



MTA ADOPTS REVISED CONTRACTOR DEBARMENT REGULATIONS

The Metropolitan Transit Authority (“MTA”) recently published and implemented revised regulations relating to “Contractor¹” debarment. Links to the new regulations can be found [here](#) (page 10 of the document, page 15 of the PDF) and [here](#) (page 14 of the document, page 20 of the PDF).

Highlights of PAL §1279-h

The revised debarment regulations are not as severe as the version adopted last year, adding flexibility to applying the debarment program. Under the new regulations, debarment is not mandatory if threshold requirements for project delays and/or cost overruns are surpassed. The MTA may debar a contractor but is not required to do so, and the MTA may defer initiating or pursuing a debarment proceeding if the contractor has asserted a claim in good faith for additional money or time. The MTA Board must also ratify or nullify any determination to begin or pursue a debarment proceeding [1004.3(a)(3)].

¹ The Debarment Regulations define contractor as follows:

“(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 contract, but shall not include the federal government, a state agency, any public authority or public benefit corporation, or any unit of local government.”

Key elements of the debarment regulations:

- 1) **Notification.** The MTA must provide notice to the contractor prior to debarment;
- 2) **Contractor Defense.** The contractor can offer a defense. The defense may include unforeseen circumstances, good-faith efforts to take remedial or corrective action, lack of bad faith, and excusable delays;
- 3) **Grounds for a Hearing.** A hearing will take place if either or both of the grounds enumerated in the statute (i.e., more than 10% late in completing the contract or a determination that claims asserted are invalid by more than 10%) exist.

An “invalid claim” is defined as a claim for payment that cannot be supported by the facts of a nonfrivolous argument that it is warranted by the contract or existing law [1004.3(a)(2)]. An invalid claim for payment to which the contractor is contractually obligated to submit to the MTA for a subcontractor does not affect the contractor. [1004.2(b)];

4) **Contract thresholds.** Debarment will only apply to contracts awarded as part of a capital element in an approved capital program plan or a non-capital plan contract with a value of more than \$25 million. [Section 1004.2(b)]. The debarment regulations are no longer retroactive and apply only to contracts entered into after April 2019; Debarment does not apply to routine inventory purchases or contracts between the MTA and members of the MTA’s Small Business Mentoring Program;

5) **Who can be Debarred.** Debarment applies to construction companies, design professionals, and other consultants who contract directly with the MTA. Moreover, related entities of the above-referenced professionals can also be debarred. The hearing 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 hearing panel may debar the related entities or individuals only if:

- a. the construction company, design professional company, or any entity that contracts with the MTA was created as a single or limited purpose entity to execute and perform the contract, or
- b. the related entity or individual had a material and knowing causal connection to the contractor’s conduct. [1004.6(b)].



Debarment does not affect defaulting subcontractors.

6) Debarment Hearing Panel. Under the final regulations, two MTA employees will serve on the hearing panel, along with a neutral party from the American Arbitration Association (AAA). ([LINK TO AAA site](#)) The AAA panel member must be independent of any state agency or public authority [1004.5(c)]; and

7) Debarment Ratification. If the hearing panel recommends debarment, the MTA Board will have to ratify the panel's recommendation to debar the contractor before debarment will be effective.

