

Staff Summary

Subject Debarment Guidelines
Department MTA Office of the General Counsel
Department Head Name Thomas J. Quigley
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Project Manager Name Thomas J. Quigley

Date JULY 22, 2020
Vendor Name N/A
Contract Number N/A
Contract Manager Name N/A
Table of Contents Ref # N/A

Board Action					
Order	To	Date	Approval	Info	Other
1	Board				

Internal Approvals			
Order	Approval	Order	Approval
1	Chief Development Officer, C&D		
2	Chief Financial Officer		
3	Chief Compliance Officer		

Purpose:

Finalize and adopt regulations setting forth an all-agency procedure for debarment of contractors, as required by Public Authorities Law §1279-h.

Discussion:

For the reasons described in this Staff Summary, the Board is requested to finalize and adopt regulations setting forth an all-agency procedure for the debarment of contractors, as required by Public Authorities Law §1279-h. On April 12, 2019, the Governor signed PAL §1279-h into law, authorizing the MTA to debar, for a five-year period, contractors that either have delayed in completing contract performance by more than 10% of the contract term or have submitted invalid claims in excess of 10% of the contact value. The statute became effective immediately upon signing. It further requires the MTA to adopt regulations establishing a debarment process that includes, among other things, an opportunity for the contractor to present defenses.

On May 22, 2019, the MTA filed proposed regulations with the New York Secretary of State to implement PAL §1279-h, in accordance with New York’s State Administrative Procedure Act (“SAPA”). They were filed with a Notice of Emergency Adoption and Proposed Rule Making. Under this emergency procedure, the emergency regulations became effective immediately upon filing, pending their finalizing and adoption following the 60-day public comment period required by SAPA, during which the public was permitted to file comments to the regulations. Comments were received in August 2019 from multiple contractors, trade associations and interested parties.

At its May 20, 2020 meeting, the Board authorized staff to begin the process of replacing the emergency regulations with adopted final regulations. Specifically, the Board authorized staff to publish the proposed final regulations, incorporating many of the prior public comments received, in the New York State Register for a 45-day public comment period and also to substitute the proposed final regulations in place of the original emergency regulations in the interim, pending the board’s adoption of final regulations. The proposed final regulations were published in the New York State Register on June 3, 2020, and this public comment period closed on July 18, 2020. No significant comments to the proposed final regulations, which incorporated many of the prior public comments, were received.

As the board was advised prior to its May 20 vote, the proposed final regulations modify the original proposed regulations in four ways.

First, the proposed final regulations narrow their scope, as follows:

- eliminate retroactive application of the debarment regulations by making them applicable only to contracts entered into after the statute took effect in April 2019; and awarded in connection with a capital element in an approved capital program plan or a non-capital plan contract with value more than \$25 million. [Section 1004.2(b)]
- apply only to those with whom the MTA has *directly* entered into a contract, not subcontractors. [1004.2(c)]
- do not apply to routine inventory purchases or contracts awarded as part of the MTA's Small Business Mentoring Program. [1004.2(b)]
- define "invalid claim" as a claim for payment that cannot be supported by the facts or a nonfrivolous argument that it is warranted by the contract or existing law. [1004.3(a)(2)]
- provide that an invalid claim for payment that the contractor is contractually obliged to submit to the MTA for a subcontractor does not affect the contractor. [1004.2(b)]

Second, the proposed final regulations inject flexibility into the determination as to whether to initiate a debarment proceeding in the first instance by providing that:

- the MTA Board may, but is not required to, debar a contractor. [1004.3(a)].
- the MTA may defer initiating or pursuing a debarment (1) if the contractor has made a good faith request to extend the contract because of excusable delay and, if granted, the contractor would not be late, or (2) for good cause shown. MTA Board must ratify or nullify any determination not to initiate or pursue a debarment proceeding. [1004.3(a)(3)]
- contractors may assert any and all defenses at a debarment hearing including unforeseen circumstances, good faith efforts to take remedial, corrective action; lack of bad faith, and excusable delay. [1004.5(e)]

Third, the proposed final regulations change the composition of the three-member hearing panel, from three MTA employees to a panel that includes only two MTA employees and one neutral party from the American Arbitration Association who is independent of any State agency or public authority. [1004.5(c)]

Finally, the proposed final regulations address concerns relating to debarment of a contractor's related parties and individuals by providing that:

- the panel may debar a contractor's related entities or individuals only if (i) the contractor was created as a single or limited purpose entity to execute and perform the contract, or (ii) the related entity or individual had a material and knowing causal connection to the contractor's conduct. [1004.6(b)]
- the panel must send written notice of intent to debar to any related entity or individual it seeks to debar

and provide a reasonable opportunity to be heard. [1004.6(b)]

The Board is now being requested to complete the process it began at the May 20 meeting by adopting the proposed final regulations, a copy of which are attached (redlined to show changes from the original proposed regulations), as the MTA's debarment regulations as required by PAL § 1279-h.

A new Part 1004 is added to read as follows:

Section 1004.1 Purpose

(a) This Part establishes rules and regulations governing the debarment of contractors by the Metropolitan Transportation Authority and its subsidiaries and affiliates, as required by Section 1279-h of the Public Authorities Law, which was enacted on and made effective immediately as of April 12, 2019. Once adopted, it shall apply to all contracts that were in effect on, or entered into after, April 12, 2019.

(b) Nothing in this Part shall preclude or otherwise limit the Authority, as defined below, from assessing the responsibility of any bidder, contractor, subcontractor, or supplier pursuant to its All-Agency Responsibility Guidelines or from prohibiting any bidder, contractor, subcontractor, or supplier found to be not responsible from responding to new and future contract solicitations or from being awarded new and future contracts or subcontracts.

Section 1004.2 Definitions

As used in this Part, the following terms shall have the following meanings unless otherwise specified:

(a) *Authority* means the Metropolitan Transportation Authority, the Long Island Rail Road Company, the Metro-North Commuter Railroad Company, the Staten Island Rapid Transit Operating Authority, MTA Bus Company, MTA Construction & Development Capital ~~Construction~~ Company, the New York City Transit Authority, the Manhattan and Bronx Surface Transit Operating Authority, or the Triborough Bridge and Tunnel Authority, or any combination thereof, ~~as the case may be.~~

(b) *Contract* means an enforceable agreement including a task order entered into by a contractor and the Authority for goods or services, ~~including without limitation construction services~~ entered into after April 12, 2019, in connection with a capital element in an approved capital program plan or a non-capital related agreement, having a value in excess of \$25 million. A contract does not include routine inventory purchases or any contract entered into by the Authority with a participant in the Authority's Small Business Mentoring Program.

(c) *Contractor* means any person, partnership, firm, corporation, or association, including any consultant, supplier or vendor, with whom the Authority has directly entered into a ~~construction, consultant, equipment, supply, or services~~ contract, but shall not include the federal government, a state agency, any public authority or public benefit corporation, or any unit of local government.

(d) *Debar* or *debarment* means the prohibition of a contractor from responding to any contract solicitation of or entering into any contract with the Authority for five years from ratification of a ~~final~~ debarment determination as provided in section 1004.6 of this Part.

(e) *Contract Modification* means amendments, change orders, additional work orders, or modifications with respect to a contract that are executed in accordance with the terms and conditions of such contract including without limitation extensions of deadlines for excusable delay.

(f) *Substantially Complete*, unless otherwise defined in the contract at issue, means the contractor's completion of the work as necessary for the Authority's beneficial use of the applicable project or improvements or the Authority's acceptance of those goods or services required to be delivered by a deadline.

(g) *Total adjusted time frame* means ~~(1) with~~ the period that a contract provides for a contractor to substantially complete its obligations under the contract. With respect to ~~all work under~~ a contract, ~~the period of that includes both design and/or construction services and operation and /or maintenance services, the total adjusted time frame includes only the~~ time that ~~at~~ the contract provides for ~~a~~ the contractor to substantially complete the ~~work, as may have been extended or reduced by one or more contract modifications, and (2) with~~ design and/or construction services. With respect to contracts for ~~goods or~~ services, ~~as to~~ or for manufacture or supply of materials, equipment, or rolling stock, any ~~portion of the goods or services that~~ which must be delivered by a deadline, the total adjusted time frame applies to each period of time that the contract provides for such delivery, ~~as may have been extended or reduced. In all cases, the total adjusted time frame shall include any adjustments required by one or more~~ the contract ~~modifications~~ for excusable delays, accelerations, scope increases and reductions, or unforeseen circumstances.

(h) *Total adjusted contract value* means the original awarded amount of the contract plus or minus the aggregate net amount of all contract modifications.

(i) *Unforeseen circumstance* means an unexpected event or situation that is not reasonably anticipated by a contractor exercising due diligence given existing knowledge of industry practice.

Section 1004.3 Grounds for Debarment

(a) The board of the Authority, ~~including all contracting personnel therein, must may~~ debar a contractor pursuant to section 1004.6 if it ~~makes~~ approves a ~~final determination~~ recommendation to debar by a hearing panel made pursuant to section 1004.5 and 1004.6, including that the contractor has:

(1) (i) failed to substantially complete all the work within the total adjusted time frame by more than ten percent of the total adjusted time frame, or (ii) failed to progress the work in a manner so that it will be substantially complete within ten percent of the total adjusted time frame and has refused or in the opinion of the Authority is unable to accelerate the work so that it will be substantially complete within ten percent of the total adjusted time frame, and such refusal or failure is an event of default under the contract; or (iii) with respect to contracts for ~~goods or~~ services, or for manufacture or supply of materials, equipment, or rolling stock, as to any ~~portion of the goods or~~ such services, materials, equipment or rolling stock that must be

delivered by a deadline, materially failed to deliver such ~~goods or services~~, materials, equipment, or rolling stock by more than ten percent of the total adjusted time frame.

(2) asserted a claim or claims for payment of additional amounts beyond the total adjusted contract value and one or more of such claims are determined in whole or in part to be invalid under the contract's dispute resolution process or if no such process is specified in the contract in a final determination made by the chief engineer or otherwise by the Authority, and together the sum of any such invalid claims exceeds by ten percent or more the total adjusted contract value. An invalid claim is a claim or claims that cannot be supported by the facts or a nonfrivolous argument that it is warranted by the contract or existing law. A claim for payment of additional amounts to a subcontractor that a contractor is contractually obliged to submit to the Authority on behalf of such subcontractor that is determined to be invalid, shall not be deemed to be an invalid claim asserted by the contractor, and shall be deemed an invalid claim submitted by the subcontractor.

~~———— (3) ——— The Authority, including all contracting personnel therein, must commence a debarment procedure where there is any evidence that any specific provision referenced in provision (a)(1) and (a)(2) have been violated, and the Authority and its contracting personnel have no discretion to excuse or justify violations of any provision referenced in provision (a)(1) and (a)(2).~~

(3) The Authority shall initiate a debarment proceeding upon determining that one or more grounds for debarment exist under sections 1004.3(a)(1) or (a)(2), except that (i) if a contractor has made a good faith request for an extension of the total adjusted time frame because of excusable delay or otherwise, which request, if granted by the Authority, would eliminate grounds for debarment under provision (a)(1), the Authority shall defer initiating a debarment proceeding until it has evaluated and determined such request; and (ii) the Authority may defer initiating, or determine not to initiate or pursue, a debarment proceeding for good cause shown, provided that the determination to defer or to not initiate or pursue a debarment proceeding after grounds for debarment have been determined to exist is presented to the Authority's Board for ratification or nullification at the next regularly scheduled meeting thereof. The Authority's Finance Committee shall be notified immediately upon a determination to defer initiating or not initiate or pursue a debarment proceeding, and all such determinations to defer initiating or to not initiate or pursue a debarment proceeding for good cause shown shall be presented to the Authority's Finance Committee for recommendation before submission to the Board. In the event that a determination to defer initiating or to not initiate or pursue a debarment proceeding is rejected by the Board, Authority personnel shall immediately commence a debarment proceeding.

Section 1004.4 Notice of Intent to Debar and Written Response

(a) ~~Upon the occurrence of one or both of the circumstances set forth in section 1004.3 of this Part~~ To commence a debarment proceeding, the Authority shall provide a written notice of intent to debar to the contractor, advising the contractor that it will hold a hearing to make a final determination as to whether a ground for debarment exists. At a minimum, the notice of intent to debar shall:

(1) state the facts upon which the Authority made its preliminary finding that one or both statutory grounds for debarment exists, including the basis for determining as provided in section ~~1004.4~~1004.3 of this Part that the contractor failed to timely Substantially Complete or the Authority's calculation of costs arising from claims determined to be invalid, and

(2) provide the contractor 30 calendar days after the date of the notice of intent to debar to respond.

(b) A contractor's written response must address each of the factual statements made by the Authority in its notice of intent to debar and state in detail any defenses including but not limited to force majeure.

(c) After submission by the contractor of a written response within the time permitted, or after the failure by the contractor to submit a written response within such time, a debarment hearing will be held, as provided in section 1004.5 of this Part.

(d) Subject to section 1004.1(b) of this Part, a contractor who has received a notice of intent to debar may respond to other contract solicitations issued by the Authority pending the ~~hearing and ratification of a final~~ debarment determination by the board of the Authority, if any; provided, however, that if the Authority awards such contractor a new contract or contracts after having provided the contractor a notice of intent to debar, and such contractor is later debarred by the Authority pursuant to such notice, the Authority must view such debarment as cause for termination under such new contract or contracts ~~and thereupon terminate any such new contracts for cause.~~

Section 1004.5 Debarment Hearing

(a) A debarment hearing shall be conducted within:

(1) 21 calendar days from the Authority's receipt of a contractor's written response to a notice of intent to debar or within such further reasonable time that the authority shall proscribe; or

(2) 14 calendar days after the date the contractor's response was due, if no response is received from the contractor within the deadline, or within such further reasonable time that the authority shall proscribe.

(b) A recording or transcript of the debarment hearing shall be made.

(c) The debarment hearing shall be conducted by a panel of at least ~~three~~two managerial level employees of the MTA designated by majority vote of the Authority's board; provided that no employee who has taken part in the award of ~~any Authority~~ or was otherwise directly involved in the contract to such contractor that is the subject of the debarment hearing, or overseen such contractor's performance on any Authority contract, may serve on a panel considering the debarment of such contractor. The debarment panel also shall include at least

one neutral party drawn from the American Arbitration Association and independent of any state agency or authority to be chosen by the board of the Authority.

(d) A contractor shall have the right to appear by and be represented by counsel at the debarment hearing and any hearings in connection with other proceedings conducted pursuant to this Part.

(e) A contractor at the debarment hearing may assert any and all defenses ~~to~~in the debarment ~~including without limitation force majeure~~proceeding. Such defenses that may be asserted by the contractor include but are not limited to force majeure; unforeseen circumstances; good faith efforts to take remedial, corrective or disciplinary action; a lack of bad faith in connection with the contractor's conduct and other mitigating factors. The contractor may assert excusable delay and such other defenses at a debarment hearing irrespective of whether the Authority has previously ruled on such defenses.

(f) If a contractor fails to appear at a debarment hearing, the panel may proceed with the hearing based ~~on the basis of~~ the record before it and reach a ~~final~~ determination without providing for any further appearance or submission by the contractor.

Section 1004.6 ~~Final~~ Debarment Determination and Ratification

(a) After consideration of the defenses raised by the contractor, and after the hearing is completed, the panel shall ~~determine if one or both of the grounds for debarment as set forth in section 1004.3 of this Part exists~~make a recommendation as to whether all of the facts and circumstances reasonably justify debarment.

(b) The panel's determination shall be by majority vote and set forth in writing. If the ~~final~~ debarment determination is that ~~one or both of the grounds for debarment exist,~~ the contractor shall be debarred ~~for,~~ the panel shall recommend that the term of the contractor's debarment shall be five years from the date of the ~~final~~ratification of the debarment determination. The panel may, in its discretion, also seek to debar any of the following related entities or individuals: (i) if the panel finds that the contractor was created as a single or limited purpose entity to execute and perform the contract which is the subject of the debarment hearing; or (ii) if the panel finds a material and knowing causal connection between such entity or individual and the ground for the contractor's debarment:(1) the contractor's parent(s), subsidiaries and affiliates; (2) any joint venture (including its individual members) and any other form of partnership (including its individual members) that includes a contractor or a contractor's parent(s), subsidiaries, or affiliates of a contractor, (3) a contractor's directors, officers, principals, managerial employees, and any person or entity with a ten percent or more interest in a contractor; (4) any legal entity controlled, or ten percent or more of which is owned or controlled, by a contractor, or by any director, officer, principal, managerial employee of contractor, or by any person or entity with a 10 percent or greater interest in contractor, including without limitation any new entity created after the date of the notice of intent to debar. If the panel seeks to debar any such related entity or individual, it shall issue a written notice of intent to debar to each such entity or individual and provide each a reasonable opportunity to be heard

on the issue of whether they had a material and knowing causal connection to the conduct and circumstances underlying the contractor's debarment.

(c) The panel's determination to debar any contractor and any related entity or individual shall be timely submitted to the board of the Authority for ratification. The board of the Authority shall review such determination and either: (i) ratify the determination or, (ii) remit the determination to the panel for further consideration of facts or circumstances identified in the remission. The facts or circumstances identified in the remission shall be reviewed by the panel who shall then, after reconsideration, make a determination. Such determination shall then be resubmitted to the Authority board for ratification or nullification. Upon initial Authority board ratification of a panel determination, or Authority board ratification or nullification of a panel determination made after reconsideration, such determination shall be deemed final.

(d) Timely and complete compliance with each and all of the requirements of this Part shall be a precondition to any legal challenge that the contractor or any related entity or individual may be permitted to bring arising out of its debarment pursuant to Section 1279-h of the Public Authorities Law.

(e) Pursuant to Executive Order No. 192, the Authority shall notify the New York State Office of General Services of any final debarment determination within five days of the date ~~thereof~~ it is ratified by the board of the Authority.