

Staff Summary

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

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| Date MAY 20, 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 | | | | |
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| Internal Approvals | | | |
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| Order | Approval | Order | Approval |
| 1 | Chief Development Officer, C&D | | |
| 2 | Chief Financial Officer | | |
| 3 | Chief Compliance Officer | | |

Purpose:

For the reasons described in this Staff Summary, board authorization is requested for staff to proceed with publication in the New York State Register of permanent regulations setting forth a procedure for the All-Agency debarment of contractors, as required by Public Authorities Law §1279-h.

Discussion:

For the reasons described in this Staff Summary, board authorization is requested for staff to proceed with publication in the New York State Register of permanent regulations setting forth a procedure for the All-Agency 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 and service providers 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 non-final 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 non-final regulations became effective immediately upon filing, pending the filing of permanent regulations. Permanent regulations could be filed under SAPA only after a 60-day public comment period 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.

Generally, the non-final regulations provide for notice to the contractor, the assertion of defenses, and a hearing if either or both of the grounds enumerated in the statute—more than 10% late in completing the contract or a determination that claims asserted are invalid by more than 10%—exist. The non-final regulations provide for a hearing by a three-person panel of MTA employees. If the panel recommended debarment, the Board would have to ratify the panel’s recommendation to debar the contractor before debarment could become effective.

In response to the concerns raised, the proposed final regulations modify the non-final regulations in four ways.

First, the proposed final regulations narrow the scope of the non-final regulations, 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)]

SAPA requires that if substantial revisions are made to the proposed regulations after they were published and commented on, the revised regulations also must be published in the *State Register* to permit an additional 45 days for public comments on the revised text of the proposed regulations. Because the proposed revisions could be considered substantial, Board approval is requested authorizing staff to publish the revised regulations for an additional 45 days and for staff to replace the existing emergency regulations with the proposed regulations, pending adoption of final regulations after the 45-day comment period.