

## The MTA's New Statutory Rules of Debarment



New York State's \$175 billion FY 2020 budget included several Metropolitan Transportation Authority ("MTA") reforms. One of these reforms, the debarment provision (Bill No. A02009C/S01509-C, Section § 1279-h), allows the MTA to determine unilaterally that alleged "defaulting" contractors and consultants will be prohibited from bidding on future MTA contracts for a period of five years based on their performance on prior or current MTA projects.

The MTA debarment rules (the "Debarment Rules"), promulgated pursuant to the debarment provision, became effective on May 22, 2019, set forth the details and process for debarment of contractors and consultants under certain circumstances.

### **Who is Impacted by Debarment?**

The definition of "contractors" in the Debarments Rules is broadly worded to include any consultant, supplier or vendor with whom the MTA has entered into a construction, consultant, equipment, supply or services contract. Therefore, as drafted, contractors, architects, engineers, suppliers and vendors (collectively, "Contractors and Consultants") engaged on an MTA project are subject to the proscriptions of the Debarment Rules.

The new debarment legislation and Debarment Rules should be of particular concern to Contractors and Consultants who have current contracts with MTA that were effective on April 12, 2019 or who enter into contracts with MTA after April 12, 2019.

## **What is the Effect of Debarment?**

Debarment jeopardizes Contractors' and Consultants' livelihoods. Once debarred, the Contractor or Consultant will be prohibited from submitting bids to the MTA (The MTA includes multiple State and City agencies involved in New York State transit infrastructure construction<sup>1</sup>) for a period of five years.

In addition, Executive Order 192, signed by Governor Cuomo before the MTA debarment legislation on January 15, 2019, mandates debarment by all New York State entities of Contractors and Consultants who are debarred pursuant to any statutory provisions. Unlike the Debarment Rules, however, Executive Order 192's debarment does not have a time limit. It provides that debarment shall remain until a court determines that the debarment was in error or until such time as a waiver has been approved by the Counsel to the Governor. A Contractor or Consultant debarred by the MTA will also be included on New York State's debarment list. Given the language of Executive Order 192, there is a possibility that the debarred Contractor or Consultant can remain on the New York State's debarment list even after the five-year MTA debarment period. Under such circumstances, debarment by the MTA could result in an indefinite debarment by all New York State entities.

The impact of debarment goes well beyond just work with New York State agencies as tendering documents for projects and out of state projects usually inquire as to the record of debarment of a potential applicant. As such, an MTA debarred Contractor or Consultant may be disqualified when it attempts to win bids out of the state.

## **Who is a “Defaulting” Contractor or Consultant under the Debarment Rules?**

Pursuant to the Debarment Rules, the MTA can debar a Contractor or Consultant if the work is not completed within 110% of the contract milestone dates or if the project cost exceeds 110% of the contract value.

In connection with scheduling, if a Contractor or Consultant fails to substantially complete the work within 110% of the total adjusted contract time frame<sup>2</sup>, the mandatory debarment process will be triggered. While a Contractor or Consultant may assert any and all defenses to debarment, one can readily appreciate that a project experiencing delays puts Contractors and

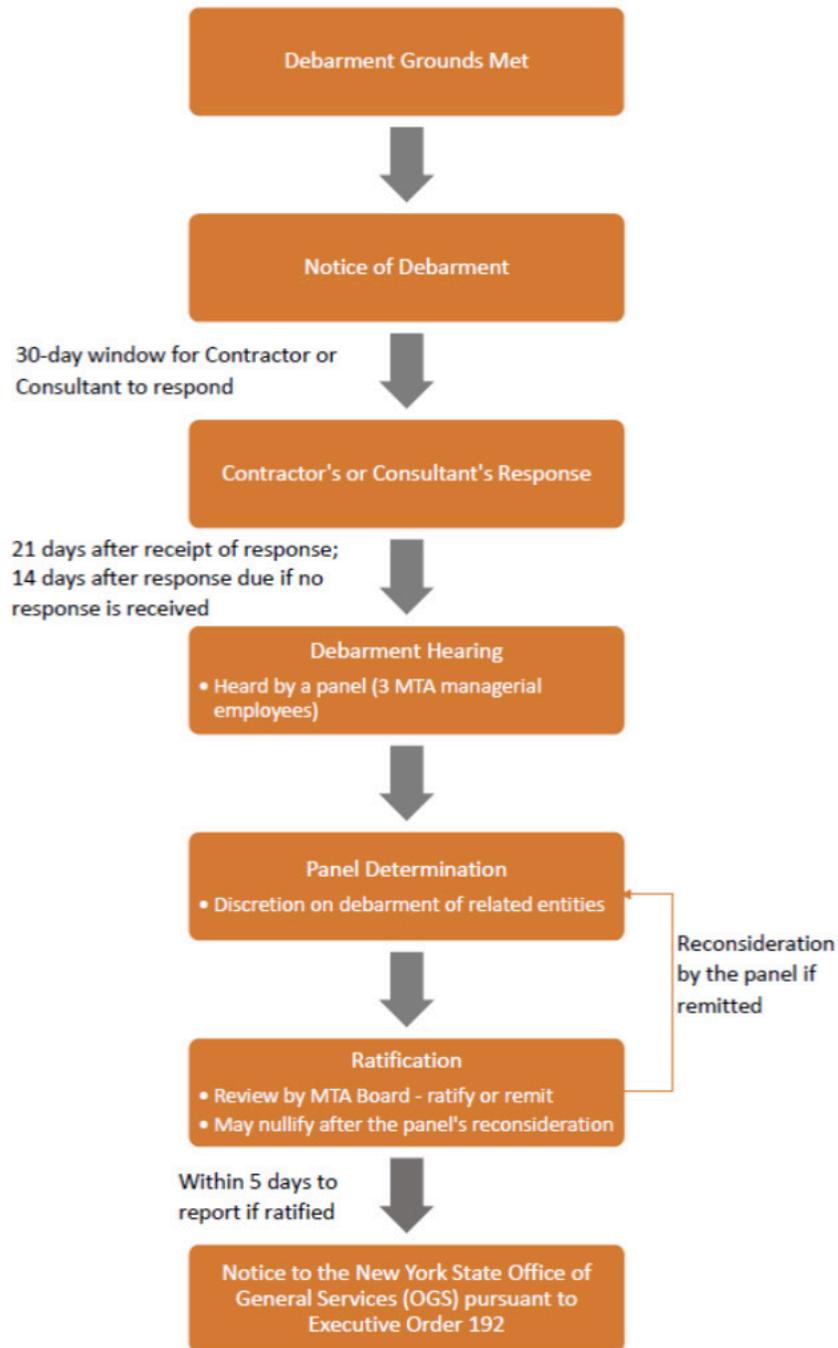
Consultants at serious risk of debarment. Whether a delay is caused by circumstances beyond a Contractor's or Consultant's control is often the subject of dispute. If a delay is 10% over the total adjusted contract time frame, commencement of the debarment process of the Contractor or Consultant is mandatory and contracting officers have no ability to exercise discretion to waive the process.

The Debarment Rules further allow the MTA to determine unilaterally whether a Contractor or Consultant is capable of completing a project within 110% of the contract time at any time during the project. If the MTA believes that a Contractor or Consultant has failed to progress the work in a manner so that it will substantially complete the work within 110% of the contract time frame, the MTA can decide that the Contractor or Consultant is incapable of successfully completing the work within such time frame and seek debarment. If the MTA makes this determination, commencement of the debarment process is mandatory regardless of whether the Contractor or Consultant could actually achieve the stated goals.

From a cost perspective, the Debarment Rules mandate debarment if claims are asserted for additional payments beyond the 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.” Unfortunately, for Contractors and Consultants, whether a claim is valid or invalid is almost always determined by the MTA. MTA contracts typically provide that the disputes between parties will be decided by a Dispute Resolution Officer (DRO) who is often an MTA officer. Further, MTA contracts often provide that the DRO’s decision is final and binding. If the DRO determines that a Contractor’s or Consultant’s claim is invalid and the claim amount is over 10% of the total adjusted contract value, commencement of the debarment process of the Contractor or Consultant is mandatory. Contractors and Consultants will be forced to decide whether to submit change orders seeking additional payment above 10% of their total contract price as an adverse determination by the DRO will result in the mandatory commencement of the debarment process.

# The Debarment Process

The typical steps of the debarment process are summarized below:



Receiving a debarment notice does not, in and of itself, debar the Contractor or Consultant. Instead, debarment becomes enforceable after a ratified final debarment determination. If a Contractor or Consultant is awarded a new contract after the debarment notice but before a final debarment determination, the Debarment Rules authorize the MTA to terminate the new contract.

The MTA is supposed to conduct a hearing within twenty-one calendar days after the receipt of the Contractor's or Consultant's response to the debarment notice. However, the Debarment Rules provide that the MTA can conduct the hearing within the twenty-one day time period or "within such further reasonable time that the authority shall proscribe."

## **What are the Remedies for a Contractor or Consultant?**

The new legislation and Debarment Rules provide the debarment hearing as the opportunity for the Contractor or Consultant to defend itself against the MTA's debarment notice. The Debarment Rules expressly provide that "timely and complete compliance" with the requirements set forth in the Debarment Rules are a pre-condition to any legal challenge that a Contractor or Consultant may be permitted to commence.

The requirements are both procedural and substantive. Procedurally, it is imperative for Contractors and Consultants to respond within a 30-day window and attend the debarment hearing. Substantively, the Contractor or Consultant must ensure that its response addresses each of the factual statements made by the MTA in its Notice of Intent to Debar and raise any relevant defenses. Failure to respond to any factual statement or raises any defense may result in the Contractor or Consultant being prohibited from contesting that fact or defense at the hearing.

If the hearing results in a final debarment determination, which is subsequently ratified by the MTA Board, the Contractor's or Consultant's only potential recourse will be to commence a CPLR Article 78 action seeking to challenge the MTA's final debarment determination.

## **What to Do Now?**

It is important that Contractors and Consultants carefully evaluate their strategy and methodology of doing business with the MTA given the Debarment Rules. The risk profile of MTA work for Contractors and Consultants has been radically changed with potentially catastrophic consequences that cannot be ignored. Contractors and Consultants may be justified in considering more conservative bids on cost and schedule in an effort to avoid potentially reaching discussions during a project that could ultimately trigger a debarment threshold.

In addition, pursuing timely approvals of time extensions from the MTA is even more important. However, since the MTA is permitted to decide unilaterally whether a Contractor or Consultant is "unable" to accelerate the work to achieve substantial completion within 110% of the contract schedule and serve a Notice of Intent to Debar, the submission of a change order to increase the project's schedule could also inadvertently result in the MTA seeking debarment.

Contractors and Consultants need also be aware that the Debarment Rules provide the MTA with discretion to pierce the “corporate veil” of the entity. As a result, parents, subsidiaries, or affiliates of a Contractor or Consultant are all at risk of being debarred as well. The MTA may also extend debarment to joint ventures or partnerships that include the Contractor or Consultant. Similarly, a Contractor's or Consultant's directors, officers, principals, managerial employees, or any person or entities controlled, or with a 10% or more interest in a Contractor or Consultant can all potentially be debarred together with the Contractor or Consultant.

One thing is eminently clear: the Debarment Rules are a game changer for Contractors and Consultants doing work with the MTA.



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<sup>1</sup> MTA agencies include 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. (<https://new.mta.info/about-us/our-agencies>)

<sup>2</sup> The Debarment Rules expressly provide that the 10% overage threshold will be calculated based on the “total adjusted time frame/contract value,” meaning any agreed modifications, including amendments, change orders, additional work orders, and other kinds of modifications made pursuant to the contract, will be taken into account as calculation base for time frame/contract value. For example, if the original contract time frame is 100 days and there is an amendment extending the contract for another 20 days, the time overage triggering the debarment process will be 110% of the 120 days, not 100 days.