

The New MTA Debarment Rule And Increased State Focus On Responsibility



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The recently enacted New York State budget for Fiscal Year 2020 included an MTA reform bill with rules for debarment that will significantly impact public contractors. Earlier this year the Governor also signaled the State's increased focus on contractor responsibility/integrity with Executive Order 192 imposing increased contractor oversight and more extensive agency reporting requirements. It is imperative that contractors understand the changes and review/implement "Best Practices" to address issues that might arise.

Grounds for Debarment

The MTA reform bill amends the New York State Public Authorities Law to add a new "Debarment" Section made effective immediately to apply to all contracts in effect on or after April 12, 2019. The Law requires MTA by regulation to establish a process to debar contractors for five (5) years where it is determined that a

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contractor (a) failed to substantially complete its contract work within the total adjusted time frame (adjusting for agreed-to contract modifications) by more than 10% of the total adjusted time frame; or (b) failed to progress the work so that it will be substantially complete within 10% of the total adjusted time frame and is unable or unwilling to do so thus causing default; or (c) where a contractor makes a claim or claims and the amount of the claim or claims deemed invalid are more than 10% of the total adjusted contract value (adjusting for agreed-to modifications).

The regulations had to include notice and an opportunity to be heard as part of the debarment process. As instructed, MTA on June 5, 2019 published its rules/regulations and procedures for debarment of contractors.

Procedures for Debarment

If there is "any evidence" that any of the debarment grounds have been violated/occurred, MTA personnel must commence a debarment procedure. They have no discretion to excuse or justify violations and proceedings must commence.

MTA must provide written notice of intent to debar which states the specific ground(s) for debarment involved and the facts and basis for the MTA's preliminary findings that a violation occurred. The notice must provide the contractor with thirty days from the notice date to respond and must advise that a hearing will be held to make a final determination. The contractor's written response must address each of factual grounds raised and detail any defenses (i.e. force majeure).

A hearing will be conducted within twenty-one days of receipt of contractor's written response before a panel of at least three individuals from MTA management not involved with any MTA work performed by the contractor. If a contractor fails to respond to the notice, the hearing may occur sooner, and a decision will be made on the available record without contractor response/appearance.

Significantly, the panel has discretion to also debar a contractor's parents, affiliates, subsidiaries, joint ventures, owners/directors/officers/managers, and entities controlled or owned (10% or more) by the contractor or its owners/directors/officers/managers, including entities created after the notice of intent to debar was sent.

The panel's determination is submitted for final determination by the MTA Board which will either nullify (after internal reconsideration process with panel) or ratify the determination. Any legal challenge to a final determination is preconditioned on timely and complete compliance with the rules.

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Tied-in to New Executive Order on Contractor Responsibility

MTA's new debarment power meshes with Executive Order 192 (EO 192) which emphasized that the State should only conduct business with responsible entities, that the State's attention to vendor responsibility should not end with contract award but persist throughout each contract, and that any contractor found non-responsible on any contract can be debarred or deemed ineligible from future bidding on public procurements.

Under EO 192 debarment and non-responsibility determinations must now be formally reported to and relied on by all State Entities. The MTA debarment process requires such reporting/reliance. Moreover, any head of a State Entity who selects a contractor deemed non-responsible, debarred, or otherwise ineligible will be considered in breach of their duty as a public officer.

Comment

It is easy now to picture countless scenarios where a good contractor might pass on a justifiable claim or even end up debarred and out of public contracting based on a slight misstep on an MTA project. Additionally, EO 192 signals the State's increased scrutiny and focus on contractors and responsibility on public projects, overall. Under the circumstances, contractors must work in house and with legal counsel to ensure that they have proper training and systems/documents in place to address the compliance, notice, record-keeping, claim preservation, and delay analysis measures needed to meet contract obligations and protect their interests.

Erik Ortmann has more than 25 years of experience representing private and public owners, municipalities, general contractors, construction managers, design professionals, trade contractors and suppliers with respect to all aspects of construction law.

In addition to representing these entities in litigation and arbitration matters, Mr. Ortmann drafts and negotiates contracts, addresses compliance issues, and provides advice on a daily basis. His experience includes representing parties in the bridge, heavy highway and vertical building industries. Mr. Ortmann is also certified by the U.S. Green Building Council as a LEED® Green Associate.



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