



Industry Coalition Challenges MTA Debarment Rules

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A new industry coalition, The Alliance for Fair and Equitable Contracting (AFFECT), a group comprised of 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 filed suit in the US District Court for the Southern District of New York seeking relief from the “draconian contractor debarment regime put in place by the New York legislature and the MTA, culminating in publication of renewed “emergency” regulations in the New York State Register on November 6, 2019.” The challenged law and related regulations also apply to design professionals and other consultants who contract with the MTA (see Federal Complaint link below or [click here](#)).

In April 2019, under cover of a budget bill and without public comment or debate, the MTA enacted a legislative scheme to amend its contract process, giving the agency the ability to debar -- to exclude or ban -- its suppliers of goods or services for unexcused cost and/or schedule overruns.

As explained in the complaint filed in the District Court, while ostensibly such changes were intended to control cost and schedule overruns, they have created significant turmoil and uncertainty and radically changed the risk profile of MTA work for contractors and consultants with potentially

catastrophic consequences that could spell ruin for contractors, design firms and other service providers and vendors. The wording in the mandatory debarment rules appear to be overly broad, impacting any contractor, consultant, supplier or vendor with whom the MTA has entered into a construction, consultant, equipment, supply or services contract. This includes contractors, architects, engineers, suppliers and other providers -- the very entities that the MTA and the public depend on to sustain and improve our aged transit system. The rules impose automatic debarment hearings and draconian penalties leading to debarment, with confusing, ill-defined and potentially little discretion to consider mitigating circumstances that are often outside the control of contractors and consultants.

The suit states, "Debarment is the death penalty for a public works contractor, and not just in New York. A debarment by the MTA could result in debarment nationwide, given that public and private contractors throughout the country commonly inquire about bidders' debarment history when considering project bids. The Debarment Statute and MTA Regulations thus effectively export an unreasonable law not only throughout New York State, but to all other states as well."

The suit asks the Court to declare both the Debarment Statute and the MTA Regulations unconstitutional under federal law and issue both a preliminary and permanent injunction to prevent enforcing either source of law.

A second suit, filed in Supreme Court of the State of New York, County of New York argues that the Executive Order violates state and federal constitutional requirements including the federal Contract Clause, dormant Commerce Clause, the procedural and substantive due processes clauses, and the state separation of powers principles inherent in the New York Constitution by purporting to create new legislative law. It also argues the MTA regulations, in addition to being "arbitrary...capricious, [and] unreasonable," exceed the scope of the MTA's authority under the Debarment Statute, violate the procedural protections of the State APA, lack a rational basis, and constitute an abuse of discretion. The petition can be found [here](#) and [below](#).

To read more about the debarment regime [click here](#).