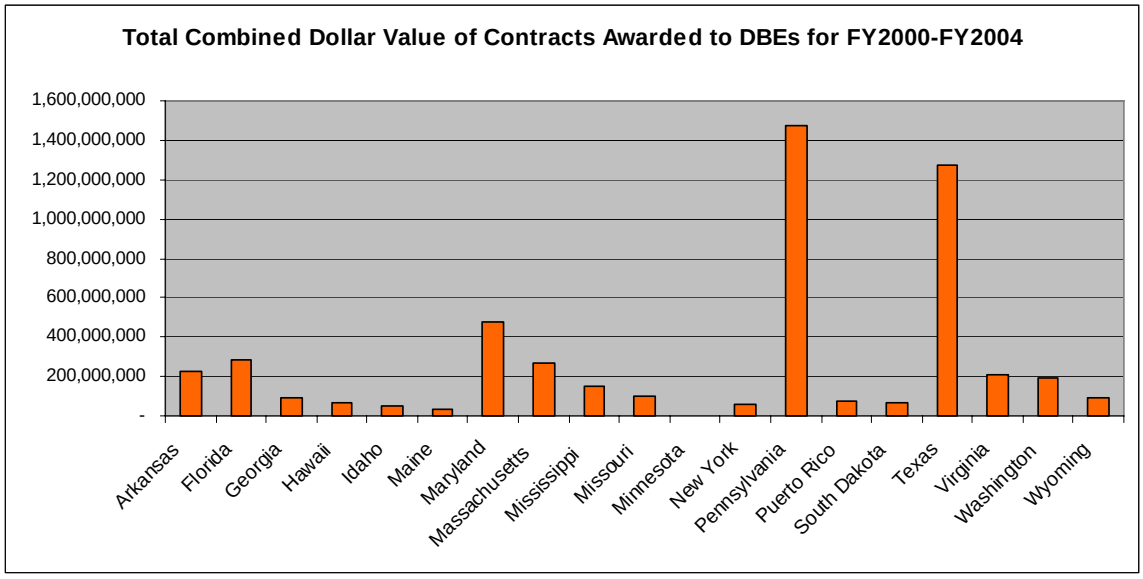
Table 3: Graph--Percentage Racial Breakdown of DBE Participants in Nineteen States



** Percentages are based upon respondents to this portion of the survey: Arkansas, Hawaii, Idaho, Maryland, Mississippi, Pennsylvania, South Dakota, and Texas. Florida, Maine, Missouri, Minnesota, and Puerto Rico are race-neutral states. Statistics are unavailable in Georgia, Massachusetts, and New York.*

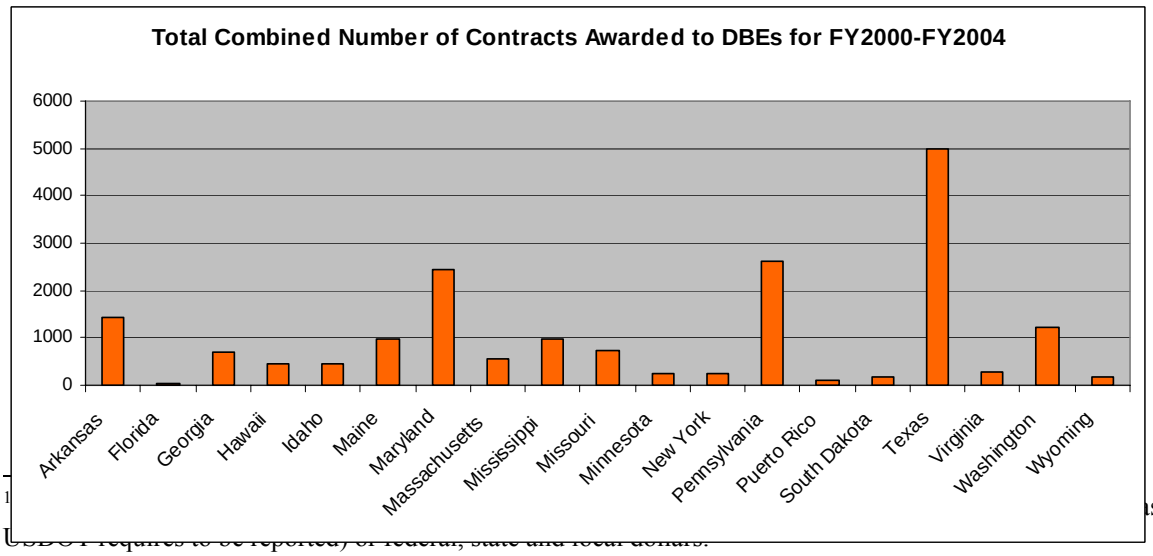
Upon examination of the results from Table 3, a correlation of the ethnic makeup of DBE participants to a particular geographical region occurred. For example, the leading participant in DBEs in Hawaii is the Asian-Pacific American group (90% of their total DBE participants); whereas Texas's leading participants are Hispanic Americans, claiming 62% of all contracts awarded. Also, Non-Minority Women have taken great strides in their DBE participation, with their numbers on the rise throughout the majority of reporting states.

Table 4: Total Dollar Value of Contracts Awarded to DBEs for FY2000-FY2004 in Nineteen States



Based on the results in Table 4, it appears that most states total combined dollar value of contracts awarded to DBEs during FY2000-FY2004, are around $200 Million or less. However, there are states such as Pennsylvania and Texas that are clear leaders in the total dollar value of contracts awarded to DBEs, providing over $1,200 Million in dollar value of contracts to DBEs.[105]

Table 5: Total Number of Contracts Awarded to DBEs for FY2000-FY2004 in Nineteen States



The survey results in Table 5 show that most states total combined number of contracts (prime and sub contracts) awarded to DBEs is under one thousand (1000) contracts for FY2000-FY2004. Texas is the clear leader in the total number of contracts awarded to DBEs, awarding 4, 988 contracts to DBEs during FY2000-FY2004.

When comparing the information in Table 5, it is interesting to note that while Pennsylvania has awarded the highest dollar value in contracts ($1,474,220,240), Texas has distributed almost twice as many contracts (4,988) than Pennsylvania (2,612). Additionally, Maryland, whose contracts were only worth about one-third as much, awarded nearly the same number of contracts as Pennsylvania (2,451 and 2,612 respectively).

Additionally, Table 6 shows the survey results of states that reported as to procedures in their state to detect and investigate fraud in construction contracts, abuses that have occurred, and legal tactics used to prosecute contractors for DBE fraud.

Table 6: Procedures to Detect and Investigate DBE Fraud in Construction Contracts in Seventeen States

REPORTING STATES	Procedures in Place to Detect and Investigate DBE Fraud in Construction Contracts	Abuses That Have Occurred Regarding Current DBE Program	Legal Devices, Tactics, or Techniques Used to Prosecute Contractors for DBE Fraud
Arkansas	The Resident Engineer's EEO Field Inspector conducts on-site inspection of DBEs to ensure the workers are permanent employees of the firm and the firm owns the equipment. If irregularities occur, the prime contractor and the DBE will be advised of the suspected irregularity by letter. A copy of the letter will be sent to the Section Head (EEO/DBE). The State Construction Engineer and the EEO/DBE section head will review the issues in the memorandum and determine whether an investigation is necessary. The Department's External EEO Coordinator will conduct a verification review to determine whether the firm is eligible to participate in the DBE program.	None	Contact US Attorney's Office and the Office of General Counsel for FHWA
Florida	Contracts are monitored by a resident compliance specialist in the field offices.	None	N/A
Georgia	Project Engineers and EEO monitoring of contracts	None	Contact and consult the IG's office
Hawaii	HDOT complaint procedures afford anyone who suspects abuse or fraud the opportunity to file a complaint. All complaints are investigated in a timely manner.	No formal complaints of abuse have been reported.	HDOT has not filed any criminal charges against contractors for DBE fraud.
Idaho	Commercially Useful Function Reports are conducted on every DBE firm working on an ITD project. This is done on State and Federal funded projects. This is done whether or not a	Have had DBE firms committed and not used and then have had DBE firms committed for materials and labor when only	Currently there has been no situation where legal devices, tactics, and/or techniques have been

REPORTING STATES	Procedures in Place to Detect and Investigate DBE Fraud in Construction Contracts	Abuses That Have Occurred Regarding Current DBE Program	Legal Devices, Tactics, or Techniques Used to Prosecute Contractors for DBE Fraud
	firm is committed.	labor is provided.	needed.
Iowa	Monitoring by our field construction staff and periodic monitoring by our central office and EEO staff	We have had very few known abuses in the current DBE program	None
Mass.	Complaints are referred to USDOT OIG Special Agent	None	Complaints are referred to USDOT OIG Special Agent
Minnesota	Minnesota's DOT periodically conducts on-site interviews, in which it interviews prime contractors and subcontractors to verify information furnished to the Department.	None	Has not been necessary in Minnesota in recent years
Missouri	1. Define issue. 2. Identify applicable requirements. 3. Gather facts and documents. 4. Analyze facts and prepare report. 5. Determine corrective action. 1. Sanctions 2. Changes to policy, procedure or specifications 3. Certification eligibility review 4. Personnel actions 6. Consult with other agencies and department divisions as necessary. 7. Notice of action, due process and appeal rights sent to DBE. Audits and Investigations opens an investigation and seeks assistance from program personnel and applicable federal agencies	Not applicable to the state program, but in the federal program: prime contractors performed DBE work with their own crews or those of non-minority firms and claimed DBE credit for the work; contractors claimed that DBE truckers would be performing X percentage of the work, but we found that the DBE truckers only controlled 1-2 trucks, and the rest were not owned or under long-term lease to them, so they were not eligible for DBE participation credit; prime contractors stated that DBE subcontractors supplied them with goods and materials for at least 60% dealer credit, but we found prime contractors had ordered and paid for materials themselves from other dealers, and the DBE firms provided no "commercially useful function" in the transaction.	Through investigation and working with federal agencies.
New York	The NYSDOT has a draft procedure that as of the date of the survey responses the Commissioner has not signed. They are working under the new unapproved guidelines.	None	The NYSDOT has never prosecuted a contractor for DBE fraud in construction contracts. The Office of Equal Opportunity Development and Compliance (OEODC) are advised by the USDOT OIG-Fraud Unit of Fraudulent Activities that contractors are involved in. The USDOT IG's Office has the power and authority to prosecute.

NCHRP 20-6, STUDY TOPIC 13-1

A SURVEY OF STATE PRACTICES FOR PROTECTING TRANSPORTATION AGENCIES AGAINST CONSTRUCTION AND DISADVANTAGED BUSINESS ENTERPRISE FRAUD INCLUDING USE OF CONTRACTOR SUSPENSION AND DEBARMENT PROCEDURES

REPORTING STATES	Procedures in Place to Detect and Investigate DBE Fraud in Construction Contracts	Abuses That Have Occurred Regarding Current DBE Program	Legal Devices, Tactics, or Techniques Used to Prosecute Contractors for DBE Fraud
Pennsylvania	Scrutinizing review of certification/recertification applicants as well as of no change affidavits and notices of change.	Notices of change are not always submitted in a timely manner.	Our state Procurement Code, a management directive, and our highway contractor prequalification regulations provide a basis to debar a contractor for fraud
Puerto Rico	We have not detected a need to establish such procedures.	None	We have not detected a need to establish such procedures.
S. Dakota	DBE participants are reviewed by the DBE Office, there are periodic visits to projects, monitoring by project engineers, and reports by competitors to DBE Office are all good sources of information.	Use of non-DBE trucks	No prosecutions
Texas	TXDOT performs audits by: • Evaluating applications for DBE certification • Conducting on-site Commercially Useful Function (CUF) audits on DBE's performing on their contracts (regarding their performance on their contracts).	A DBE falsified their official financial statement	None
Virginia	In addition to our regular DBE monitoring via compliance reviews, we have established a DBE fraud committee that takes a look at any activity with appearance of fraudulent activity and refers appropriate cases to our internal Office of Inspector General (OIG) where further investigation is performed and appropriate referrals made to state legal authorities, USDOT or the FBI.	One DBE firm (supplier) was convicted in Federal court of filing false claims.	We have no special or unique tactics, and techniques, used to prosecute contractors for DBE fraud in construction contracts.
Washington	SDOT is in the formative stages of initiating a DBE Fraud Awareness/Prevention program.	Certification applicants misrepresent themselves on their applications (resulting in denials or removals)	N/A
Wyoming	WYDOT field personnel are the "first line" defense, and are trained in the DBE program requirements. If anything contrary to their training is observed, it is reported to the DBE Office. The DBE Office will conduct a preliminary inquiry to see if there is a need for an investigation.	None	WYDOT has the same legal devices, tactics, and techniques available as would any other governmental agency, to and through the appropriate offices and legal avenues.

TABLE 7: DBE FRAUD REPORTED

	Year of Occurrence	Dollar Value of DBE firms with Abuses Detected	Total DBE Dollars in Year Fraud Occurred	% of Total Dollars?	Occurrence of Fraud	Total # of DBE Contracts in Year Fraud Occurred	% of Contracts
South Dakota	2004	$ 109,000	$ 8,000,000	1.36%	1	53	1.89%
Missouri	2002	$ 27,000	NA- Avg. $21Mil.	0.10%	1	NA- Avg. 90	1.10%

**Missouri did not provide complete data for FY2002, but figures from their other reported years were averaged to determine the percentage of total dollars that went to fraudulent DBEs.*

In Table 7, only South Dakota and Missouri provided us with information on any DBE fraud and abuses detected in their states. It should be noted that in both states who reported abuse, it was on the part of a DBE firm awarded a sub contract rather than a prime contract. South Dakota is one of the leaders in sub contract value for DBEs, and this may be a factor in why fraudulent activity occurred in that state.

Undoubtedly, in order to protect state transportation agencies against DBE fraud, the USDOT must develop a well-coordinated, multi-disciplined, and intergovernmental approach. GAO's 2001 report entitled, *Disadvantaged Business Enterprises: Critical Information is Needed to Understand Program Impact,* contains several recommendations to USDOT designed to enhance the collection of data so that additional and improved information will be available to evaluate the impact of the DBE program and DBE fraud and help states and transit authorities set DBE participation goals that reflect the availability of ready, willing, and able DBEs in the relevant market.[106]

The integrity of states' Disadvantaged Business Enterprise programs depend to a large extent upon the establishment of systematic procedures to ensure that only bona fide small disadvantaged business firms are certified to participate in DOT federally assisted programs.[107] The procedures the nineteen states have in place to help prevent and detect against DBE fraud may provide guidance and assistance to states embarking on that path.

[106] U.S. GEN. ACCOUNTING OFFICE. DISADVANTAGED BUSINESS ENTERPRISES: CRITICAL INFORMATION IS NEEDED TO UNDERSTAND PROGRAM IMPACT. REPORT TO CONGRESSIONAL COMMITTEES, GAO 01-586 (2001).

[107] U.S. Department of Transportation Office of Civil Rights, *available at* http://www.dotcr.ost.dot.gov/asp/dbe.asp

IV. Federal and State Investigation, Suspension, and Debarment

Debarment and suspension procedures are one of the most effective tools of a State DOT. It is administered by the States' DOT itself and the decision on debarment or suspension can be implemented immediately. In turn, the procedures and standards for judicial review defer to the agency's judgment.[108]

A. Policy and Procedures

According to the USDOT and FHWA, state transportation agencies have a responsibility to report suspicions of fraudulent activity in highway construction projects. They are required to ascertain persons eligible to participate in federally assisted projects that are not "excluded parties." Excluded parties are individuals or companies debarred, suspended, proposed for debarment, or declared ineligible by a federal agency. The Government debarment and suspension procedures are intended to prevent poor performance, waste, fraud, and abuse in federal procurement and non-procurement actions. Debarment or suspension of an organization, business, or individual from doing business with the federal government is not meant to be a punishment, but a procedure to ensure that federally funded business is conducted legally with responsible persons. [109] A federal agency uses the nonprocurement debarment and suspension system to protect the public interest by only doing business with responsible persons while excluding from federal programs persons who are not presently responsible.[110]

Guidance for agency suspension and debarment activities is provided by 49 CFR Part 29. The USDOT regulations in 49 CFR Part 29 are applicable to all of the federally funded state DOT highway and airport programs of prime interest and dollars. In fact, 49 CFR Part 29 has recently been amended to include additional lower tiered transactions as well. (See Appendix D for Instructions for Certification for Primary Covered Transactions and Appendix E for Lower Tiered Transactions). Debarred contractors will not be allowed to be suppliers on federally funded projects if the supply contract is expected to equal or exceed $25,000.[111]

In addition, the Excluded Parties List System (EPLS) is a widely available source of the most current information about persons who are excluded or disqualified from covered.[112] In

[108] *See* GAO Briefing Report to the Chairman, Committee on Government Operations, House of Representatives, "Procurement, Suspension and Debarment Procedures, GAO/NSIAD-87-37BR , February 1987.

[109] *See* Section 49 CFR 29.110, (2006)

[110] *Id*.

[111] *See* Section 49 CFR 29.220(b), (2006).

[112] Excluded Parties List System, *available at* http://www.epls.gov/ (last visited October 24, 2007). This World Wide Web site is provided as a public service by General Services Administration (GSA) for the purpose of efficiently and conveniently disseminating information on parties that are excluded from receiving Federal contracts, certain subcontracts, and certain Federal financial and non-financial assistance and benefits, pursuant to the

accordance with the OMB guidelines, the General Services Administration (GSA) maintains the EPLS list of parties that are debarred, suspended, or excluded from doing business with the federal government.[113] When a federal agency takes an action to exclude a person under the nonprocurement or procurement debarment and suspension system, the agency enters the information about the excluded person into the EPLS.[114] Similarly, some states maintain a state list of their suspended or debarred contractors. The US Department of Defense maintains an internal working listing of state and local government purchasing offices, suspension and debarment web pages, business entity registries, and other online resources for researching contractors, that can be used to assist investigators and fraud attorneys. It includes, inter alia state and local government websites. [115]

Suspension differs from debarment in that suspension is a temporary status of ineligibility for procurement and nonprocurement transactions pending completion of an investigation or legal proceeding.[116] It also excludes individuals from participating in federal assistance programs while a debarment action is being processed. Suspension proceedings are conducted in an informal manner and flexible procedures are utilized. In turn, the suspending official[117] is not required to follow formal rules of evidence or procedure in creating an official record upon which to base a final suspension decision.[118] If legal or debarment proceedings are initiated at the time of, or during a suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months,

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provisions of 31 U.S.C. 6101, note, E.O. 12549, E.O. 12689, 48 CFR 9.404, and each agency's codification of the Common Rule for Non-procurement suspension and debarment. The Excluded Parties List System (EPLS) includes information regarding entities debarred, suspended, proposed for debarment, excluded or disqualified under the nonprocurement common rule, or otherwise declared ineligible from receiving Federal contracts, certain subcontracts, and certain Federal assistance and benefits. This information may include names, addresses, DUNS numbers, Social Security Numbers, Employer Identification Numbers or other Taxpayer Identification Numbers, if available and deemed appropriate and permissible to publish by the agency taking the action. Please be aware that although GSA operates this system, individual agencies are responsible for the timely reporting, maintenance, and accuracy of their data.

[113] *Id.*

[114] Section 49 CFR 29.510 (2006).

[115] *See* http://www.desc.dla.mil/DCM/DCMPage.asp?LinkID=DESCGCounsel, then click on the link State Suspension and Debarment Websites. Christine L. Poston, Fraud Counsel , Office of Counsel (DESC-G), Defense Energy Support Center, contact person.

[116] Section 49 CRF 29.605 (2006).

[117] Section 49 CFR 29. 1010 (a) Suspending official means an agency official who is authorized to impose suspension. The suspending official is either:(1) The agency head; or (2) An official designated by the agency head. (b) For DOT ``suspending official'' means the designated head of a DOT operating administration, who may delegate any of his or her functions under this part and authorize successive delegations.

[118] Section 49 CFR 29.7400 (2006).

unless a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing for an additional 6 months suspension.[119]

A debarment on the other hand, is imposed for a specified period of time as a final determination that a person is not presently responsible.[120] A debarring official must conclude by a preponderance of evidence that the person has engaged in conduct that warrants debarment.[121] Section 49 CFR 29.800 provides the causes for debarment, which may include:

(a) Conviction of or civil judgment for—

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;
(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
(3) 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
(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects your present responsibility;

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as—

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;
(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or
(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction;

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, or a procurement debarment by any Federal agency taken pursuant to 48 CFR part 9, subpart 9.4, before August 25, 1995;
(2) Knowingly doing business with an ineligible person, except as permitted under Sec. 29.120;
(3) 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

[119] Section 49 CFR 29.760 (2006).

[120] *Id*.

[121] *Id*.

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;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under Sec. 29.640 or of any settlement of a debarment or suspension action; or

(5) Violation of the provisions of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701); or

(d) Any other cause of so serious or compelling a nature that it affects your present responsibility.

As in suspension proceedings, debarment proceedings are also conducted in a fair and informal manner. The debarring official is not required to follow formal rules of evidence or procedure in creating an official record upon which to base the decision whether to debar.[122] All that is needed is a preponderance of evidence. If however, the proposed debarment is based upon a conviction or civil judgment, the standard of proof is met.[123] The time period of a debarment is based on the seriousness of the cause(s) of the debarment. Generally, debarment should not exceed three years. However, if circumstances warrant, the debarring official may impose a longer period of debarment.[124]

Suspension and debarment apply to both primary contractors and subcontractors. In instances of suspension and debarment, a contractor or subcontractor is prohibited from receiving any new contracts. The contractor or subcontractor receives a notice of its suspension or proposed debarment, is notified that it has the right to submit information and argument in opposition to the suspension or proposed debarment, and has certain hearing rights if its submission raises an issue of material fact.[125]

After the opening of bids or receipt of proposals, suspended or debarred parties should not be evaluated for awards or included in the competitive range, but rejected, unless the agency determines in writing that there is a compelling reason to include the contractor.[126] If the agency should decide to continue the process, despite the contractor's listing, then counsel should be consulted.[127]

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[122] Section 49 CFR 29.835 (2006).

[123] Section 49 CFR 29.850 (2006).

[124] Section 49 CFR 29.865 (2006).

[125] Section 49 CFR 29 (2006).

[126] 48 CFR § 9.405. The contracting officer is urged to periodically review the list of excluded parties to identify any persons excluded from federal procurement and non-procurement process.

[127] It is FHWA's policy for the legal counsel for the Division, the Federal Lands Highway CBU, or the Office of Acquisition Management responsible for the recommendation, to notify the Assistant Inspector General for Investigations and the Office of the U.S. Attorney before the suspension or debarment recommendation is submitted to the appropriate debarring official. Notification should occur as early as possible in the process and should take place before any notice of suspension or proposal to debar is issued to the party or parties being proposed for

A Contractor Debarment and Suspension Survey was sent to the 50 states regarding state debarment and suspension practices (See Appendix F). Ten (10) states responded to the survey. According to the responding surveys, state transportation departments comply with state laws and regulations regarding suspension and debarment. States also utilize the legal services of the State Attorney General, more so than the US Attorney, for investigation and prosecution of cases. Investigation in many cases take from one month to four (4) years to complete, depending on the complexity of the case; while taking only six (6) months to commence and conclude a debarment proceeding. Not all responding jurisdiction require certification from the vendor that they have not been debarred or suspended prior to participation in a procurement solicitation. Some jurisdictions verify such information by using the federal computer databases. Because many jurisdictions comply with state laws and regulations regarding suspension and debarment, the time periods for such action varies.

Table 8 provides an overview of the Contractor Debarment and Suspension practices from the responding states.[128]

Table 8: Contractor Suspension and Debarment Survey Summary

State	State Laws/Regs.)	Suspension/Debarment Investigation Agency	Time for Investigation Suspension	Time for Investigation Debarment	Certification Required
Hawaii	Yes	Procurement Office	1 month	6 months	No response
Idaho	None	No response	No response	No response	No response
Iowa	Yes	State DOT	3 months – 3 years	3 months – 3 years	Use fed. aff.
Maine	Yes	State DOT	6-12 months	6-12 months	Yes
Maryland	Yes	AG/ BPW	1-6 months	1-6 months	No response
Minnesota	Yes	State DOT	Varies	Varies	Yes
Missouri	Yes	State DOT/w FBI/DOJ	Days - years	Days-years	Yes
Vermont	CFR/Policy	No response	No response	No response	Yes
Virginia	Yes	State IG and AG	1 month - 4 years	6 months	No
Washington	Yes	Various state agencies	Varies	Varies	Yes

Table 9 provides examples of construction contracts from states surveyed that responded that they have either suspended or debarred contractors.

suspension or debarment. To ensure continued timely processing of the S/D action, if FHWA has not heard otherwise from the Office of the U.S. Attorney within 5 working days of the notification, the action should proceed as normal. *FHWA Policy Memorandums-Revised Process for Suspension and Debarment Actions*, April 11, 2001 Memorandum from Vincent F. Schimmoller, Deputy Executive Director, FHWA Administrative Services Business Unit *available at* http://www.fhwa.dot.gov/legsregs/directives/policy/sdactions.htm.

[128] Because of the limited responses received in the Contractor Debarment and Suspension Survey, we are unable to draw definitive conclusions as to the extent of contractor suspension and debarment in the states.

TABLE 9: CONSTRUCTION CONTRACTS WHERE SUSPENSION/DEBARMENT OCCURREND IN STATES SURVEYED

	Year of Occurrence	Dollar Value of Contracts with Suspension	Total Value of Construction Contracts	% of Total Dollars	# of Contracts where a Suspension or Debarment occurred	Total # of Contracts	% of Contracts
Virginia	2002	$ 900,000	$ 2,445,357,000	0.04%	1	628	0.04%
	2003	$ 7,000,000	$ 2,260,188,000	0.31%	2	477	0.31%
	2004	$20,000,000	$ 2,183,847,000	0.92%	1	537	0.92%
Maryland	2000	Unknown	Unknown	Unknown	3	Unknown	Unknown
	2001	Unknown	Unknown	Unknown	4	Unknown	Unknown
	2002	Unknown	Unknown	Unknown	7	Unknown	Unknown
	2004	Unknown	Unknown	Unknown	2	Unknown	Unknown
Minnesota	2000	Unknown	$ 486,655,055	Unknown	1	300	Unknown
	2004	Unknown	$ 474,577,914	Unknown	1	233	Unknown

Minnesota, who had a suspension/debarment in both 2000 and 2004, did not have the exact value of the contracts where a contractor was suspended and debarred. The leader in DBE sub contract value, Virginia, did not report any DBE fraud on their survey but did indicate two contractor suspension/debarments in 2002 through 2004. Likewise, while Maryland reported no suspensions, it did report several debarments (three in 2000, four in 2001, seven in 2002 and two in 2004). However, they did not keep track of the dollar value of these contracts, and they did not respond to the survey questions asking the total dollar value of their construction contracts or the total number of contracts.

Undoubtedly, the proper reporting, collection and analyzing of suspension and debarment data by all states would be helpful in better understanding the impact of fraud in this area in the transportation industry. Comprehensive tracking information needed to evaluate suspension and debarment of contractors in construction contractors appears to be lacking on the part of many states.

V. Conclusion

At the federal level, the following statutory schemes are used to detect and prosecute fraudulent construction contract fraud: the Federal False Claims Act, the Criminal False Claims Act, the False Statement Provision, and the Civil and Criminal Racketeer Influence and Corrupt Organization Act (RICO). The states use a variety of false claims acts. At least 23 states have general false claims acts and 26 states have false statement acts. The data provided through the survey responses did not indicate the widespread existence of specific initiatives to detect construction contract fraud. Such fraud is detected through vigilant program management and processed as any other state false claim or false statement violation.

As is evident from the responses to the DBE Survey, available data indicates the existence of some fraud, but responses were limited as to the number of actual occurrences and specific dollar amount lost as a result of DBE fraud. Despite the anecdotal evidence of DBE fraud, as with the GAO report, sufficient data was not provided to fully asses the magnitude of the problem. Thus, we cannot conclude either that the problem is minimal or that it is widespread. It is clear, however, that states have implemented a variety of procedures for investigating and monitoring DBE fraud.

Debarment and suspension procedures are the major tools for protecting the integrity of the transportation contracting process. Federally funded state transportation projects must include suspension and debarment procedures as a further protection against contract fraud. Investigation periods vary as does whether or not a state requires a contractor to show certification of its suspension and debarment status. Few states that responded to the survey kept track of the dollar value of contracts affected by suspension and debarment actions. However, survey responses and general research reveal that many states lack effective suspension and debarment tracking procedures. Consequently, the differences in the procedures indicated in the responses to the surveys, and arguably the lack of responses may be indicative of the need for the states to implement suspension and debarment assessment and evaluation tools.

The overview of fraud statutes adopted by federal and state governments along with the survey responses indicate that federal and state governments, as well as the courts, have consistently been dealing with the issue of fraud for many years. While federal and state transportation agencies have designed processes to detect and deter fraud in construction contracts and DBEs, fraudulent practices will exist and possibly increase, costing the USDOT and state transportation agencies billions of dollars, unless there is an increased effort and coordination between the federal and state governments to provide a statutory framework to actively monitor, report and enforce fraud penalties.

APPENDIX A FALSE CLAIMS SURVEY

Transportation Research Board

PROTECTING TRANSPORTATION AGENCIES AGAINST CONSTRUCTION CONTRACT AND DISADVANTAGED BUSINESS ENTERPRISE FRAUD
A Survey of State Practices

False Claims Survey

June 2005

Williams, Wilson, and Sexton, P.A.
Attorneys At Law

Introduction

This survey investigates False Claims in State Department(s) of Transportation construction projects.

Although the extent of false claims in construction projects has not been quantified, the potential for abuse in transportation projects has been recognized due to multi-million dollar judgments for false claim abuses.

It is our intent to compile and compare state practices regarding false claims, and to prepare a report.

Instructions

We request this survey to be completed and returned to the following address:

NCHRP 20-6, Study Topic 13-1
Attn: James E. Saunders, III
Williams Wilson & Sexton, P.A.
110 E. Broward Boulevard
Suite 1700
Fort Lauderdale, FL 33301

If you have any questions or need any assistance, please feel free to contact by email: Thornton Williams, tjwilliams@twalaw.com or James Saunders, jsaunders@twalaw.com,. You may also contact them directly by phone at (850) 224-3999 and (954) 315-3900 respectively.

Timeline for Study

Throughout this survey, you will be asked to provide numerical data for the last five fiscal years (2000-2004). We realize that there are differences in the federal, state, and individual agency fiscal years. Please indicate the beginning and end of the fiscal year that would be easiest for you to document in this survey (example: Federal FY is October 1 to September 30)._____

_____

_____

Please use the indicated fiscal year throughout the Survey.

Biographic Information

Please provide the following information for the person(s) that will act as a contact person(s) in your agency. (Note: This is not necessarily the person who is completing the survey).

Name_____
Title_____

Office Address _____
_____
_____

Office Phone_____

Email Address_____

Name_____
Title_____

Office Address _____
_____
_____

Office Phone_____

Email Address_____

False Claims Survey

1. Is there a state statute(s) that is used as a basis for prosecution of a false claim in construction project in your state?
   Yes
   No
If yes, please indicate the statute(s)_____
_____
_____
_____

2. Was there a need identified, study presented, or abuse detected that resulted in the implementation of this state statute? **
   Yes
   No

If yes, please identify the need, study, or abuse.
_____
_____
_____
***Please attach any documentation available that may illustrate a reason for the implementation of this statute.*

3. Are there any cases that have arisen in your state that are commonly used as precedent to prosecute false claim actions?
   Yes
   No

If yes, please identify the case(s)_____
_____
_____
_____

4. Has your state relied on 31 USC §3729 for prosecution of false claims in Department of Transportation construction projects?**
   Yes
   No

If yes, has your state relied on the U.S. Attorneys office for help in prosecution of false claims under 31 USC §3729?
   Yes
   No

If yes, please explain your interaction with the U.S. Attorneys office_____
_____
_____
_____
***Please attach any documentation that may illustrate your state's interaction with the U.S. Attorneys Office.*

5. Please summarize the process that is used to handle false claims in construction projects by listing the steps.

Step 1:_____
_____
Step 2:_____
_____
Step 3:_____
_____
Step 4:_____
_____
Step 5:_____
_____
Step 6:_____
_____
Step 7:_____
_____
Step 8:_____
_____
Step 9:_____
_____
Step 10:_____
_____

6. Please explain the procedures that are in place to detect and investigate false claims in construction contracts._____
_____
_____
_____
_____
_____
_____
_____

7. Please provide any legal devices, tactics, and techniques, used to prosecute contractors for false claims in construction contracts._____
_____
_____
_____
_____
_____
_____
_____

8. Please provide a summary of significant false claims abuses in construction contracts that have been detected in your state. (Please include dollar amounts if available). _____
_____
_____
_____
_____
_____
_____

9. Please complete the following chart for FY 2000-2004 *(If none enter 0)(Distinguish between civil and criminal prosecutions):*

	FY 2000	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004**
Overall Number of construction contracts					
Overall Dollar Value of construction contracts					
Overall Number of construction contracts where abuses were detected					
Overall Dollar Value of construction contracts where abuses were detected					
Overall Number of successful prosecution of abuse claims in construction contracts					
Overall Dollar Value of successful prosecution of abuse claims in construction contracts					
Overall Dollar Value of Litigation expenses to prosecute false claims.					

10. What improvements to your fraud prevention protocols have you determined (if any) are necessary?
_____
_____
_____
_____
_____
_____

11. If you have not implemented these improvements, what has prevented you from implementing them? _____
_____
_____
_____

_____
_____

12. Are there any recommendations you would make to improve this area that have not been addressed in the above sections?
Yes
No

If yes, please explain your recommendations.
_____
_____
_____
_____
_____

13. What financial resources have been received from the Federal Highway Administration for designing and planning transportation projects within your state? Please describe the specific projects funded and the dollar amount of funding.

14. What percentage of your projects matched or came in under their project cost estimates? What percentage of your projects exceeded their project cost estimates?

15. What percentage of your current projects are on time? What percentage of your current projects are delayed? If delayed, on what basis?

16. Please indicate the number of employees and their respective titles or independent contractors responsible for monitoring progress on a transportation project?

17. How many projects are incomplete due to delay? How many projects are incomplete due to cancellation?

18. How are financial invoices processed for payment? What support documentation is required? What personnel is required to process such documentation? How many personnel in that capacity to monitor invoices?

19. Do you possess a copy of USDOT's Construction Program Management and Inspection Guide? Which sections of the guide have you implemented?

20. Does your staff meet with other federal and state agencies to discuss project costs, schedules, status and quality issues? If so, how often and on what type of projects?

21. Have you litigated any false claims actions in your state? If so, did the relief include suspension or debarment? Did relief include monetary penalties? If so, please list the number of cases litigated, the number of subsequent suspensions and/or debarments, and the monetary penalties awarded.

22. In any false claim action, did your state share in the monetary recovery?

23. How many false claim cases were filed? By whom? Please distinguish whether the cases were filed in state or federal court or other forum.

_____
_____
_____
_____
_____

APPENDIX B EXAMPLES OF APPLICABLE STATE FALSE CLAIM STATUTES

States	False Claims Statute Reference	Summary of False Claims Statute
Alaska	Alaska Statute § 36.30.687 Misrepresentations and Fraudulent Claims	A person who makes or uses in support of a contract claim under this chapter, a misrepresentation, or who practices or attempts to practice fraud, at any stage of proceedings relating to procurement of a contract controversy under this chapter forfeits all claims relating to that procurement or contract; and is liable to the state for reimbursement of all sums paid on the claim, for all costs attributable to review of the claim, and for a civil penalty equal to the amount by which the claim is misrepresented. Additionally, there is a six year statute of limitations after discovery of misrepresentation, fraud, or attempted fraud.
Arizona	Ariz. Rev. Stat. § 47-9527 Unauthorized records; material misstatements, false claims; liability; special action; damages; violation; classification	A person who knows or has reason to know that the record contains a material misstatement or false claim is liable to a debtor, a consumer obligor, a person named as debtor or the owner or holder of collateral affected by the record for the sum of at least $500 dollars or for treble the actual damages caused by the record, whichever is more, and reasonable attorney fees and costs of the action, if person who causes record to be filed or recorded willfully refuses to terminate or correct record within 20 days after date of written request from debtor. This is a class 1 misdemeanor.
California	California Govt. Code § 12650-56-False Claims Act	Any person who knowingly presents or causes to be presented to an officer or employee of state a false claim for payment or approval; knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved; or conspires to defraud the state or political subdivision by getting false claim allowed or paid by state or political subdivision shall be liable to the state or to the political subdivision for 3 times the amount of damages which the state political subdivision sustains because of the act of that person. A person who commits any of the above acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of the penalties or damages, and may be liable for civil penalty up to $10,000 for each false claim. The AG will investigate violations under this section and may bring civil action against violator. The prosecuting authority may also intervene and bring civil claim. A person may also bring civil action for violation of this article (*qui tam* action) for the person and either for the State of California in the name of the state if state funds involved, or for political subdivision, if political subdivision funds exclusively involved. Additionally, a civil action under § 12652 may not be filed more than 3 years after the date of discovery by the official of state charged with responsibility to act or, in any event, no more than 10 years after the date on which the violation of §12651 is committed.

States	False Claims Statute Reference	Summary of False Claims Statute
Delaware	Delaware Code Annotated Title 6, § 1201-1209 Chapter 12- Delaware False Claims and Reporting Act	Any person who knowingly presents, or causes to be presented, directly or indirectly to an officer or employee of the Government a false or fraudulent claim for payment or approval; or knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved; or conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; shall be liable to the Government for a civil penalty of not less than $5,500 and not more than $11,000 for each act constituting a violation of this section, plus 3 times the amount of the actual damages which the Government sustains because of the act of that person. A person violating this subsection shall also be liable for the costs of a civil action brought to recover any such penalties or damages, including payment of reasonable attorney's fees and costs. The AG shall investigate suspected violations. A private civil action may be brought by any affected person, entity or organization on behalf of the party bringing suit and for the Government (*qui tam*). Civil action may not be brought more than 6 years after date violation committed; or more than 3 years after date facts material to action are known or reasonably known by official of Government charged to act; but in no event more than 10 years after date violation committed.
DC	District of Columbia False Claims Act § 2-308.14- False Claims Liability, Treble Damages, Costs and Civil Penalties; Exceptions.	Any person who knowingly presents, or causes to be presented, directly or indirectly to an officer or employee of the Government a false or fraudulent claim for payment or approval; knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved; conspires to defraud the Government by getting a false or fraudulent claim allowed or paid shall be liable to the District for 3 times the amount of damages which the District sustains because of the act of that person; also liable to District for costs of a civil action and may be liable for civil penalty no less than $5,000 and not more than $10,000 for each false claim. The Corporation Council shall investigate. A *qui tam* plaintiff is allowed. When a *qui tam* plaintiff brings an action pursuant to this section, no other person may bring an action pursuant to this section based on the facts underlying the pending action.
Florida	Florida False Claims Act- § 68.081-68.09	If a person knowingly presents a false claim or conspires to submit false claim to an officer or employee of an agency, the violator is liable to the state for a civil penalty of not less than $5,000 and not more than $10,000 and for treble the amount of damages the agency sustains because of act or omission of that person. The Department of Legal Affairs investigates the violation. The Department of Financial Services may bring civil action if action arises from investigation by that Department and Legal Affairs has not filed action. No proof of specific intent to defraud is required. Innocent mistake shall be a defense to an action under this act. *Qui tam* action is also allowable. Statute of Limitations: No more than 5 years after date on which violation committed; or more than 2 years after date material facts reasonably should have been known by state official, but in no event more than 7 years after date violation committed.
Hawaii	Haw. Rev. Stat. § 661-21 to 29- *Qui Tam* Actions or Recovery of False Claims to the State	Notwithstanding § 661-7 to the contrary, any person who knowingly presents, or causes to be presented, directly or indirectly to an officer or employee of the Government a false or fraudulent claim for payment or approval; knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved; conspires to defraud the Government by getting a false or fraudulent claim allowed or paid, shall be liable to the State for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages that State sustains. The AG shall investigate violation. Proof is preponderance of evidence. Statute of limitations is 6 years after false claim discovered. *Qui tam* action is allowable.

States	False Claims Statute Reference	Summary of False Claims Statute
Illinois	Illinois Whistleblower Reward and Protection Act –740 Ill. Comp. Stat. § 175/1-8	Any person who knowingly presents, or causes to be presented, directly or indirectly to an officer or employee of the Government a false or fraudulent claim for payment or approval; knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved; conspires to defraud the Government by getting a false or fraudulent claim allowed or paid, shall be liable to the state for a civil penalty of not less than $5,000 and not more than $10,000 per violation, plus 3 times the amount of damages, including consequential damages, that the state sustains because of the act of that person. *Qui tam* action is allowed.
Massachusetts	Mass. Gen. Laws Chapter 12 § 5(A –O) False Claims	Any person who knowingly presents, or causes to be presented, directly or indirectly to an officer or employee of the Government a false or fraudulent claim for payment or approval; knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved; conspires to defraud the Government by getting a false or fraudulent claim allowed or paid, shall be liable to the commonwealth or political subdivision for a civil penalty of not less than $5,000 and not more than $10,000 per violation, plus 3 times the amount of damages, including consequential damages, that the commonwealth or political subdivision sustains because of the act of that person. They shall also be liable for the expense of any civil action brought to recover any such penalty or damages, including reasonable attorney fees.
Maine	Me. Rev. Stat. Ann.- Title 22, § 15- Civil Liability of Persons Making False Claims	Any person, firm, association, partnership, corporation or other legal entity who makes, causes or presents for payment or approval any claim upon or against the department or upon any funds administered by the department, knowing such claim to be false fictitious or fraudulent or who makes false written statement or enters into agreement or conspiracy to defraud the department by obtaining payment or approval for false, fictitious, or fraudulent claim, shall in addition to any criminal liability that may be provided by law, be subject to a civil suit by this State for recovery of civil penalties to include: restitution (for all excess benefits and payments); payment of interest (on amount of excess benefits or payments); payment of civil penalties (3 times the a mount of excess, but not less than $2,000 for each false claim, whichever is greater; cost of suit, cost of investigation, and attorney's fees.
Minnesota	Minn. Stat. § 609.455- Permitting False Claims Against Government and § 609-465- Presenting False Claims to Public Officer or Body	§ 609.455--A public officer or employee who pays any claim or demand made upon state which he knows is false or fraudulent in whole or part, may be sentenced to imprisonment for not more than 5 years or to payment of a fine not more than $10,000 or both. §609.465—Whoever, with intent to defraud, presents a claim or demand, with knowledge that it is false in whole or part, for payment is guilty of an attempt to commit theft of public funds and may be sentenced accordingly.
Mississippi	Miss. Code Ann. §97-7-10- False representations to Defraud Government	Whoever, with intent to defraud the state or any department, agency, office, board, commission, county, municipality, knowingly and willfully falsifies, conceals, or covers up by trick, scheme or device a material fact, or makes any false, fictitious, or fraudulent statement or entry shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than 5 years or by both.
Montana	Mont. Code Ann. § 17-8-231 And Mont. Code Ann. § 7-6-4311	A person who knowingly presents or causes to be presented a false, fictitious, or fraudulent claim for allowance or payment to any state agency or its contractors forfeits the claim, including any portion that may be legitimate, and in addition is subject to a penalty is not to exceed $2,000 plus double the damages sustained by the state as a result of the false claim, including all legal costs. The forfeiture and the penalty may be sued for in the same suitable the damages sustained by the state as a result of the false claim, including all legal costs. A person who knowingly presents or causes to be presented a false, fictitious, or fraudulent claim for allowance or payment to any city or town or its contractors forfeits the claim, including any portion that may be legitimate, and in addition is subject to a penalty is not to exceed $2,000 plus double the damages sustained by the city or town as a result of the false claim, including all legal costs. The forfeiture and the penalty may be sued for in the same suitable the damages sustained by the state as a result of the false claim, including all legal costs.

States	False Claims Statute Reference	Summary of False Claims Statute
Nevada	Nevada Submission of False Claims to State or Local Government – Chapter 357: NRS §357.010-357.250)	A person who with or without specific intent to defraud, who knowingly presents, or causes to be presented, directly or indirectly to an officer or employee of the Government a false or fraudulent claim for payment or approval; knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved; conspires to defraud the Government by getting a false or fraudulent claim allowed or paid, shall be liable for 3 times the amount of damages sustained by the state or political subdivision, for the costs of a civil action brought to recover damages and a civil penalty of not less than $2,000 and not more than $10,000 for each act. A private plaintiff may maintain an action on his own account and that of the state if money, property or services provided by the state or political subdivision, or both are involved. Statute of Limitations- no more than 3 years after the date of discovery of the fraudulent activity by the AG or more than 5 years after fraudulent activity occurs, whichever is earlier.
New Hampshire	New Hampshire False Claims Act §167:61b	Any person who knowingly presents, or causes to be presented, directly or indirectly to an officer or employee of the Government a false or fraudulent claim for payment or approval; knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved; conspires to defraud the Government by getting a false or fraudulent claim allowed or paid, shall be liable to the state for a civil penalty of not less than $5,000 and not more than $10,000 per violation, plus 3 times the amount of damages that the state sustains because of the act of that person
N. Carolina	N.C. Gen. Stat. § 108A-70.13- 16 False Claim Procedures	In action brought, the State is required to prove all essential elements of the cause of action, including damages, by the greater weight of evidence. A final judgment in favor of the State in any criminal proceeding charging fraud or false statements, whether by trial verdict or upon guilty or no lo contender plea, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding. Treble and double damages and civil penalties shall not be assessed against provider if already assessed under same claim under the federal False Claims Act.
Oklahoma	Okla. Stat. tit. 21§ 142.16- False Claims	Filing of a false claim for compensation shall constitute a misdemeanor, and shall be punishable by a fine not to exceed $1,000 or by imprisonment in the County jail for a term not to exceed 1 year, or by both.
Utah	Utah Code Ann. § 26-20-1-13—False Claims Act	False statement or false presentation means a statement or representation which is knowingly and willfully made if the person making the statement or representation has knowledge of the falsity thereof. Knowledge of past acts is not necessary to establish the fact that a false statement or representation was knowingly made. Criminal punishment is determined by the cumulative value of the funds or other benefits received or claimed in the commission of all violations of a similar nature, and not by each separate violation. A person violating this law will also be subject to civil penalties.
Virginia	Virginia Fraud Against Taxpayers Act Article 19.1--§ 8.01-216.1-8.01-216.19	Any person who knowingly presents, or causes to be presented, directly or indirectly to an officer or employee of the Government a false or fraudulent claim for payment or approval; knowingly makes, uses or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved; conspires to defraud the Government by getting a false or fraudulent claim allowed or paid, shall be liable to the Commonwealth for a civil penalty of not less than $5,000 and not more than $10,000 per violation, plus 3 times the amount of damages sustained by the Commonwealth. They shall also be liable for the costs of any civil action brought to recover any such penalty or damages.
Wyoming	Title 6: Chapter 3-Article 6- Fraud	A contractor or subcontractor who purchases materials on credit and represents that they will be used in a designated building or improvement and who knowingly and with intent to defraud the seller uses the materials or allows them to be used in a building or improvement other than the one designated is guilty of a misdemeanor punishable by imprisonment for not more than 6 months, a fine of not more than $750 dollars, or both.

APPENDIX C DISADVANTAGED BUSINESS ENTERPRISE FRAUD SURVEY

Transportation Research Board

PROTECTING TRANSPORTATION AGENCIES AGAINST CONSTRUCTION CONTRACT AND DISADVANTAGED BUSINESS ENTERPRISE FRAUD
A Survey of State Practices

DISADVANTAGED BUSINESS ENTERPRISE FRAUD SURVEY

June 2005

Williams, Wilson, and Sexton, P.A.
Attorneys At Law

Introduction

This survey investigates state practices of handling Disadvantage Business Enterprise (DBE) Fraud in state Departments of Transportation construction projects.

State Departments of Transportation awarded more than $35 billion dollars in highway construction contracts to businesses owned and controlled by socially and economically disadvantaged persons during 1983-2000, according to statistics maintained by the Federal Highway Administration's Office of Civil Rights. In any program as large as the DBE program, there is always a potential for fraud. DBE fraud undermines the legality and integrity of the program, keeping legitimate businesses from getting deserved contracts.

Through this survey, we hope to identify the types of DBE fraud experienced by different states, as well as the procedures that are implemented to handle such fraudulent activities.

Instructions

We request this survey be completed and returned to the following address:

NCHRP 20-6, Study Topic 13-1
Attn: James E. Saunders, III
Williams Wilson & Sexton, P.A.
110 E. Broward Boulevard
Suite 1700
Fort Lauderdale, FL 33301

If you have any questions or need assistance, please feel free to contact by email: Thornton Williams, tjwilliams@twalaw.com or James Saunders, jsaunders@twalaw.com. You may also contact them directly by phone at (850) 224-3999 and (954) 315-3900 respectively.

Timeline for Study

Throughout this survey, you will be asked to provide numerical data for the last five fiscal years (2000-2004). We realize that there are differences in the federal, state, and individual agency fiscal years. Please indicate the beginning and end of the fiscal year that would be easiest for you to document in this survey (example: Federal FY is October 1 to September 30).

_____
_____
_____
_____

Please use the indicated fiscal year throughout the survey.

Biographic Information

Please provide the following information for the person(s) that will act as a contact person(s) in your agency. (Note: This is not necessarily the person who is completing the survey).

Name_____
Title_____

Office Address _____
_____
_____

Office Phone_____

Email Address_____

Disadvantaged Business Enterprise (DBE) Fraud Survey

1. Is there a state statute(s) that is used as a basis for prosecution of false claims in construction projects in your state?

☐ Yes

☐ No

If yes, please indicate the statute(s)_____
_____
_____
_____

2. Was a study performed in support of your DBE program?

☐ Yes

☐ No

If yes, please provide a copy of the study or studies.

3. Please list the steps in the federal DBE certification process followed by your state for federal contracts.

Step 1:_____
_____
Step 2:_____
_____
Step 3:_____
_____
Step 4:_____
_____
Step 5:_____
_____
Step 6:_____
_____
Step 7:_____
_____
Step 9:_____
_____
Step 10:_____
_____

4. What abuses have occurred regarding your current DBE program?

_____
_____
_____
_____
_____

5. Please explain the procedures that are in place to detect and investigate DBE fraud in construction contracts.

_____
_____
_____
_____
_____

6. Please provide any legal devices, tactics, and techniques, used to prosecute contractors for DBE fraud in construction contracts.

_____
_____
_____
_____
_____
_____

7. Please complete the following chart for FY 2000-2004 *(If none, enter 0):*

	FY 2000	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004**
Overall Number of **prime** construction contracts awarded to DBE firms					
Overall Dollar Value of **prime** construction contracts awarded to DBE firms					
Overall Number of **prime** construction contracts awarded to DBE firms where abuses were detected					
Overall Dollar Value of **prime** construction contracts awarded to DBE firms where abuses were detected					
Overall Number of successful prosecutions of abuse claims in **prime** construction contracts awarded to DBE firms					
Overall Dollar Value of successful prosecutions of abuse claims in **prime** construction contracts awarded to DBE firms					

8. Please complete the following chart for FY 2000-2004 *(If none, enter 0):*

	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004
Overall Number of DBE firms that were awarded **subcontracts**					
Overall Dollar Value of DBE firms that were awarded **subcontracts**					
Overall Number DBE firms that were awarded **subcontracts** where abuses were detected					
Overall Dollar Value of DBE firms that were awarded **subcontracts** where abuses were detected					
Overall Number of successful prosecutions of abuse claims in **subcontracts** awarded to DBE firms					
Overall Dollar Value of successful prosecutions of abuse claims in **subcontracts** awarded to DBE firms					

9. If you did not provide complete information in questions 4 - 8, please explain the reason(s)._____

10. What improvements to your DBE fraud prevention protocols have you determined are necessary, if any, to enhance your DBE Program? _____

11. If you have not implemented these improvements, what has prevented you from implementing them?_____

12. Are there any recommendations you would make to improve this area that have not been asked in the above sections?

Yes
No

If yes, please explain your recommendations.

13. How are DBE goals established in USDOT assisted construction projects?

14a. What percentage of USDOT assisted construction contracts contain established DBE goals?

14b. What percentage of USDOT assisted construction contracts were executed with lower or no DBE goals because of a good faith effort or other standard?

15a. How often are DBEs required to renew their certification?

15b. What supporting documentation is required for certification?

15c. Who collects this documentation?

15d. Any routine investigation performed by your state to verify documentation?

16. Which racial categories participate in your DBE program? Please indicate the percentage of participation of each racial group and the total dollar value received from such participation from FY 2000 to FY 2004.

_____
_____
_____
_____
_____

17. Have any third parties ever presented evidence suggesting that a minority participant was not in fact economically or socially disadvantaged? Or that a minority participant did not satisfy any other certification criteria? If so, please explain._____
_____
_____
_____
_____
_____

18. Are there any programs geared to provide technical assistance (or just outreach) to DBEs? If so, please list and explain._____
_____
_____
_____
_____
_____

19. Do you have a database containing the personal net worth of individuals who own or control DBEs?_____
_____
_____
_____
_____
_____

20. Do you maintain a bidders list? If so, for what category of work?_____
_____
_____
_____
_____

21. How often do you revise or update the bidders list?_____
_____
_____
_____
_____
_____

22. Do you ever remove individuals from the bidders list? If so, on what criteria and how often?_____
_____
_____
_____
_____
_____

23. How many DBE fraud complaints were filed by other DBEs? How many total DBE fraud complaints have been filed? _____
_____
_____
_____
_____
_____

APPENDIX D 49 CFR PART 29- CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS--PRIMARY COVERED TRANSACTIONS

Instructions For Certification:

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

4. The prospective primary participant shall provide immediate written notice to the department or agency to which this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled ``Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion- Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS--PRIMARY COVERED TRANSACTIONS

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded by any Federal department or agency;
(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification;
(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

_____ _____
Signature/Authorized Certifying Official Typed Name and Title

_____ _____
Applicant/Organization Date Signed

APPENDIX E CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION--LOWER TIER COVERED TRANSACTIONS

Instructions For Certification:

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or had become erroneous by reason of changed circumstances.

4. The terms covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and voluntarily excluded, as used in this clause, have the meaning set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled ``Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion-Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not proposed for debarment under 48 CFR part 9, subpart 9.4, debarred, suspended, ineligible, or voluntarily excluded from covered transactions, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is proposed for debarment under 48 CFR part 9, subpart 9.4, suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AN VOLUNTARY EXCLUSION--LOWER TIER COVERED TRANSACTIONS

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

_____ _____

Signature/Authorized Certifying Official Typed Name and Title

_____ _____

Applicant/Organization Date Signed

APPENDIX F CONTRACTOR SUSPENSION AND DEBARMENT SURVEY

Transportation Research Board

PROTECTING TRANSPORTATION AGENCIES AGAINST CONSTRUCTION CONTRACT AND DISADVANTAGED BUSINESS ENTERPRISE FRAUD
A Survey of State Practices

Contractor Suspension and Debarment Survey

June 2005

Williams, Wilson, and Sexton, P.A.
Attorneys At Law

Introduction

This survey involves debarments, suspensions, or investigations of contractors for civil or criminal wrongdoing in state Department(s) of Transportation construction projects.

All states wrestle with balancing issue of low bids and public integrity in contracting with firm(s) under investigation for criminal or civil wrongdoing. Many state highway departments, other public authorities, and federal agencies have differing approaches to working with contractors on these issues. Research is needed to determine how state and federal agencies are dealing with these matters. It is our intent to explore the various methods utilized by states to address these concerns.

Instructions

We request this survey to be completed and returned to the following address:

NCHRP 20-6, Study Topic 13-1
Attn: James E. Saunders, III
Williams Wilson & Sexton, P.A.
110 E. Broward Boulevard
Suite 1700
Fort Lauderdale, FL 33301

If you have any questions or need any assistance, please feel free to contact by email: Thornton Williams, tjwilliams@twalaw.com or James Saunders, jsaunders@twalaw.com,. You may also contact them directly by phone at (850) 224-3999 and (954) 315-3900 respectively.

Timeline for Study

Throughout this survey, you will be asked to provide numerical data for the last five fiscal years (2000-2004). We realize that there are differences in the federal, state, and individual agency fiscal years. Please indicate the beginning and end of the fiscal year that would be easiest for you to document in this survey (example: Federal FY is October 1 to September 30). _____
_____
_____

Please use the indicated fiscal year throughout the survey.

Biographic Information

Please provide the following information for the person(s) who will act as a contact person(s) in your agency. (Note: This is not necessarily the person who is completing the survey).

Name_____
Title_____

Office Address _____
_____
_____

Office Phone_____

Email Address_____

Name_____
Title_____

Office Address _____
_____
_____

Office Phone_____

Email Address_____

Contractor Debarment and Suspension Survey

1. What is the process to authorize a contractor to bid on USDOT assisted construction contracts in your state?

Step 1:_____
_____
Step 2:_____
_____
Step 3:_____
_____
Step 4:_____
_____
Step 5:_____
_____
Step 6:_____
_____
Step 7:_____
_____
Step 8:_____
_____
Step 9:_____
_____
Step 10:_____
_____

2. Identify the federal statute(s) or regulation(s) that are used as the basis for any construction contractor suspension or debarment in your state's construction projects.

_____
_____
_____
_____
_____
_____

3. Please provide any rules or procedures governing contractor suspension or debarment for construction projects in your state._____
_____
_____
_____
_____
_____
_____

4. Are there any cases that have arisen in your state that are commonly used as precedent in the area of suspension and debarment of construction contractors?

Yes
No

If yes, please identify the case(s).

_____
_____
_____
_____
_____

5. Does your state require prequalification for a construction contractor to bid on contracts in your state?

Yes
No

If yes, please explain how construction contractors are pre-qualified in your state.

Step 1:_____
_____
Step 2:_____
_____
Step 3:_____
_____
Step 4:_____
_____
Step 5:_____
_____
Step 6:_____
_____
Step 7:_____
_____
Step 8:_____
_____
Step 9:_____
_____
Step 10:_____
_____

6. Describe the procedures or processes that are followed to suspend a construction contractor in your state.

Step 1:_____
_____
Step 2:_____
_____
Step 3:_____

Step 4:_____

Step 5:_____

Step 6:_____

Step 7:_____

Step 8:_____

Step 9:_____

Step 10:_____

7. Please provide any legal devices, tactics, and techniques, used to prosecute construction contractors for the purposes of **suspension**._____

8. If a contractor is **suspended** is he/she allowed to bid on constructions contracts in your state?

Yes
No

If yes, please provide the conditions or restrictions on the construction contractors ability to bid (if any)._____

9. What procedures or processes are followed in debarring a construction contractor in your state?

Step 1:_____

Step 2:_____

Step 3:_____

Step 4:_____

Step 5:_____

Step 6:_____

Step 7:_____

Step 8:_____

Step 9:_____

Step 10:_____

10. Please provide any legal devices, tactics, and techniques, used to prosecute construction contractors for the purposes of **debarment**.

11. If a contractor is **debarred** is he/she allowed to bid on constructions contracts in your state?

Yes
No

If yes, please provide the conditions or restrictions on the construction contractors ability to bid (if any)._____

12. Please complete the following chart concerning construction contracts for FY 2000-2004 *(If none, enter 0)*:

	FY 2000	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004**
Overall Number of construction contracts					
Overall Dollar Value of construction contracts					

13. Please complete the following chart concerning contractor **suspensions** for FY 2000-2004 *(If none, enter 0)*:

	FY 2000	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004**
Overall Number of construction contracts where a **suspension** occurred.					
Overall Dollar Value of construction contracts where a **suspension** occurred.					

14. Please provide a list of criteria (a legal basis) by which a construction contractor is suspended in your state.

15. Please provide the relative net worth of construction contractors suspended in your state.

16. How and by what agency are investigations initiated and conducted to suspend a construction contractor in your state?

17. Provide the length of time required to conduct an investigation of alleged conduct warranting suspension of a construction contractor in your state.

18. Please complete the following chart concerning contractor **debarments** for FY 2000- 2004 *(If none, enter 0)*:

	FY 2000	**FY 2001**	**FY 2002**	**FY 2003**	**FY 2004**
Overall Number of construction contracts where a **debarment** occurred.					
Overall Dollar Value of construction contracts where a **debarment** occurred.					

19. Please provide a list of criteria (a legal basis) by which a construction contractor was debarred in your state.

20. Please provide the relative net worth of construction contractors debarred in your state.

21. How and by what agency are investigations initiated and conducted to debar a construction contractor in your state?

22. Provide the length of time required to conduct an investigation to debar a construction contractor in your state.

23. What improvements to your suspension and debarment protocols have you determined are necessary?

24. If you have not implemented these improvements, what has prevented you from implementing them?

25. Are there any recommendations you would make to improve this area that have not been addressed in this survey?

26. Who maintains the list of contractors that have been suspended or debarred?

27. Do you require contractors to certify in their bids that they have not now or at any time been suspended or debarred or even issued notice of such investigation of suspension or debarment or any other action that would make them ineligible for award? If so, please provide a copy of such certification._____

28. How and by whom are investigations made of contractors for fraud related convictions or civil judgments?_____

29. How and by whom are investigations made of contractors to determine if they are under indictment or charged for fraud related conduct?

30. Is there a database for the above information regarding contractors which will allow your state to obtain information prior to awarding a contract? If so, which elements may be searched? Indictments? Investigations? Convictions?_____