SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

ALLIANCE FOR FAIR AND EQUITABLE CONTRACTING TODAY, INC.,

Petitioner-Complainant,

For Judgment Pursuant to Article 78 and §§ 3001 and 6301of the Civil Practice Law and Rules

-against-

ANDREW M. CUOMO, in his official capacity as Governor of the State of New York,

METROPOLITAN TRANSPORTATION AUTHORITY,

and

PATRICK J. FOYE, in his official capacity as Chairman and CEO of the Metropolitan Transportation Authority,

Respondents-Defendants.

Index No. _____

Assigned to Justice _____

VERIFIED ARTICLE 78 & DECLARATORY JUDGMENT PETITION-COMPLAINT

Petitioner-Complainant Alliance For Fair and Equitable Contracting Today, Inc. (AFFECT), for its verified Petition-Complaint pursuant to Article 78 of the Civil Practice Law and Rules (C.P.L.R.) and C.P.L.R. §§ 3001 and 6301, alleges as follows against Respondents-Defendants Governor Andrew Cuomo, in his official capacity, the Metropolitan Transportation Authority (MTA), and Patrick J. Foye, in his official capacity as Chairman and CEO of the MTA (collectively, Respondents-Defendants) in this hybrid Article 78 and plenary action.

PRELIMINARY STATEMENT

1. This is a Special Proceeding pursuant to Articles 30, 63, and 78 of the C.P.L.R. seeking to challenge a draconian new contractor debarment regime. Specifically, Petitioner-Complainant seeks: (i) a declaratory judgment that Governor Cuomo's Executive Order No. 192 (the EO), which created a new process for findings of "non-responsibility" and debarment of public contractors, violates state separation of powers principles and is otherwise unconstitutional and unlawful; (ii) a declaratory judgment that "emergency" regulations promulgated by the MTA relating to the debarment of contractors, N.Y. Comp. Codes R. & Regs. tit. 21, § 1004, *et seq*. (the MTA Regulations), published in the New York Register on November 6, 2019, are unlawful, arbitrary, and capricious under the State Administrative Procedure Act (APA); (iii) a judgment annulling and vacating the EO and MTA Regulations; and (iv) a temporary restraining order, preliminary injunction, and permanent injunction preventing Respondents from enforcing the EO and MTA Regulations.

2. In January 2019, Governor Cuomo issued the EO, which purported to (i) grant New York agencies the power to declare contractors "non-responsible" based on vaguely defined factors; and (ii) required that entities found non-responsible or debarred are automatically disqualified from any contracts with the State of New York.

3. In April 2019, a new MTA debarment law was slipped into the New York State budget bill, N.Y. Senate Bill S1509c (January 18, 2019), and passed without public comment or debate. The bill was codified as N.Y. Pub. Auth. Law § 1279-h (the Debarment Statute). The Debarment Statute required MTA to establish through regulation a debarment process for contractors working with the MTA. The statute required the implementing regulations to mandate a five-year period of debarment (i) if a contractor fails to complete a project "within

the time frame set forth in the contract, or in any subsequent change order, by more than ten percent of the contract term" or (ii) if a contractor claims costs later deemed to be "invalid" by ten percent or more "pursuant to the contractual dispute resolution process."

4. After issuing "emergency" regulations in June 2019, which were then extended on August 19, 2019, the MTA again re-extended the "emergency" regulations in a rulemaking published in the New York State Register on November 6, 2019. *See* 45 N.Y. Reg. 8-10 (Nov. 6, 2019).

5. The MTA Regulations, codified at N.Y. Comp. Codes R. & Regs. tit. 21, § 1004, *et seq*., extend well beyond the statutory authority granted to the MTA in the Debarment Statute and fail to follow the procedures mandated by the State APA.

6. The MTA Regulations require a five-year period of debarment if a contractor (i) fails to substantially complete all work under the contract by more than ten percent of the total adjusted time frame; (ii) merely *appears* to the MTA to be in danger of failing to do so, if such failure is an event of default under the contract; or (iii) tries to assert claims for costs in excess of ten percent of the total adjusted contract value that are later deemed to be invalid in a "final determination." The MTA Regulations do not permit the agency any discretion whatsoever in applying these requirements—even in the face of compelling and undisputed facts showing that the contractor acted in good faith, or that the debarment would be unfair or contrary to the public interest.

7. The MTA Regulations apply both prospectively to new contracts, and retroactively to all current contracts already in existence—not just before issuance of the first emergency regulations, but also before passage of the Debarment Statute itself. The Debarment Statute did not authorize retroactive application to existing contracts.

8. To compound matters, the MTA Regulations permit the MTA to debar not only the targeted contractor but also the "parent(s), subsidiaries, and affiliates" of a targeted contractor, as well as the targeted contractor's "directors, officers, principals, managerial employees, and any person or entity with a ten percent or more interest in a contractor," as well as "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." *Id.* §1004.6(b). The MTA may debar these entities and persons even if their relationship to the targeted contractor has nothing to do with the conduct (or even the same contract) that led to the debarment in question. The Debarment Statute made no mention of debarment of any such third party entities.

9. The MTA Regulations also run afoul of the State APA's procedural requirements. The State APA provides that rules can be adopted under temporary emergency status and then extended once. If an agency seeks to continue regulations under an "emergency," it must provide an assessment of the comments it has received. Specifically, the agency must provide: "(i) a summary and an analysis of the issues raised and significant alternatives suggested by any such comments, (ii) a statement of the reasons why any significant alternatives were not incorporated into the rule and (iii) a description of any changes made in the rule as a result of such comments." *Id.* § 202 (5)(b). Here, the MTA has renewed the MTA Regulations for a second time under a purported emergency but has failed to follow the requirements for adequately addressing the comments. The MTA has provided only a cursory overview of comments and then expressly stated that it is "*not* yet ready . . . to fully assess and respond to all the comments." 45 N.Y. Reg. 10 (Nov. 6, 2019) (emphasis added). That is not sufficient to comply with the State APA.

10. The EO is unlawful for a host of reasons. First and foremost, it violates state separation of powers principles inherent in the New York Constitution by purporting to create new legislative law. It also violates the federal Supremacy Clause and Dormant Commerce Clause. And it violates other federal constitutional requirements as well, including those of procedural and substantive due process.

11. The MTA Regulations are equally unlawful under the State APA.[1] They exceed the scope of the agency's authority under the Debarment Statute. They are also arbitrary and capricious, unreasonable, lack a rational basis, and constitute an abuse of discretion. And they violate the procedural protections of the State APA, because the MTA purported to reissue them as "emergency" regulations without providing an adequate assessment of the comments it received.

12. For all of these reasons, this Court should declare both the EO and the MTA Regulations unlawful and issue temporary, preliminary, and permanent injunctive relief preventing Defendants-Respondents from enforcing either source of law.

PARTIES

13. Petitioner-Complainant AFFECT is a New York not-for-profit organization that represents and serves five member associations, who in turn represent thousands of construction contractors, engineers, and related companies. AFFECT has a principal place of business at 91 Broadhollow Road, Melville, New York. AFFECT is comprised of five member organizations: the General Contractors Association of New York, the New York Building Congress, the Associated General Contractors of New York State LLC, the Building Trades Employers Association, and the American Council of Engineering Companies of New York. AFFECT

[1] The MTA Regulations are unlawful under federal law too, but those claims are being separately asserted in a federal lawsuit filed simultaneously in federal court.

advocates for fair and equitable contract terms from public agencies in New York State. This includes advocating for changes in existing statutes, advocating for new statutes, advocating for changes in agency regulations and agency contract management procedures, possible litigation, and educating the public about the cost and impact of unfair contract terms.

14. Founded in 1909, the General Contractors Association of New York (GCA) is a trade association exclusively devoted to the issues facing heavy construction contractors in New York City. GCA's members collectively employ more than 20,000 unionized tradespeople. GCA's mission is to promote the role of heavy construction owners, trades, and the services that support them in New York City and New York State. GCA advocates for its members to support effective changes in bidding and contracting processes and otherwise advance issues of importance to the industry.

15. Founded in 1921, the New York Building Congress (the Building Congress) is a broad-based membership trade association committed to promoting the growth and success of the construction industry in New York City and its environs. The Building Congress has more than 500 constituent organizations which employ more than 250,000 skilled tradespeople and professionals. Its missions include supporting sound public policy, promoting productive capital spending, encouraging public/private partnerships, and evaluating the implementation of major government projects.

16. The Associated General Contractors of New York State (AGC NYS) is a trade association based in Albany, New York. AGC NYS is a leading voice of the building and highway heavy construction industry, representing contractors and related companies dedicated to the ideals of skill, integrity and responsibility. AGC NYS represents about 200 general contractors and construction managers throughout the State of New York who perform the

majority of building construction, highway, heavy construction, municipal, and utility work throughout the State. AGC NYS monitors and pushes for legislation that benefits its members and works proactively for legislative changes that will benefit the industry.

17. The Building Trades Employers Association of New York (BTEA) is a unified advocate for construction contractors on issues of construction safety standards, professional development, government affairs, public relations, and fostering communication between public officials, public and private owners, labor, and the general public. The BTEA represents 26 construction manager, general contractor, subcontractor, and specialty trade contractor associations with over 1,300 individual contractor members. Its member associations range in size from multi-billion dollar internationally recognized firms to small and mid-sized specialty subcontractor firms. The projects these companies collectively build include roads, bridges, and government facilities. In 2017, BTEA contractors had an estimated $40 billion in construction revenue.

18. Founded in 1921, the American Council of Engineering Companies of New York (ACEC New York) is an industry association based in Albany, New York that represents and serves over 300 engineering and related firms, ranging from small firms to large national and multinational engineering and related companies. ACEC New York's members include firms engaged in every discipline of engineering related to the build environment, including civil, structural, mechanical, electrical, environmental, and geotechnical engineering and construction. ACEC New York's mission is, among other things, to promote the business interests of member firms through networking, advocacy, education, and business services. It has authority to file lawsuits and/or engage in activities to promote the greater interests of its constituent members.

19. Defendant-Respondent Andrew Cuomo is the Governor of the State of New York. He maintains his offices at the Capitol Building in Albany, New York 12224 and at 633 Third Avenue, 38th Floor, New York, New York. He is sued in his official capacity only.

20. Defendant-Respondent MTA is a public-benefit corporation chartered by the New York State Legislature in 1965. The MTA constitutes North America's largest transportation network, serving a population of 15.3 million people across a 5,000 square-mile travel area surrounding New York City, Long Island, southeastern New York State, and Connecticut. The MTA comprises six agencies: MTA New York City Transit, MTA Bus Company, MTA Long Island Rail Road, MTA Metro-North Railroad, MTA Bridges and Tunnels, and MTA Capital Construction. The MTA maintains its headquarters and principal place of business at 2 Broadway, 4th Floor, New York, New York 10004.

21. Defendant-Respondent Patrick J. Foye is the Chairman and CEO of the MTA and is responsible for overseeing critical agency priorities and the agency's day-to-day management. He maintains his offices at 2 Broadway, 4th Floor, New York, New York 10004. Mr. Foye is sued in his official capacity only.

JURISDICTION AND VENUE

22. Jurisdiction in this Court is grounded upon and proper under N.Y.C.P.L.R. § 3001. This Court also has jurisdiction pursuant to N.Y.C.P.L.R. §§ 7801-7806 to review actions by bodies or officers who have failed to perform a duty enjoined upon them by law and who have made a determination in violation of lawful procedure.

23. Venue is proper in this Court under N.Y.C.P.L.R. § 503(a) because at least one of the parties resides in this county, and pursuant to CPLR §§ 506(b) and 7804(b) because it is the county in which the material events giving rise to this proceeding took place.

24. AFFECT has standing to bring this lawsuit because the contractors and engineers who are members of its member organizations are suffering and face imminent actual injury as a result of the challenged EO and regulations. This lawsuit seeks to vindicate interests that are germane to both AFFECT and its member organizations' purposes; a critical mission of all such entities is to protect their members' interests in connection with policy changes affecting public works contracts initiated by the MTA and the State of New York. There is no need for AFFECT's members to participate in this lawsuit because AFFECT is not asserting individualized harms or seeking money damages on members' behalves.

FACTUAL BACKGROUND

25. The MTA and its family of agencies—MTA New York City Transit Authority, MTA Long Island Rail Road, MTA Metro-North Railroad, MTA Capital Construction, MTA Bridges and Tunnels, and the MTA Staten Island Railway—operate and maintain the subways, buses, commuter railroads, and inter-borough toll crossings in and around New York City. *See* About Us, https://new.mta.info/about-us. (Exhibit 1.)

26. The MTA awards some of the largest and most complex government contracts in the State of New York. For example, the MTA has solicited bids for 128 capital projects valued at $823 million between September 2019 and August 2020. *See* http://web.mta.info/mta/capital/pdf/eotf_0919_0820.pdf. (Exhibit 2.) And the MTA recently announced a $54.8 billion plan to overhaul New York City's public transit network. *See* MTA Board Approves Proposed 2020-2024 Capital Plan (Sept. 16, 2019), available at https://new.mta.info/. (Exhibit 3.)

27. Because a number of the public work projects overseen by MTA are funded at least in part through federal grants, mandatory federal requirements governing federal grants

apply to the underlying contracts that MTA awards to contractors for those projects. Current MTA projects receive billions of dollars in federal grant funds in total each year, and hundreds of millions in additional federal funds are up for bid in the next few months alone. *See* https://www.usaspending.gov/#/recipient/3a338d8b-082d-d4b1-e5be-cba60d0ceb83-P (showing $2.3 billion of federal funds across 39 transactions in the previous 12 months) (Exhibit 4); http://web.mta.info/mta/grant/ (listing over $300 million in Federal Transit Administration grants for Fiscal Year 2019 for 4 MTA projects alone) (Exhibit 5); http://web.mta.info/mta/capital/eotf-allagency_new.htm (scheduled projects receiving federal grants marked with asterisks) (Exhibit 6).

28. In order to secure a contract with the MTA, contractors must be on the Bidders List, which is a computerized record of vendors who supply the goods and services frequently used by the MTA. Doing Business with the MTA: A Guide for Contractors and Suppliers, http://web.mta.info/mta/procurement/doingbusiness.htm. (Exhibit 7.)

29. The MTA solicits bids and proposals in three ways:

a. For small amounts of goods or services (under $10,000), the MTA may contact vendors directly from the Bidders List. Contracts resulting from these informal solicitations usually are awarded based on the lowest quote, but the MTA may specify another basis for award.

b. The MTA issues an Invitation for Bid (IFB) when a contract is competitively bid using a sealed bidding process. Vendors submit bids that are opened in a public meeting at the location, date, and time specified in the IFB; the contract is awarded to the qualified vendor submitting the lowest bid. IFBs are usually for goods or trade services (such as computer hardware and construction). IFBs over

$100,000 are advertised; suppliers on the Bidders List may be notified by mail or by telephone. IFBs are awarded to the lowest responsive and responsible bidder. This means that while competitive price is the critical factor, the MTA will also determine if the lowest bidder can responsibly fulfill the contract. Delivery performance, quality, and ability to meet bid specifications are all important considerations in evaluating a bidder's level of responsibility.

c. The MTA issues a Request for Proposal (RFP) when a contract is to be competitively negotiated. A selection committee evaluates the proposals and, based on the selection criteria set forth in the RFP, negotiates with prospective awardees before making a selection and awarding a contract. RFPs are typically for professional services (economic consulting, systems design, management services, architectural and engineering services) and major equipment purchases such as rolling stock, and have recently been increasingly used for design/build contracts where the building entity has responsibilities for both design and construction of the project. For competitively negotiated contracts, a number of criteria are considered. These are specified for each contract and may include competitive pricing, demonstrated ability to fulfill the contract, quality of samples, previous experience, and contract performance. The MTA may choose to negotiate with one or more vendors as part of the RFP process.

30. Public work projects, including MTA projects, often run over on time or cost through no fault of the contractor. Plans and specifications in MTA projects (as with all contracting projects) are rarely complete and accurate when bid. This is particularly true for MTA projects, which are often underground and involve working with aging infrastructure on

an active transit system. In many instances, post-contract changes are required because the MTA elects to make changes to the scope of the original project upon which the contractor bid. That could happen because the agency has made a design error, or decides to change the project design or materials for stylistic or other reasons. This adds additional cost and time that could not possibly have been accounted for in a contractor's bid. In other instances, conditions unexpected by both parties require a change to the time and/or cost necessary to complete the work—*e.g.*, there is difficulty obtaining access to work sites, unexpected problems are encountered during construction, or there are unforeseen acts of nature. Sometimes, projects run over in cost or timing because of poor performance by suppliers identified by MTA as sole or limited source suppliers. Because a contractor has no control over any of these factors, it has no way of taking them into account when preparing its initial bid.

31. The MTA, like virtually all government agencies that award construction contracts, provides a mechanism for contractors to be compensated for unexpected deviations from the original plans that are out of their control. The MTA form contract contains specific provisions that entitle contractors to seek additional compensation and adjustments of the project schedule as a result of these factors. As part of the MTA change order process, contractors submit the anticipated costs and schedule impact. The contract sets forth specific procedures to be followed for the review, negotiation, and processing of these requests. *See* MTA All Agency Procurement Guidelines (Mar. 21, 2018), available at http://web.mta.info/mta/compliance/pdf/Procurement_Guidelines.pdf. (Exhibit 8.)

32. MTA projects are typically massive infrastructure projects with unique challenges. The New York City Subway, for example, is one of the world's oldest public transit systems. Much of the work needed for the subway must be done underground, and some of the

tunnels are more than a hundred years old. Similar challenges are encountered in work on bridges, tunnels, railroads, bus stations, and other types of projects contracted out by the MTA. As a result, it is not uncommon for there to be multiple requests for change orders during performance of the contract.

33. Change orders are vital to the government contracting process; among other things, they allow the MTA and contractors to keep costs down by providing flexibility to make necessary changes to projects after the contract is signed.

Governor Cuomo's Executive Order

34. On January 15, 2019, Governor Cuomo issued the EO. *See* https://www.governor.ny.gov/news/no-192-executive-order-imposing-continuing-vendor-integrity-requirements-state-contracts. (Exhibit 11.) The EO declared that "it is imperative that the State conduct business only with responsible entities" and that "contractors, vendors, and grantees who are the subject of debarment or are found to be non-responsible are not able to bid on public procurements." *Id.*

35. The EO provides that "State Entities are directed to evaluate—utilizing the existing vendor responsibility determination process—whether bidders are responsible, based in pertinent part upon the following factors: (i) financial and organization capacity; (ii) legal authority; (iii) integrity; and (iv) past performance. Moreover, State Entities are required to determine whether a contractor, vendor, or grantee has failed to comply with any statutory provisions relating to debarment." *Id.*

36. The EO further provides that if a state agency "discovers information that indicates a contractor, vendor, or grantee may not be responsible, may no longer be responsible during the term of the contract, or be subject to debarment for violation of a statutory provision

or provisions, the State Entity is directed, as applicable, (i) to conduct an analysis, review, hearing, or investigation, which may include, but is not limited to, conducting a document review supplemented by interviews involving the questioning of the contractor or vendor or grantee and their representatives; and (ii) to make a determination following such review, hearing or investigation." *Id.*

37. Once such a determination is made, the EO requires that the New York State Office of General Services (OGS) post a listing on its website of all contractors deemed to be non-responsible or debarred. *Id.*

38. The EO also requires State Entities to "rely on the determination made by other State Entities in ascertaining the responsibility, ineligibility, or debarment of a contractor, vendor, or grantee in current and future procurements." *Id.*

39. The EO also provides that "[a]ny commissioner, agency or department head, or member of a board of directors of a State Entity who selects, absent an approved waiver, a contractor, vendor, or grantee, who has been deemed non-responsible, debarred, or otherwise ineligible shall be breaching their duty as a public officer and/or fiduciary duty as a board member." *Id.*

40. The EO defines "State Entity" broadly to encompass all agencies over which the Governor has executive authority or appoints a certain number of board members. *Id.*

41. In short, the EO gives New York agencies the power to declare contractors non-responsible based on vaguely defined factors, and further requires that entities found non-responsible or debarred are automatically disqualified from any contracts with the State of New York.

The Debarment Statute

42. Over the past year or so, the MTA has taken a number of aggressive positions designed to put pressure on contractors working on public projects. For example, on February 22, 2019, Respondent-Defendant Foye sent a letter on behalf of the MTA to all contractor partners stating that due to budget concerns, "the MTA is requiring all vendors providing professional, technical and advisory services to implement a 10% reduction in the current per-hour unit rate." February 22, 2019 letter from Patrick Foye re: MTA Enterprise-Wide Cost Reduction Initiative. (Exhibit 9.) And then came the Debarment Statute and MTA Regulations.

43. On April 12, 2019, a new MTA debarment law was slipped into the New York State budget bill, N.Y. Senate, B. S1509c (January 18, 2019), and passed without public comment. The bill was codified as N.Y. Pub. Auth. Law § 1279-h.

44. The Debarment Statute provides that the MTA "shall establish, pursuant to regulation, a debarment process for contractors of the authority that prohibits such contractors from bidding on future contracts, after a debarment determination by such authority, for a period of five years from such determination. Such regulations must ensure notice and an opportunity to be heard before such debarment determination and provides as a defense acts such as force majeure." *Id.*

45. The Debarment Statute also states: "Such regulations shall *only* provide for a debarment in situations involving a contractor's failure to substantially complete the work within the time frame set forth in the contract, or in any subsequent change order, by more than ten percent of the contract term; or where a contractor's disputed work exceeds ten percent or more of the total contract where claimed costs are deemed to be invalid pursuant by [sic] the contractual dispute resolution process." *Id.* (emphasis added).

The MTA Regulations

46. On June 5, 2019, the MTA issued "emergency" regulations purporting to implement the Debarment Statute. *See* N.Y. Comp. Codes R. & Regs. tit. 21, § 1004.1 *et seq.* (eff. May 22, 2019). The emergency regulations became effective as of May 22, 2019, and remained in effect for 90 days, until August 19, 2019.

47. On September 4, 2019, the MTA issued another "emergency" rule extending the emergency regulations another 60 days until October 17, 2019. *See Id.* § 1004.1 *et seq*. (eff. Aug. 19, 2019). The extended emergency regulations became effective as of August 19, 2019 and remained in effect for 60 days, until October 17, 2019.

48. On October 18, 2019, the MTA quietly reissued the emergency regulations a second time. They were published in the New York State Register on November 6, 2019. *See* 45 N.Y. Reg. 8-10 (Nov. 6, 2019).

49. The MTA Regulations purport to apply to "all contracts that were in effect on, or entered into after, April 12, 2019." N.Y Comp. Codes R. & Regs. tit. 21, § 1004.1(a).

50. In other words, the MTA Regulations apply both prospectively to new contracts and retroactively to all current contracts that were in existence before issuance of the first emergency regulations—including contracts that predate the Debarment Statute itself. The Debarment Statute failed to authorize such retroactive application of the debarment regime.

51. The MTA Regulations provide that the MTA, "including all contracting personnel therein, *must* debar a contractor if it makes a final determination 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, as to any portion of the goods or services that must be delivered by a deadline, materially failed to deliver such goods or services 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 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.

Id. § 1004.3 (emphasis added).

52. The MTA Regulations define the phrase "total adjusted time frame," as applied to construction contracts, to mean "the period of time that a contract provides for a contractor to substantially complete the work, as may have been extended or reduced by one or more contract modifications." *Id*. § 1004.2(g).

53. The MTA Regulations define the phrase "total adjusted contract value" to mean "the original awarded amount of the contract plus or minus the aggregate net amount of all contract modifications." *Id*. § 1004.2(h).

54. The MTA Regulations define the terms "debar" and "debarment" to mean "the prohibition of a contractor from responding to any contract solicitation of or entering into any contract with the Authority for five years from a final debarment determination." *Id.* § 1004.2(d).

55. In other words, the MTA Regulations prohibit a contractor from contracting with MTA for five years if (i) it fails to substantially complete all work under the contract by more than ten percent of the total adjusted time frame; (ii) it merely *appears* to MTA to be in danger of failing to do so, if such failure is an event of default under the contract; or (iii) it tries to

assert claims for costs in excess of ten percent of the total adjusted contract value that are later deemed to be invalid. The MTA Regulations do not permit the agency any discretion whatsoever in applying these requirements—even in the face of compelling and undisputed facts showing that the contractor acted in good faith, or that the debarment would be unfair or contrary to the public interest.

56. To compound matters, the MTA Regulations also permit the MTA to debar not only the targeted contractor but also the "parent(s), subsidiaries, and affiliates" of a targeted contractor, as well as the targeted contractor's "directors, officers, principals, managerial employees, and any person or entity with a ten percent or more interest in a contractor," as well as "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." *Id.* §1004.6(b). The MTA may debar these entities and persons even if their relationship to the targeted contractor has nothing to do with the conduct (or even the same contract) that led to the initial debarment.

57. The MTA Regulations provide scant procedural protections for contractors that are subject to a debarment threat. They require a debarment hearing to be conducted in-house, "by a panel of at least three 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 contract to such contractor or overseen such contractor's performance on any Authority contract may serve on a panel considering the debarment of such contractor." *Id.* § 1004.5(c). In other words, the persons making the debarment determinations are all MTA employees.

58. That is particularly problematic because the standard dispute resolution provision in MTA construction contracts, Article 8.03, provides that disputes concerning requests for additional compensation or schedule adjustments are also determined by an MTA employee—the Chief Engineer. As a result, the entire process—starting with the initial contract dispute resolution provision and continuing through the final debarment determination—is determined solely by MTA employees. At no time are claims heard by or determined by a neutral third party.

The EO And MTA Regulations Are Unlawful

59. Governor Cuomo has made no secret of his antipathy for public works contractors and the MTA. On October 7, 2019, he sent an open letter to Defendant Foye and the MTA Board of Directors explaining the legislative purpose of the Debarment Statute and several other pieces of MTA-related legislation passed earlier in the year. That letter stated: "The legislation that I put forth and was passed by the Legislature acknowledges the past management failures of the MTA and mandated their correction through legislative action, thus circumventing MTA dysfunction." *See* Governor Cuomo Issues Letter to MTA Chair and CEO Foye Calling For Forensic Audit of MTA Capital Plan, *available at* https://www.governor.ny.gov/news/governor-cuomo-issues-letter-mta-chair-and-ceo-foye-calling-forensic-audit-mta-capital-plan. (Exhibit 10.)

60. The EO and MTA Regulations that were purportedly aimed at "circumventing MTA dysfunction" have created a great deal *more* dysfunction for contractors and other vendors.

61. The EO is unlawful because it violates the separation of powers. It is legislative in nature; under its terms, state agencies are both empowered and required to make "non-

responsibility" findings of contractors based on vaguely defined criteria. In addition, the EO requires that debarment or a finding of non-responsibility by one state entity shall result in debarment state-wide.

62. The EO also is unlawful because it violates the Supremacy Clause, the Dormant Commerce Clause, and the Due Process Clause of the United States Constitution.

63. The MTA Regulations are unlawful under the State APA and Article 78 because they exceed the scope of the agency's statutory mandate. The Debarment Statute specified the "only" criteria that could be applied in making debarment decisions; the MTA Regulations applied different criteria. The Debarment Statute failed to authorize retroactive application of the new debarment regime, but the MTA Regulations purport to apply retroactively, to contracts already in existence before either source of law came about.

64. The MTA Regulations also are unlawful because they are arbitrary and capricious, unreasonable, and lack any rational basis, all in violation of the State APA and Article 78. They do not permit consideration of mitigating factors or allow inquiry into whether the contractor, engineer, or other vendor acted in good faith. MTA authorities *must* debar a contractor, consultant or supplier once a determination is made that the contractor exceeded the statute or regulation's schedule or claim thresholds. No consideration is given to why a project went longer or whether a claim for a cost overrun was put forth in good faith. Nor is any consideration given to whether the contractor has taken steps to prevent schedule and cost overruns in the future.

The Members of Plaintiff's Member Organizations Will Suffer Irreparable Harm Absent Judicial Intervention

65. The EO and MTA Regulations create a draconian universe where a contractor or engineer operating in good faith may be debarred for merely claiming additional costs or requesting additional time due to changes or delays necessitated by the MTA or a third party.

66. Debarment is the death penalty for contractors, and not just in New York. Across the country, public and major private owners routinely inquire about a bidding contractor's debarment history as part of their RFP and procurement processes. A "yes" answer to this inquiry is virtually disqualifying to participation in any large-scale construction contract nationwide.

67. The EO and MTA Regulations create an existential and unmanageable risk to contractors, engineers, and other vendors. The risk of mandatory debarment through no fault of the contractor has a chilling effect on contractors' willingness to submit a request for a change order, forcing many contractors to simply absorb contract costs that should appropriately be borne by other parties (including the MTA).

68. It is difficult—if not impossible—for contractors to quantify or account for the impacts of these new restrictions when preparing a bid. Many contractors may choose not to bid on public works projects rather than expose themselves to incalculable risks and the threat of arbitrary debarment. At a recent MTA board meeting relating to accessibility upgrades at the 170th Street Station in the Bronx, MTA board members acknowledged that three contractors declined to submit final bids in the two-step bidding process because of the excessive risk inherent in the MTA's proposed contract terms. MTA officials confirmed the debarment policy was to blame. The firms had been pre-qualified to bid because of their favorable, relevant experience on MTA agency projects. Yet they were unwilling to do so in light of the inherent

risks presented by the unlawful Debarment Regulations—risks that threaten all public work contractors so long as the challenged debarment policies remain operable.

69. Absent judicial intervention, contractors, engineers, and other vendors on public works projects—including members of AFFECT's member organizations—will suffer concrete and imminent harm.

70. The threat of debarment is not merely hypothetical—it is very real for New York contractors and engineers. The new contracting regime creates an unreasonably high risk of debarment and injects significant uncertainty into government contracting. Under the new regime, a contractor may have a good faith belief that it is entitled to a price or schedule adjustment pursuant to the contract's change order provisions, whether due to design changes that have been made by the MTA, unforeseen conditions that have been encountered, or factors beyond its control. However, if the contractor exercises its contractual rights and submits a request for a change order, and the MTA disagrees with the relief requested, the contractor could face mandatory debarment for five years—regardless of whether it acted in good faith.

71. The new debarment requirements also will make it difficult if not impossible for contractors to engage in joint ventures, or to hire engineers or managerial employees, given the risks imposed on such entities and persons. It also will make it harder for contractors to work with subcontractors, whose claims are typically passed along to MTA through their general contractors.

72. Government contracts are the livelihood of many New York contractors and the inability to bid on state public projects could effectively put a public works contractor out of business.

73. The effects of debarment are not limited to future MTA contracts. Thanks to the EO, debarment by the MTA now means debarment for the purposes of all state contracts.

74. Moreover, the consequences of a debarment or non-responsibility finding reach beyond New York. Debarment or a non-responsibility finding by MTA has far-reaching implications for contractors who work with other states. In order to bid for most public and private contracts nationwide, a contractor must indicate whether it has ever been debarred from contracting in another state. It is almost impossible to overcome a positive answer to this question. As such, a debarment or non-responsibility finding by the MTA will mean, essentially, a nationwide prohibition on future work—effectively putting the targeted contractor out of business.

FIRST CAUSE OF ACTION
(EO—SEPARATION OF POWERS, N.Y. CONST., ART. III and IV)

75. AFFECT re-alleges and incorporates by reference the foregoing allegations of this Petition as if fully stated herein.

76. The New York Constitution vests legislative power in the Senate and Assembly, not the Governor. N.Y. Const. art. III, § 1. The Governor, by contrast, is vested with "[t]he executive power." N.Y. Const. art. IV, § 1.

77. Separation of legislative and executive powers "is implied by the separate grants of power to each of the coordinate branches of government." *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985). "The principle requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." *LeadingAge New York, Inc. v. Shah*, 32 N.Y.3d 249, 259 (2018) (internal quotation marks omitted). "This distribution avoids excessive concentration of power in any one branch or in any one person." *Rapp v. Carey*, 44 N.Y. 2d 157, 162 (1978).

78. The EO "assume[d] the power of the Legislature to set State policy in an area of . . . increasing public concern." *Id.* at 160, 746. Under its terms, state agencies are both empowered and required to make "non-responsibility" findings of contractors based on vaguely defined criteria. In addition, the EO requires that debarment or a finding of non-responsibility by one state entity shall result in debarment statewide.

79. Nothing in the State Constitution or any State statute grants express or implied authority for the Governor to impose the requirements in the EO. On the contrary, the EO usurps the Legislature's prerogatives. Because the Governor has exceeded his authority and acted ultra vires, the EO has no legal force and effect and should be nullified.

80. For all of the above reasons, the EO constitutes improper legislative policymaking outside the scope of the Governor's authority. The result is a violation of the separation of powers required by the New York Constitution.

81. As a direct and proximate result of Governor Cuomo's violation of their constitutional rights, AFFECT and AFFECT's members have already been harmed and will suffer further irreparable harm in the absence of injunctive relief.

SECOND CAUSE OF ACTION
(EO—SUPREMACY CLAUSE, U.S. CONST. ART. VI)

82. AFFECT re-alleges and incorporates by reference the foregoing allegations of this Petition as if fully stated herein.

83. The Supremacy Clause in Article VI of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land."

84. The federal "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," 2 C.F.R. § 200 *et seq.* (Uniform Guidance) establish the

requirements that federal grantees must follow when procuring goods and services needed to carry out a federal grant or sub-grant.

85. Under the Uniform Guidance, while states "must follow the same policies and procedures" they use "for procurements from . . . non-Federal funds," "[a]ll other non-Federal entities, entities, including subrecipients of a state" are bound to adhere to certain baseline federal standards enumerated in the Uniform Guidance. *Id.* § 200.317.

86. A number of public contracting entities subject to the EO (including the MTA) receive federal grants to fund, or partially fund, a number of public works. *See, e.g.*, *Grant Management*, Metropolitan Transportation Authority, http://web.mta.info/mta/grant/) (*see* Ex. 5, *supra*). The MTA is not a "state" for purposes of the Uniform Guidance. Rather, it is more akin to a "local government," which is excluded from the definition of a "state" under the Uniform Guidance. *See* 2 C.F.R. §§ 200.64, 200.90. *See also A. Esteban & Co. v. Metro. Transp. Auth.*, No. 02 Civ. 3615 (NRB), 2004 WL 439505, at *4 (S.D.N.Y. Mar. 9, 2004). As a result, the MTA's procurement decisions are subject to the baseline federal standards set forth in the Uniform Guidance.

87. The Uniform Guidance states that it is federal policy that "[a]ll procurement transactions must be conducted in a manner providing full and open competition." As a result, "non-Federal entities" are prohibited from placing "unreasonable requirements on firms in order for them to qualify to do business" or taking "[a]ny arbitrary action in the procurement process." 2 C.F.R. § 200.319(a), (d); *see also* 49 U.S.C. § 5325 ("Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary [of Transportation].").

88. The EO imposes "unreasonable requirements" on bidders on public-works projects seeking to qualify to do business and invite "arbitrary action" throughout the procurement process.

89. The EO conflicts with the Uniform Guidance and stand as an obstacle to achieving the express federal policy of full and fair competition in the procurement process.

90. The EO thus violates the Supremacy Clause.

91. As a direct and proximate result of Governor Cuomo's violation of their constitutional rights, AFFECT and AFFECT's members have already been harmed and will suffer further irreparable harm in the absence of injunctive relief.

THIRD CAUSE OF ACTION
(EO—DORMANT COMMERCE CLAUSE, U.S. CONST. ART. I, § 8, cl. 3)

92. AFFECT re-alleges and incorporates by reference the foregoing allegations of this Petition as if fully stated herein.

93. Article I, Section 8 of the United States Constitution provides to the United States Congress alone the power "[t]o regulate Commerce . . . among the several States."

94. The EO radically and unjustifiably requires state agencies—including the MTA—to determine whether entities are non-responsible or subject to debarment based on vaguely specified criteria. It also requires state agencies to rely on the responsibility and debarment determinations made by other state agencies.

95. That will have consequences outside of New York as well. The laws of "more than a dozen states" provide expressly for reciprocal debarment with "specific reciprocity provisions" while many others contain "catch-all language" understood to the same effect. *See The Practitioner's Guide to Suspension and Debarment*, ABA Public Contract Law Section, Ch. 10.C at 270 (Frederic M. Levy and Michael T. Wagner, eds.) (4th ed. 2018) (discussing 62

Pa. Stat. and Cons. Stat. Ann. Appendix 531(b)(9) (2001); Minn. R. 1330.1150, Subpart 2.F; and Mass. Gen. Laws Ch. 29, § 29F(c)(2)). In these jurisdictions, an MTA debarment may thus trigger a formal debarment preventing out-of-state contracting as a matter of the relevant State law. Because "there are literally thousands of state and local governmental agencies that have debarring authority," a single debarment carries "the potential for a mass reciprocal-debarment chain reaction." *See id.* at 269–270 ("The possibility of a reciprocal debarment should be of particular concern to contractors that contract only or primarily with a limited number of state and local governments.").

96. In addition to those jurisdictions that have formally enumerated reciprocal-debarment rules, "[m]any states, municipalities, and other public entities also routinely require prospective contractors to fill out detailed background-information forms" such that "past convictions or existing suspensions or debarments" must be disclosed even if "such disclosure is not required by statute." *Id.* at 274. The effect of an MTA debarment in these situations will be largely the same, as having to disclose the fact of a previous New York debarment serves as a major red flag that will severely impede if not eliminate outright a contractor's ability to bid on and win out-of-state work.

97. The EO thus threatens to trigger a cascade of debarments across jurisdictions based on the unreasonable requirements of the EO. As a result, a debarment in New York effectively creates a *de facto* regime of reciprocal interstate debarment nationwide. The burden that the EO imposes on interstate commerce as a result is clearly excessive relative to any putative local benefits.

98. The result is a substantial burden on interstate commerce in violation of the Dormant Commerce under 42 U.S.C. § 1983.

99. As a direct and proximate result of Governor Cuomo's violation of their constitutional rights, AFFECT and AFFECT's members have already been harmed and will suffer further irreparable harm in the absence of injunctive relief.

FOURTH CAUSE OF ACTION
(EO—PROCEDURAL DUE PROCESS, U.S. CONST. AMEND. XIV, § 1)

100. AFFECT re-alleges and incorporates by reference the foregoing allegations of this Petition as if fully stated herein.

101. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

102. Contractors who are members of AFFECT's member organizations have both liberty and property interests in contracts already entered into and in the full and fair opportunity to bid on contracts now and in the future.

103. The EO fails to ensure a minimal threshold of procedural protections for those persons potentially subject to debarment determinations.

104. The EO provides for debarment decisions to be made by agency officials with particular interest in the outcome of the proceedings, thus denying contractors a fair process.

105. The EO also lacks procedural safeguards necessary to create a meaningful opportunity for contractors to present evidence and argument in their defense or to be heard on the merits of their claims. For example, contractors are not provided the opportunity to present testimony, submit evidence, or cross-examine witnesses.

106. The result is a violation of the Fourteenth Amendment's Due Process Clause under 42 U.S.C. § 1983.

107. As a direct and proximate result of Governor Cuomo's violation of their constitutional rights, AFFECT and AFFECT's members have already been harmed and will suffer further irreparable harm in the absence of injunctive relief.

FIFTH CAUSE OF ACTION
(EO—SUBSTANTIVE DUE PROCESS, U.S. CONST. AMEND. XIV, § 1)

108. AFFECT re-alleges and incorporates by reference the foregoing allegations of this Petition as if fully stated herein.

109. The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

110. Members of AFFECT's member associations have both liberty and property interests in contracts already entered into and in the full and fair opportunity to bid on contracts now and in the future.

111. The touchstone of due process is the protection from arbitrary State conduct. The EO reflects an egregious and shocking deprivation of contractors' protected rights.

112. The EO threatens to upend an entire industry by mandating compliance with arbitrary, uncertain, and impossible-to-comply-with requirements, left entirely to the discretion of officials who have the obvious incentive to lower their own costs and can now leverage the draconian threats of statewide debarment determinations.

113. These threatened consequences, however unjustified, now loom over each and every contractor who does business with the State.

114. The result is a violation of the Fourteenth Amendment's Due Process Clause under 42 U.S.C. § 1983.

115. As a direct and proximate result of Governor Cuomo's violation of their constitutional rights, AFFECT and AFFECT's members have already been harmed and will suffer further irreparable harm in the absence of injunctive relief.

SIXTH CAUSE OF ACTION
(MTA REGULATIONS—SUBSTANTIVE VIOLATION OF THE STATE APA)

116. AFFECT re-alleges and incorporates by reference the foregoing allegations of this Petition as if fully stated herein.

117. Agencies may engage in legislative rulemaking only to the extent authorized by the legislature. The MTA Regulations are unlawful and exceed the agency's statutory authority.

118. The Debarment Statute provides that the MTA Regulations "shall *only* provide for a debarment" in two specified situations: "a contractor's failure to substantially complete the work within the time frame set forth in the contract, or in any subsequent change order, by more than ten percent of the contract term; or where the contractor's disputed work exceeds ten percent or more of the total contract cost where claimed costs are deemed to be invalid pursuant by [sic] the contractual dispute resolution process." N.Y. Pub. Auth. Law § 1279-h (emphasis added).

119. The MTA Regulations, however, authorize debarment in additional circumstances not contemplated by the statute.

120. For example, they mandate debarment (1) not only where the contractor has failed to complete work within the time frame, but also where the MTA *anticipates* that it will fail to do so; and (2) not only where claims exceeding ten percent of total contract cost are found invalid under "the contractual dispute resolution process," but also where "no such process is specified in the contract" and "a final determination [is] made by the chief engineer or otherwise by the Authority." N.Y. Comp. Codes R. & Regs. tit. 21, §§ 1004.3(a)(1)-(2).

121. The Debarment Statute requires that the regulations "provide as a defense acts such [as] a force majeure." N.Y. Pub. Auth. Law § 1279-h. The MTA Regulations make passing reference to such a defense in the procedural section, but nonetheless mandate automatic debarment so long as the ten percent threshold is surpassed, without reference to any such defense.

122. The Debarment Statute directs the MTA to establish "a debarment process for contractors of the authority." *Id.* Yet the MTA Regulation allows the MTA to debar not only "contractors," but also their "parent(s), subsidiaries and affiliates," those who participate in a "joint venture" with the contractor, and the contractors' directors and managerial employees—a scope that sweeps well beyond that contemplated by the statute. N.Y. Comp. Codes R. & Regs. tit. 21, § 1004.6(b).

123. The MTA Regulations also purport to apply retroactively. *See Id.* § 1004.1 (providing that the Regulation "shall apply to all contracts that were in effect on, or entered into after, April 12, 2019"). But the Debarment Statute nowhere authorizes retroactive application. As such, the MTA lacked the statutory authority to promulgate retroactive legislation. Indeed, New York law independently prohibits retroactive application of new laws to pre-existing contracts, unless expressly provided for in the law. *See Kinney v. Kinney*, 48 A.D.2d 1002, 1003 (4th Dep't 1975) ("statutory enactments operate prospectively unless there is a clear legislative intent to make them operate retrospectively"); *cf. Garal Wholesalers, Ltd. v. Miller Brewing Co.*, 193 Misc. 2d 630, 637-38 (Sup. Ct. Suffolk Cty. 2002) (permitting retroactive application where there is "no doubt that the Legislature expressed its intention" as the statute "contain[s] a clear statement concerning retroactivity").

124. The Debarment Statute also provides that the regulations "must ensure notice and an opportunity to be heard" before any debarment determination. N.Y. Pub. Auth. Law § 1279-h. Yet the MTA Regulations do not permit contractors the ability to present testimony, cross-examine witnesses, or present evidence. Moreover, the MTA Regulations subject parents, subsidiaries, affiliates, joint venturers, directors, and managerial employees to the risk of debarment without *any* notice or opportunity to be heard whatsoever. *Id.* § 1004.4.

125. The MTA Regulations are also arbitrary and capricious, unreasonable, and lack any adequate basis under the State APA. They reflect a draconian regime, whereby contractors and engineers may be debarred by a panel comprised of biased MTA managers, even if the contractor acted in good faith, and even if it was MTA that was responsible for the additional work leading to the delay or disputed claim. The new contracting regime creates an unreasonably high risk of debarment and injects significant (and unreasonable) uncertainty into government contracting.

SEVENTH CAUSE OF ACTION
(MTA REGULATIONS—PROCEDURAL VIOLATION OF THE STATE APA)

126. AFFECT re-alleges and incorporates by reference the foregoing allegations of this Petition as if fully stated herein.

127. New York law requires that all administrative rules "shall be promulgated in substantial compliance with [the State APA]." N.Y. A.P.A. Law § 202 (8). Rules promulgated in violation of the State APA are invalid.

128. The State APA provides that New York agencies can adopt an emergency rule "if an agency finds that the immediate adoption of a rule is necessary for the preservation of the public health, safety or general welfare and that compliance with the requirements of

subdivision one of [the State APA] would be contrary to the public interest." *Id.* § 202 (6)(a). Such emergency rule is only valid for 90 days. *Id.* § 202 (6)(b).

129. The State APA allows for a single re-adoption of an emergency rule for an additional sixty days. *Id.* However, "No second or subsequent re-adoption shall be filed with the secretary of state unless the agency at the same time submits an assessment of public comments prepared pursuant to paragraph (b) of subdivision five of this section [of the State APA]." *Id.* § 202 (6)(e). Paragraph 5(b) of the State APA requires that an agency provide an assessment of written comments received in response to the proposed rule. That assessment must contain: "(i) a summary and an analysis of the issues raised and significant alternatives suggested by any such comments, (ii) a statement of the reasons why any significant alternatives were not incorporated into the rule and (iii) a description of any changes made in the rule as a result of such comments." *Id.* § 202 (5)(b).

130. The MTA first submitted a Notice of Emergency Adoption and Proposed Rulemaking for the Debarment Regulations to the Secretary of State on May 22, 2019. 45 N.Y. Reg. 9 (Nov. 6, 2019).

131. The MTA re-adopted the same emergency rule on August 19, 2019. *Id.*

132. The MTA re-adopted the emergency rule a second time on October 18, 2019. 45 N.Y. Reg. 9 (Nov. 6, 2019).

133. In re-adopting the emergency rule for the second time, the MTA provided only a cursory description of the comments it received. 45 N.Y. Reg. 9 (Nov. 6, 2019). It did not provide "an analysis of the issues raised and significant alternatives suggested," "a statement of the reasons why any significant alternatives were not incorporated," or "a description of any changes made in the rule as a result of such comments." N.Y. A.P.A. Law § 202 (5)(b). In fact,

the MTA expressly stated that it was *not* yet ready… to fully assess and respond to all the comments." 45 N.Y. Reg. 10 (Nov. 6, 2019) (emphasis added).

134. The MTA has therefore failed to adequately assess comments as required by Section 202(5)(b) of the State APA. As a result, the MTA Regulations are invalid.

PRIOR APPLICATION

135. No prior application for the specific relief sought herein has been made.

PRAYER FOR RELIEF

AFFECT respectfully prays for the following relief:

A. A declaration pursuant to N.Y.C.P.L.R. § 3001 that the EO is unconstitutional, unlawful, and improper;

B. A declaration pursuant to N.Y.C.P.L.R. § 3001 that the MTA Regulations violate the State APA because they are unlawful, arbitrary, capricious, and unreasonable;

C. Temporary, preliminary, and permanent injunctive relief vacating the EO and the MTA Regulations and prohibiting Defendants-Respondents from further implementing, enforcing, or taking any further action in reliance on the EO and the MTA Regulations;

D. An order awarding AFFECT its costs, expenses, and attorneys' fees incurred in these proceedings pursuant to N.Y.C.P.L.R. § 8601; and

E. Such other and further relief as the Court deems just and proper.

Dated: New York, New York
November 25, 2019

Respectfully submitted,

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Counsel for Alliance of Fair and Equitable Contracting Today, Inc.

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Pursuant to C.P.L.R. § 3020, Lou Coletti, being duly sworn, deposes and says:

I am the President and CEO of the Building Trades Employers' Association. I have personal knowledge of all of the material allegations of the pleading in this action. I have read the foregoing petition and know the contents thereof, that the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

Executed this 25th day of November, 2019.

Louis J. Coletti
Lou Coletti

Sworn to before me this
25th day of November 2019

Denise M. Pandullo
Notary Public

DENISE M. PANDULLO
Notary Public, State of New York
No. 01PA6232507
Qualified in Nassau County
Commission Expires 12/13/2018 22

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Pursuant to C.P.L.R. § 3020, Mike Elmendorf, being duly sworn, deposes and says:

I am a member of the Board of Directors of AFFECT. I also have personal knowledge of all of the material allegations of the pleading in this action. I have read the foregoing petition and know the contents thereof, that the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

Executed this 22nd day of November, 2019.

Mike Elmendorf

Sworn to before me this
22 day of November 2019

Notary Public

KEEGAN E. O'CONNOR
NOTARY PUBLIC, STATE OF NEW YORK
No. 01OC6391830
Qualified in Sara County
Commission Expires 05/13/2023

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Pursuant to C.P.L.R. § 3020, Carlo Scissura, being duly sworn, deposes and says:

I am Carlo Scissura. I have personal knowledge of all of the material allegations of the pleading in this action. I have read the foregoing petition and know the contents thereof, that the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

Executed this 15 day of November, 2019.

Carlo Scissura

Carlo Scissura

Sworn to before me this
25th day of November 2019

Notary Public

YESENIA HERNANDEZ-BRITO
NOTARY PUBLIC-STATE OF NEW YORK
No 01HE6369113
Qualified in New York County
My Commission Expires 12-26-2021

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Pursuant to C.P.L.R. § 3020, Robert Wessels, being duly sworn, deposes and says:

I am a member of the Board of Directors of AFFECT. I also have personal knowledge of all of the material allegations of the pleading in this action. I have read the foregoing petition and know the contents thereof, that the same is true to my own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters I believe them to be true.

Executed this 22nd day of November, 2019.

Robert Wessels

Sworn to before me this
22 day of November 2019

Notary Public

ANTHONY CALIENDO
Notary Public – State of New York
NO. 01CA6365007
Qualified in Westchester County
My Commission Expires Sep 25, 2021