



August 2, 2019

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Andrew S. Rein

Peter Sistrom
Deputy General Counsel
Metropolitan Transportation Authority
2 Broadway, 4th Floor
New York, NY 10004

Dear Mr. Sistrom:

The Citizens Budget Commission (CBC) is pleased to submit this comment on proposed rule I.D. No. MTA-23-19-00006-EP. CBC urges the Metropolitan Transportation Authority (MTA) to reconsider the proposed rule regarding five-year debarment of contractors that exceed timeline for substantial completion by more than 10 percent or submit invalid claims in excess of 10 percent of the contract amount.ⁱ The MTA should amend these rules to:

- Grant the MTA discretion whether to debar a contractor when debarment would disadvantage the MTA; and
- Incorporate a debarment remedy as part of an overall reform to the MTA procurement process.

Allow more discretion: Debarment is an appropriate consequence of contractor non-performance in certain situations and providing the MTA authority to debar could improve its ability to hold contractors accountable. The applicable statute (section 1279-H of the public authorities law) requires the MTA to establish regulations to debar deficient contractors. The statute specifies that debarment shall only apply “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 cost...” While the statute codified that debarment *shall only apply* in certain situations, the proposed rule is that debarment *must* occur in these situations. The rule states that the MTA would have no “discretion to excuse or justify violations” and the hearing process can only evaluate if the contractor exceeded the time or cost submittal limits, regardless of justification.

The rule should be modified to allow the MTA to exercise discretion, which may be warranted in circumstances when debarment would disadvantage the MTA. First, legitimate mitigating

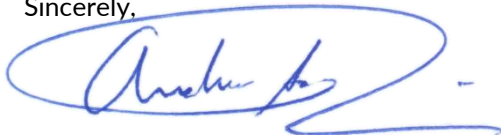
circumstances may affect a contractor's performance, and such lapse may not warrant such a significant penalty. For example, if a contractor submits invalid claims on behalf of a subcontractor that are ultimately disallowed by MTA, the contractor would have to be debarred if those claims exceeded 10 percent of the contract amount. Second, mandatory debarment, which also includes debarment from other state agencies and authorities, increases contractors' risk. The cost of that risk may be added to bid or proposal prices, resulting in cost increases for the MTA. Furthermore, some contractors may choose not to bid on MTA projects, reducing the competitive pool and thereby potentially increasing costs. Finally, there may be cases where there are very few or even a single vendor(s) that can provide a service. Authority to exercise discretion and utilize alternative remedies would provide the MTA flexibility it may need to continue procuring services when the vendor pool is limited.

Debarment should be complemented by incentive-based procurement reform: Other public entities have successfully utilized a combination of punitive and incentive-based measures to encourage efficient contractor behavior. The Port Authority of New York and New Jersey used an incentive-based contract when building the AirTrain to JFK airport. At the end of the contract, the contractor was entitled to 40 percent of an unused contingency account—a \$12 million payment.ⁱⁱ

Rather than relying solely upon mandatory debarment, the MTA should introduce incentive-based measures to award the best performing contractors alongside discretionary debarment for the worst performing contractors. These complementary measures would provide contractors an incentive to complete projects efficiently and cost-effectively.

I hope these comments are helpful. We look forward to continuing to work constructively with you to improve the MTA contracting and construction process, ensuring better services for all New Yorkers.

Sincerely,



Andrew S. Rein
President

ⁱ Pursuant to the proposed rule and Executive Order 192, a debarment would apply for five years and apply to the MTA and all other state agencies and authorities. See New York State Executive Chamber, "Executive Order 192, Executive Order Imposing Continuing Vendor Integrity Requirements in State Contracts" (January 15, 2019), www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_192.pdf.

ⁱⁱ Charles Brecher and Patrizia Nobbe, *Case Study of the JFK Airport AirTrain* (World Conference on Transportation Research Special Session on Urban Transportation Megaprojects, July 13, 2010), www.vref.se/download/18.53e8780912f2dbbe3a580003534/Brecher+%26+Nobbe+-+Case+Study+of+the+JFK+Airport+Airtrain+-+2010.pdf.