Meltzer Lippe
CONSTRUCTION ALERT

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CONSTRUCTION

The Construction Practice Group represents clients in all aspects of negotiation and bidding of all types of both private construction and public improvement contracts, assuring legal compliance, administering contracts and responding to and resolving claims that may arise from the beginning of a project through payment of the final retainage.

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The legislature has recently passed a law that can effectively result in prohibiting you from performing government work for five years for simply making a claim for additional payment. Recently, the State passed a law (Public Authorities Law 1279-h, entitled Debarment) and subsequently, regulations (21 NYCRR 1004.1 et seq.) that require, not just permit, the MTA to debar contractors that either:

1. Fail to actually substantially complete their work within merely 10% of the adjusted time frame;

2. Look like they will be unable to complete their work within 10% of the adjusted time frame; or

3. Assert a claim(s) for additional payment that the MTA deems is invalid (and the total of the claim(s) is 10% or more of the adjusted contract price).

To make matters worse, the law provides that the MTA "must commence a debarment procedure where there is any evidence" of a violation of one of the three categories and the MTA "and its contracting personnel have no discretion to excuse or justify violations of any provision…" In other words, if you submit a claim that the MTA ultimately determines to be invalid (and the total of all such claims exceeds the adjusted price by more than 10%), you will be debarred. If the MTA believes that you delayed the project by more than 10%, not only are you subject to liquidated damages, you will be debarred. In fact, if an MTA employee even believes that (a) you will not complete your work within the adjusted schedule; or, (b) dependent upon the amount of the claim, that you submitted an invalid claim, he/she must start the debarment process.

Prior to the enactment of the statute, a contractor would typically be subject to debarment for things like failing to pay prevailing wages or fraud, embezzlement, theft, forgery, bribery, tampering with records, violating Federal criminal laws, tax evasion, unfair trade practices, or other similar offenses. In fact, under the Labor Law, a person would have to have been found guilty of two willful violations of the prevailing wage laws to be debarred from bidding/performing public contracts. By enacting this new Public Authorities Law section, the State has, in this writer's opinion, effectively equated submitting a claim or delaying a project to a crime.

Of course, debarment is not automatic. Contractors do have the right to a hearing and to defend themselves. After receiving a Notice of Intent to Debar from the MTA, they will have 30 days to respond, in writing. A hearing is then conducted; not before a Judge, but rather before "three managerial level employees of the MTA." For all intents and purposes, if that panel of MTA employees issues a determination of debarment, your ability to continue to perform public work will likely be over.

Here's why:

- The panel will send the determination to MTA Board to be 'ratified' or 'remitted for further consideration. Having not actually attended the hearings, the Board will likely ratify the determination;
- The MTA is required to notify the NYS Office of General Services of the debarment;
- Any attempt to have the MTA's determination reviewed by a court will likely be limited to what is known as an Article 78 review. Typically, to prevail, a moving party in an Article 78 proceeding – unlike a standard court action – must demonstrate that the MTA's determination was 'arbitrary and capricious.' In other words, convincing a Judge to agree with you is not enough; you would have to demonstrate that the determination was completely irrational. To give it some perspective, successful Article 78 petitions are a rarity.

Although the actual debarment is limited to the MTA, the fact remains that every other government agency in New York (and perhaps elsewhere) will be aware of the debarment; and knowledge of that fact will likely give every other agency grounds to reject your bid and determine you to be a 'non-responsible bidder.' And once one agency issues such a determination, a snowball effect will likely follow, effectively ending your ability to perform government work.

Before you think that the statute does not apply to any work you are currently performing for the MTA, think again. The regulations apply to "all contracts that were in effect on, or entered into after, April 12, 2019." In other words, unless your contract was closed out prior to April 12, 2019, you are subject to this law.

To put it in all into perspective, do you think 18 days is a long delay over the life a six-month project? Well, it can get you debarred and effectively put you out of business. Also, consider this: if there is a delay, the MTA's project manager must choose between commencing a debarment proceeding or conceding that you are not the cause of the delay. Which do you think he/she will likely choose? Take a different example: if an MTA employee disagrees with your change order requests, once the value of the disputed change orders gets to 10 percent of the contract price, he/she will *have* to commence a debarment proceeding. The law requires it.

In short, the law has taken disputes and matters that were typically commonplace for a construction project, where the risk to both parties was the amount in dispute, and turned them into landmines that can destroy one's business and livelihood in all but an instant. In sum, this writer is not sure you should walk away from MTA projects; you may want to *run*.

On a final note, were this rule passed using normal rulemaking processes, this regulation could be considered a legitimate manifestation of the democratic will. However, the new rule was purportedly passed under emergency proceedings, allowing the MTA to begin implementing the rule without the traditional 60-day public notice and comment period. There appears to have been no proposed justification for the use of emergency rulemaking power that met an enumerated purpose of the Open Meetings Law § 105. This means that the rule has already taken effect without any ability of the public to review the rule and offer amendments, and the emergency power used was not established to be necessary under its own procedure. This is critical as the notice and comment process is designed to protect the public from poorly designed rulemaking and provide an opportunity for agencies to hear from the affected constituencies so they can more narrowly tailor the proposed rules to effectively target the desired behavior. That didn't happen here.