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MTA Implements Revised Contractors Debarment Regulations

On June 3, 2020, the Metropolitan Transit Authority (“MTA”) published and implemented revised regulations pertaining to the debarment of contractors. The revised regulations address many of the deep concerns raised by the contracting community.

Under relevant administrative procedure, the MTA publication of the revised regulations starts a 45 day notice period before the regulations can be adopted as final.

The prior regulations essentially required that debarment occur upon a purely formulaic calculation establishing that a contractor: 1) was more than 10% late, or 2) had submitted invalid claims that exceeded the adjusted contract price by a measure of 10%.

The revised regulations represent improvements over the prior regulations.

Critically, the revised regulations address the primary concern raised by the contracting community, that being the mandate of purely formulaic debarment. Instead, the revised regulations establish a process that includes greater flexibility and discretion before debarment may ensue.

The prior regulations were drafted to be retroactively effective, rendering the debarment risk applicable to contracts pending prior to April 2019, when the underlying statute was authorized. Retroactivity has been eliminated.

Other key advances in the revised regulations include:

- An improved definition of “invalid claims” and the elimination of subcontractor claims from the 10% calculation where subcontractor claims are contractually required to be passed through to the MTA;
- An opportunity to present defenses, including lack of bad faith, and remedial and corrective efforts. Presentations will be made to a three person debarment panel, one of which is independent of the MTA and selected from the American Arbitration Association;
- Clarification that debarment does not apply to subcontractors, projects under \$25 million or contracts awarded under the MTA’s Small Business Mentoring Program; and
- Limiting the imposition of debarment on related entities and joint venture partners.

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View the MTA's Staff Summary of the proposed changes that was part of the process by which the MTA Board approved the revised regulations [HERE](#).

The revised regulations are not yet final, although it is anticipated that the MTA will approve the regulations after the 45 day period.

P&A was closely involved in the process and legal proceedings that resulted in these revised regulations. While it is premature to provide a more detailed analysis before the regulations are finalized, P&A will share greater insights, considerations, and concerns regarding the significance of these changes to the contractor community upon final approval of the regulations, assuming that occurs.

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