



EXECUTIVE MANAGEMENT AND AUDIT COMMITTEE
October 17, 2002

Metropolitan
Transportation
Authority

One Gateway Plaza
Los Angeles, CA
90012-2952

**SUBJECT: CONTRACTOR DEBARMENT AND
SUSPENSION ORDINANCE**

**ACTION: RECEIVE AND FILE AT OCTOBER BOARD MEETING
AND ADOPT AT FOLLOWING MEETING**

RECOMMENDATION

Receive and file the attached Contractor Debarment and Suspension Ordinance at the October regular Board meeting and formally adopt it at the next regular Board meeting.

ISSUE

As required by statute, the MTA currently has a process for the pre-qualification of potential contractors. The MTA does not have a formal debarment process. Pre-qualification is an evaluation process completed on a contract-by-contract basis and any denial of pre-qualification is for a particular contract. Debarment also denies a contractor the right to bid on contracts, but the denial extends for a defined period of time. Suspension is a temporary measure that is available when necessary to discontinue, pending further proceedings, the services of a contractor doing business with the MTA who commits an act which would support debarment. Because debarment is a more onerous sanction than denial of pre-qualification, the law generally requires more procedural due process before the imposition of debarment than before a denial of pre-qualification. The proposed ordinance would adopt a detailed process for debarment which fully meets the procedural due process requirements for such a sanction.

The law requires that an ordinance not be adopted at the Board meeting in which the ordinance is introduced. Therefore, the ordinance is being introduced as a receive and file matter in October and will be presented again for consideration of its adoption at the following regular Board meeting.

POLICY IMPLICATIONS

The proposed ordinance would adopt a formal contractor debarment and suspension program. Unlike the contractor denial of pre-qualification program, a formal

debarment and suspension program is not mandated by law. However, most public entities which engage in a significant amount of contracting for construction work, have adopted formal debarment programs.

ALTERNATIVES CONSIDERED

The alternative is to maintain the status quo and not adopt a formal debarment program. However, absent a formal debarment program, which includes the due process procedures required to sustain a debarment, the existing pre-qualification process could, in some instances, result in successive denials amounting to a defacto debarment which would be subject to a legal challenge based on a denial of due process. The adoption of a formal debarment program addresses this concern and provides the MTA with a process through which it can avoid doing business, for an extended period of time, with a contractor who has engaged in unacceptable business practices. The adoption of such a program also is consistent with recent Board direction that a process be developed to debar an entity found to have falsified its status as a disadvantaged business enterprise.

FINANCIAL IMPACT

There is no significant direct financial impact which will flow from the adoption of this ordinance. However, the objective of the debarment process is to prevent dishonest or otherwise unqualified contractors from doing business with the MTA. The accomplishment of this objective should have an overall positive financial impact on the cost of doing business.

BACKGROUND

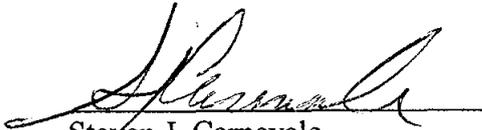
The law specifically requires the MTA to have a contractor pre-qualification process. The MTA has such a process which operates under procedures which have been adopted and implemented by staff which are sufficient to satisfy the procedural due process requirements that attach when someone is denied the right to bid on a particular contract. The law does not specifically mandate a contractor debarment process for the MTA. However, in certain instances where the denial of pre-qualification for a particular contract is justified, the facts might also justify a succession of denials for a succession of contracts. Where a contractor repeatedly applies for pre-qualification for successive contracts and is repeatedly denied, this may constitute defacto debarment. Any such defacto debarment would be subject to challenge under both state and federal law because the procedural steps for the denial of pre-qualification do not provide the contractor the legally required level of procedural due process necessary before debarment is imposed. This ordinance has been developed to address this issue by creating a formal debarment process which fully meets the procedural due process requirements for imposition of such a

sanction. The ordinance sets forth specific grounds for debarment and describes a formal hearing process through which a contractor subject to debarment can present evidence and legal arguments to challenge a proposed debarment.

The ordinance also provides procedures for the suspension of a contractor already doing business with the MTA when the contractor has engaged in certain actions which could justify a debarment. The suspension process is generally used as a temporary measure while full debarment is being considered.

**Prepared by: Robert Reagan
Principal Deputy County Counsel**

Lloyd W. Pellman
County Counsel

A handwritten signature in black ink, appearing to read "S. Carnevale", written over a horizontal line.

Steven J. Carnevale
Assistant County Counsel
Transportation Division

ATTACHMENT

Contractor Debarment and Suspension Ordinance

ATTACHMENT

An ordinance to establish procedures for the debarment and suspension of contractors.

BE IT ORDAINED BY THE BOARD OF THE LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY

1. Statutory Authority

- A. The Los Angeles County Metropolitan Transportation Authority is a local public entity duly organized as the single successor agency to the Southern California Rapid Transit District and the Los Angeles County Transportation Commission. [PUC Section 130050.2] It possesses the authority to determine its organizational structure [PUC Section 130051.11] and to exercise the powers and responsibilities necessary for the performance of its goals and objectives. [PUC Section 130051.12] The determination of business entity responsibility is required before the Authority may contract for goods and services. [PUC Sections 130051.21; 130232]

2. Findings and Objectives

- A. The Board of Directors of the Los Angeles County Metropolitan Transportation Authority [the “Board”] finds that in order to promote integrity in the public contracting processes and to protect the public interest it will contract only with responsible individuals and entities. Debarment and suspension are discretionary actions that, taken in accordance with this Ordinance, are among the appropriate means to effectuate this policy.
- B. Toward this end, the Los Angeles County Metropolitan Transportation Authority [the “Authority”] shall have, through this Ordinance, the discretion to exclude from contracting with the Authority a contractor who is debarred pursuant to this Debarment Procedure or suspended pursuant to this Suspension Procedure or who appears on any suspended, excluded or debarment list by any local, state or federal government.
- C. To protect the public interest the Board finds that procedures and processes are necessary to insure that businesses found to be non-responsible be prevented from contracting with the Authority.
- D. To promote integrity in the public contracting process the Authority is specifically authorized and required by statute to prequalify businesses seeking to do business

with the Authority. The statute authorizing and directing prequalification of contractors does not preclude denial of prequalification for an extended period or repeated prequalification denials. When a contractor is denied prequalification for an extended period, or repeatedly denied prequalification, defacto debarment may occur. To assure that contractors doing business with the MTA are provided proper safeguards and procedures and to avoid the occurrence of defacto debarments, a formal suspension and debarment procedure is necessary.

- E. To insure Compliance with 49 CFR, part 26 in federally funded projects, the Authority has established a Disadvantaged Business Enterprise Program and qualifies businesses seeking status with the Authority as a Disadvantaged Business Entity.
- F. As a grantee of federal funds the Authority is accountable for the use of the funds provided and must comply the with requirements and standards set forth by the Federal Government including the determination of contractor responsibility.
- G. The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Authority's protection and not for the purpose of punishment. The Authority shall impose suspension and debarment to protect its interest and only for the causes and in accordance with the procedures set forth in this Ordinance.

3. **Definitions.**

The following terms, whenever used in this Ordinance, shall be construed as defined in this section.

- A. "Affiliate". Entities and/or persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or, a third person or entity controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees or a business entity organized following the debarment, bankruptcy, dissolution, or reorganization of a contractor or entity which has the same or similar management, ownership, or principal employees as the, debarred, ineligible, or voluntarily excluded entity or person.
- B. "Authority" means the Los Angeles County Metropolitan Transportation Authority acting through its Board of Directors, or through any officer with powers delegated by the Board of Directors or authorized by law.
- C. "Benefits" means money or any other thing of value provided by or realized

because of, a contract with the Authority. A thing of value includes insurance or guarantees of any kind.

- D. "Civil Judgment" means a decision in a civil action by any court of competent jurisdiction, whether entered by verdict, settlement, stipulation or otherwise creating a civil liability for the wrongful acts complained of.
- E. "Consent Decree" means a settlement between the Authority and a contractor whereby the contractor promises to refrain from certain acts or omissions.
- F. "Contract" means any agreement to provide goods to, or perform services for or on behalf of, the Authority.
- G. "Contractor" Contractor includes persons, partnerships, corporations, joint ventures or other entities who contract directly or indirectly (e.g. through an affiliate) with, or is seeking to contract with, the Authority to provide goods to, or perform services for or on behalf of, the Authority. A contractor includes a contractor, subcontractor, vendor, affiliate or any person or entity who or which owns an interest of 10 percent or more or has a position of significance with a contractor, subcontractor or vendor.
- H. "Contracting Officer" means the Executive Officer, Procurement or his/her designee.
- I. "Covered Transaction" means any procurement program, activity, agreement or transaction with the Authority, regardless of type, amount or source of funding.
- J. "Conviction" means a judgment or conviction of a criminal offense of a type which would give rise to debarment of the convicted party under the terms of this Ordinance by any court of competent jurisdiction at the trial or appellate level whether entered upon a verdict or a plea, and includes a conviction upon a plea of nolo contendere.
- K. "Debarment" means an action taken by the Authority which results in a contractor, and any affiliate of the contractor, being prohibited from bidding upon, being awarded, and/or performing work on a covered transaction or related transactions with the Authority for a period of up to 5 years. A contractor who has been determined by the Authority to be subject to such a prohibition is "debarred."
- L. "Debarring Official" means the Chief Executive Officer of the Authority who may delegate any of his/her functions under this Ordinance and authorize successive delegations. The Debarring Official is responsible for initiating recommended

debarment actions and obtaining concurrence of the Office of the General Counsel.

- M. "Ex Parte Communication" means any communication with a member of the Executive Review Panel, other than by Panel member's staff, which is direct, or indirect, oral or written, concerning the merits or procedures of any pending proceeding which is made by a party in the absence of any other party.
- N. "Executive Review Panel" means the three member panel designated by the Debarring Official to preside over contractor suspension and debarment hearings and make findings. Members of the panel shall not have been involved in the investigation of the grounds for debarment.
- O. "Indictment" means indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.
- P. "Ineligible" means excluded from Authority contracting (and subcontracting, if appropriate) pursuant to statutory, Executive Order, or regulatory authority (including the Federal Government).
- Q. "Notice" means the written communication served on a contractor, its bonding companies and affiliates in accordance with Section 8 of this Ordinance, to initiate a debarment action. Notice shall be considered to have been received by the contractor, its bonding companies and affiliates five (5) days after being deposited in the US Mail, postage pre-paid, and addressed by the Authority to the contractor, its bonding companies and affiliates' last known address based on information provided by the contractor, its bonding companies and affiliates.
- R. "Participant" means any person who submits a bid or proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who is legally authorized to act on behalf of or to commit a participant in a covered transaction.
- S. "Person" means any individual, corporation, partnership, association, member of a joint venture, unit of government or legal entity, however organized.
- T. "Preponderance of the Evidence" means proof by information that, compared with that opposing it, tends to the conclusion that the fact at issue is more probably true than not.
- U. "Principal" means officer, director, owner, partner, key employee or other person within a contractor with significant management or supervisory responsibilities; a

person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant or any affiliate of a participant, the operations of which are so intertwined with the participant that the separate corporate identities may be disregarded.

- V. “Proposal” means any response to a solicitation, application, request for proposal, invitation to submit a proposal or similar communication by or on behalf of a contractor seeking to participate or receive a benefit, directly or indirectly, in or under a covered transaction.
- W. “Related Transaction” means a transaction directly related to a covered transaction, which assists the participant in executing a covered transaction, regardless of the extent of the influence on or substantive control over the covered transaction by the person performing the related transaction. Related transactions include, but are not limited to, transactions of the participant with any of the following persons:
- i. contractors (including direct subcontractors);
 - ii. principal investigators;
 - iii. loan officers;
 - iv. staff appraisers and inspectors;
 - v. underwriters;
 - vi. bonding companies;
 - vii. appraisers and inspectors;
 - viii. real estate agents and brokers;
 - ix. management and marketing agents;
 - x. accountants, consultants, investment bankers, architects, engineers, attorneys and others in a business relationship with participants in connection with a covered transaction under an Authority procurement or agreement or activity;
 - xi. vendors of materials and equipment in connection with an Authority procurement, agreement or activity;
 - xii. closing agents;
 - xiii. turnkey developers of projects;
 - xiv. title companies;
 - xv. escrow agents;
 - xvi. project owners;
 - xvii. employees or agents of any of the above.
- X. “Respondent” means a person against whom a debarment action has been initiated.
- Y. “Suspension” means action taken by the Suspending Official to disqualify a contractor temporarily from participating in covered transactions and/or related

transactions with the Authority. A contractor so disqualified is “suspended.”

- Z. “Suspending Official” means the Executive Officer, Procurement or his/her designee. The Suspending Official is responsible for suspending a contractor with the concurrence of the Office of the General Counsel.
- AA. “Voluntary Exclusion or Voluntarily Excluded” means a status, assumed by a person, who is excluded from participating in covered transactions and related transactions with the Authority in accordance with the terms of a settlement with the Authority.
- BB. “Warning Letter” means a written communication from the Authority to one or more persons concerning acts and omissions prohibited by this Ordinance.

4. Coverage

- A. This Ordinance applies to:
 - i. Any contractor who has participated, is currently participating, or may reasonably be expected to participate, in a covered transaction, irrespective of the source of funding;
 - ii. Any contractor who has participated, is currently participating, or may reasonably be expected to participate, in a related transaction, irrespective of the source of funding;
 - iii. Any principal of the contractors described in (i) and (ii) above, and;
 - iv. Any affiliate of the contractors described in (i), (ii) or (iii) above.

5. General

- A. The causes of debarment set forth in Section 7 are not intended to be an exhaustive list of the acts or omissions for which a person may be debarred; grounds other than those enumerated in this section may be a basis for debarment.
- B. The Authority may debar a contractor for any of the causes set forth in Section 7 using the procedures set forth in Sections 9 through 11. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors shall be considered in making any debarment decision.
- C. Debarment constitutes debarment of all divisions or other organizational elements

of the contractor named in the debarment proceedings, unless the debarment decision is limited by its terms to specific affiliates, divisions, organizational elements and individuals. The Debarring Official may extend the debarment decision to include any affiliates of the contractor and persons if they are:

- i. Specifically named, and
 - ii. Given written notice of the proposed debarment and an opportunity to respond
- D. The Authority hereby delegates the debarment of contractors to the Chief Executive Officer or his or her designee.

6. Investigation and Referral

- A. The Authority shall utilize Authority personnel, the Office of Inspector General (OIG), or other appropriate resources to conduct the investigation and develop the documentation required by paragraph (C) of this section.
- B. Information concerning the existence of a cause for debarment from any source shall be promptly investigated, reported, and referred to the Debarring Official for consideration. The Debarring Official shall be responsible for deciding whether or not to proceed with the action. After consideration, the Debarring Official may issue a notice of proposed debarment, pursuant to Section 8 of this Ordinance.
- C. Basic documentation shall be developed that includes but is not limited to:
 - i. The name of the specific respondent(s) against whom the action is being proposed or taken;
 - ii. The reason(s) for proposing the debarment;
 - iii. A short narrative stating the facts and/or describing other evidence supporting the reason(s) for the need to debar;
 - iv. The recommended time period for the debarment;
 - v. Copies of any relevant support documentation identified under this section.
- D. The Office of the General Counsel is responsible for:
 - i. Reviewing the documentation and notices for legal sufficiency, and

- ii. Providing any necessary coordination with prosecutorial offices.

7. Debarment of Contractors

- A. The Authority may debar a contractor if the Authority finds, in its discretion, that the contractor is responsible for any of the following:
 - i. Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public agreement or transaction;
 - ii. Violation of Federal or State antitrust statutes, including those prescribing price fixing between competitors, allocation of customers between competitors, and bid rigging;
 - iii. Commission of embezzlement, theft, forgery, bribery, making false statements, submitting false information, attempting to commit a fraud against the Authority, receiving stolen property, making false claims to any public entity, obstructing justice, fraudulently obtaining public funds;
 - iv. Performance or conduct on one or more private or public agreements or transactions that caused or may have caused a threat to the health or safety of the contractor's employees, any other persons involved with the transaction, the general public or property;
 - v. Debarment by any other governmental agency;
 - vi. Violation of federal guidelines for disadvantaged business entity status including, but not limited to, violation of 49 CFR part 26 et seq. and misrepresenting minority or disadvantaged business entity status;
 - vii. Noncompliance with the prevailing wage requirements of the Labor Law, including any pending violations by the contractor, or any affiliate of the contractor.
 - viii. Violation of any Authority requirements for providing a drug-free workplace;
 - ix. Violation of any nondiscrimination provisions included in any public agreement or transaction;
 - x. Any other significant Labor Law violations, including, but not limited to, child labor violations, failure to pay wages, or unemployment insurance

tax delinquencies.

- xi. A violation of a statutory or regulatory provision or requirement applicable to a public or private agreement or transaction;
- xii. Violation of any licensing, subletting or sublisting laws;
- xiii. Falsification, concealment, withholding and/or destruction of records;
- xiv. Violation of settlement agreements and/or consent decrees which impose obligations on the contractor to perform certain activities and/or to refrain from certain acts;
- xv. Violation of any law, regulation or agreement relating to conflict of interest with respect to government funded procurement;
- xvi. Knowingly or negligently doing business with a debarred, suspended, ineligible, or voluntarily excluded contractor in connection with a covered transaction or a related transaction;
- xvii. Violation of a material provision of any settlement of a debarment action;
- xviii. Commission of an act or offense which indicates a lack of business integrity or business honesty.
- xix. Willful failure to perform in accordance with the terms of one or more contracts.
- xx. A history of failure to perform, or of unsatisfactory performance of one or more contracts including, without limitation, default on contracts with the Authority or any other public agency;
- xxi. Commission of any act or omission which negatively reflects on the contractor's quality, fitness or capacity to perform a contract with the Authority or any other public entity, or engaged in a pattern or practice which negatively reflects on same including, but not limited to, deficiencies in on-going contracts, false certifications or statements, fraud in performance or billing or lack of financial or technical resources;
- xxii. Any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor.

8. Notice of proposed debarment.

- A. A debarment proceeding shall be initiated by notice to the contractor, its bonding companies and affiliates, at least ninety (90) days prior to the date of the debarment hearing advising:
- i. That debarment is being considered;
 - ii. Information on the specific debarment action proposed;
 - iii. Of the reasons for the proposed debarment in terms sufficient to put the contractor, its bonding companies and affiliates on notice of the conduct or transaction(s) upon which it is based;
 - iv. Of the cause(s) relied upon under Section 7 for proposing debarment;
 - v. Of the provisions of Sections 8 & 9, and any other procedures, if applicable, governing debarment decision making;
 - vi. That the contractor, its bonding companies and/or affiliates must submit a written response within thirty (30) days of the receipt of the Notice of Proposed Debarment and the consequence of not providing a response;
 - vii. The date, time and place of the debarment hearing;
 - viii. Of the potential effect of a debarment;
 - ix. Of the right to a hearing before the Executive Review Panel;
 - x. That the contractor, its bonding companies and/or affiliates, may appear at the debarment hearing to challenge the debarment action and that failure to appear may result in a waiver of the contractor's, its bonding companies' and/or affiliates' defenses to the debarment action, and be taken as an admission by the party failing to appear that the basis for the debarment is accurate, except to the extent the contractor, its bonding companies and/or affiliates challenge the debarment action solely by means of a written submission.
 - xi. That the Authority may submit a reply to the written response of the contractor, its bonding companies and/or affiliates within (30) days following receipt of the response made by or on behalf of the contractor, its bonding companies and/or affiliates;
- B. The notice to the contractor, its bonding companies and affiliates shall be signed

by the Debarring Official and transmitted by certified mail, return receipt requested to the last known address provided the authority by the contractor, its bonding companies and affiliates.

- C. The Office of the General Counsel will be consulted on all proposed debarment actions prior to the notice being sent to the respondent.
- D. Notice to the contractor, its bonding companies and affiliates shall be deemed sufficient if it is served by any of the means, authorized by California Code of Civil Procedure Section 1013, or as otherwise specified in Section 8.
- E. Any attempt by the contractor, its bonding companies and/or affiliates to affirmatively avoid service by way of example, and not limitation, refusing to pick-up a certified letter, shall be deemed ineffective and shall not prevent the debarment proceeding from going forward.

9. Documents Submitted to the Executive Review Panel

A. Respondent's Response

- i. The Respondent shall submit to the Executive Review Panel and serve in accordance with Section 10, a response to the Notice of Proposed Debarment within thirty (30) days of receipt of the Debarring Official's notice which response shall:
 - (1) State whether the Respondent will appear at the hearing;
 - (2) Respond to the allegations of the Authority. Allegations by the Authority contained in the notice to the Respondent may be deemed admitted by the Executive Review Panel when not specifically denied in the Respondent's response.
- ii. The response may set forth any affirmative defenses and any evidentiary support therefore, to the allegations by the Authority. Where a Respondent intends to rely on any affirmative defense, it must be set forth in the response.
- iii. If the Respondent intends to waive its right to a hearing and rely solely on the response in support of its position, the response must clearly state such intention. Failure to clearly state such intention may be deemed a waiver of the Respondent's defenses to the debarment action if the Respondent does not appear at the hearing.

- iv. In the event that the Respondent fails to file a written response within thirty (30) days of receipt of the Debarring Official's notice in accordance with this section, the allegations of the Authority may be deemed admitted, the Executive Review Panel may enter an order of default and transmit it to the Debarring Official. The Debarring Official's decision shall thereafter issue, with service on the parties.

B. Reply by the Authority

- i. The Authority may submit to the Executive Review Panel and serve in accordance with Section 10, a reply to the Respondent's response not later than thirty (30) days after receiving the Respondent's response.

C. Stipulations

- i. The parties are encouraged to meet and resolve as many matters as possible by stipulated agreement prior to the hearing. The parties may stipulate as to any relevant matters of fact or law. Stipulations may be received in evidence at the hearing, and when received shall be binding on the parties with respect to the matter stipulated.

D. Document and Submission Requirements

- i. An original and one copy of all documents to be presented to the Executive Review Panel and a list of all witnesses to be called at the debarment hearing shall be served on the Executive Review Panel no later than 10 days before the scheduled hearing, and copies of all documents served on the Executive Review Panel shall be served simultaneously on the opposing party at the specific location designated on the notice of debarment in accordance with Section 10.
- ii. All documents required or permitted under this Ordinance, in addition to being served on Executive Review Panel in accordance with this Section, shall be served upon:
 - (1) the Office of the General Counsel at One Gateway Plaza, 24th Floor, Los Angeles, CA 90012;
 - (2) The Respondent or Respondent's representative;
- iii. Documents served in accordance with this Section and Section 10 shall state clearly the party's name and the title of the document. All documents should be typewritten or printed in clear, legible form.

10. **Service**

- A. Service of documents on the Respondent, including the notice, shall be made by any reasonable means, including by first class mail, fax, e-mail or delivery to:
 - i. the Respondent to be served or that Respondent's designated representative or agent, at the last known address;
 - ii. the Respondent's last known place of business; or
 - iii. a principal of the Respondent, of the entity for which the respondent is a principal.
- B. Proof of service shall not be required unless the fact of service is denied under oath and put in issue by appropriate objection on the part of the Respondent allegedly served. In such cases, service may be established by written receipt signed or on behalf of the Respondent to be served, or may be established prima facie by any responsible means, including, but not limited to affidavit or certificate of service of mailing.
- C. Service of documents on bonding companies and affiliates shall follow the procedures set forth in Sections 10A and 10B.

11. **Time Computation**

- A. Any period of time prescribed or allowed by this Ordinance shall include in its computation of the prescribed period, Saturdays, Sundays and national holidays, except that when the last day of the period is Saturday, Sunday, national holiday or other day that the Authority is closed, the period shall run until the end of the next following business day.

12. **Executive Review Panel Powers and Responsibilities**

- A. To ensure the fair and efficient administration of debarment proceedings, they shall be presided over by the Executive Review Panel, as defined in Section 4(N) of this Ordinance. The Debarring Official shall appoint the three members of the Executive Review Panel.
- B. If the Debarring Official determines in his/her sole discretion that the debarment proceeding will be unusually complex, is expected to be of extended duration, or for any other reason, he/she may appoint a retired judge to conduct the hearing. The retired judge shall have all of the powers and duties otherwise reserved to the

Executive Review Panel.

C. Powers of the Executive Review Panel

- i. The Executive Review Panel shall conduct a fair and impartial hearing and, to that end, shall have the power to:
 - (1) schedule the debarment hearing date, time and place;
 - (2) postpone the debarment hearing date;
 - (3) regulate the course of the hearing and the conduct of the parties and their counsel;
 - (4) hold conferences to facilitate the settlement or simplification of the issues by consent of the parties or at the request of a party;
 - (5) consider and rule upon all evidentiary and procedural matters pertaining to the hearing, including, but not limited to, setting page limits on documents that may be submitted;
 - (6) make findings of fact and take notice of any material fact not appearing in evidence in the record which would properly be a matter of judicial notice;
 - (7) receive evidence and rule on offers of proof;
 - (8) administer oaths and affirmations;
 - (9) issue a decision imposing debarment of the Respondent with respect to future Authority transactions, or imposing no sanction;
 - (10) recommend to the Authority staff, if so requested, a course of action to remedy Respondent's past actions which gave rise to the debarment action;
 - (11) Recommend to the Debarring Official that a contractor should or should not be debarred;
 - (12) take any other action necessary to protect each party's rights, to avoid delay in the disposition of the debarment proceeding and to maintain order.

ii. **Prohibition Against Ex-parte Communications**

(1) Ex-parte communications are prohibited unless:

- (a) the purpose and content of the communication have been disclosed in advance or simultaneously to all parties involved; or
- (b) the communication is a request for information to the Executive Review Panel's staff concerning the status of the debarment action.

13. **Debarment Hearing Procedure**

A. **Right to Hearing**

- i. All Respondents subject to debarment pursuant to this Ordinance shall be entitled to a hearing at the date, time and place set forth in the notice.
- ii. The Respondent may elect to waive its right to a hearing and rely solely on a written response. If the Respondent elects to waive its right to a hearing, such waiver must be clearly stated in the Respondent's response. However, if the Respondent fails to file a written response as required under Section 9, the allegations of the Authority shall be deemed admitted, and an order of default shall be entered pursuant to Section 9(A)iv.
- iii. The Executive Review Panel shall perform no independent collection of evidence and shall render a decision based on the evidence as submitted by the parties, although the Executive Review Panel may take judicial notice of common, uncontested facts.

B. **Conduct of Hearing**

- i. The hearing shall be informal in nature and members of the Executive Review Panel may ask questions at any time.
- ii. The hearing shall proceed with all reasonable speed. The Executive Review Panel may order the hearing be recessed for good cause, stated on the record. The Hearing Panel may, for convenience of the parties, or in the interest of justice, order that the hearing be continued or extended to a later date.

C. Representation of the Parties

- i. The Authority may be represented by a member of the staff of the Office of the General Counsel and /or by an attorney assigned by the Office of the General Counsel, as may be appropriate in a particular case.
- ii. The Respondent may be represented at the hearing as follows:
 - (1) individuals may appear on their own behalf;
 - (2) a member of a partnership or joint venture may appear on behalf of the partnership or joint venture;
 - (3) a bona fide officer may appear on behalf of a corporation or association upon a showing of adequate authorization;
 - (4) an attorney who submits a notice of appearance and representation with the Executive Review Panel may represent the Respondent; or
 - (5) an individual not included within subsections (1) through (4) of this section may represent the respondent upon an adequate showing, as determined by the Executive Review Panel, that the individual possesses the legal, technical or other qualifications necessary to advise and assist in the presentation of the Respondent's case.

D. All testimony provided at the hearing shall be under oath.

E. At the request of either the Respondent or the Authority, the proceedings shall be transcribed by an authorized court reporter. The cost of the transcript of the proceedings shall be paid by the party requesting the transcript, or in the event both parties request the transcript, the cost shall be divided evenly between them.

14. Standard of Proof

A. The cause for debarment must be established by a preponderance of the evidence.

15. Burden of Proof

A. The Authority has the burden of proof to establish the cause for debarment. The Respondent has the burden of proof to establish mitigating circumstances.

- B. Where the proposed debarment is based upon a conviction, civil judgment, or a debarment by another governmental agency and the Authority submits evidence as to the existence of such, the Authority shall be deemed to have met its burden of proof to establish cause for debarment.

16. Closing of the Hearing Record

- A. The closing of the hearing record may be postponed by the Executive Review Panel, in its discretion, in order to permit the admission of other evidence into the record. In the event further evidence is admitted, each party shall be given an opportunity within a reasonable time to respond to such evidence.
- B. Once the Executive Review Panel deems the hearing to be concluded there shall be no further proceedings before it or evidence accepted by it on the cause for debarment unless a request is made in writing within 3 days following the conclusion of the hearing, and good cause shown.

17. Rules of Evidence

- A. Every party shall have the right to present its case or defense by oral or documentary evidence and to submit rebuttal evidence. The Executive Review Panel may, within its discretion, permit cross-examination of witnesses on request. The Executive Review Panel may exclude irrelevant, immaterial or unduly repetitious evidence.
- B. The debarment hearing need not be conducted according to technical rules relating to evidence and witnesses except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law statutory rule which might make improper the admission of the evidence over objection in civil actions.
- C. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.
- D. The rules of privilege as set forth in the California Code of Civil Procedure shall apply.
- E. The Executive Review Panel has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will

necessitate undue consumption of time.

- F. The Executive Review Panel shall not have the power or authority to compel any witness or party to give evidence in contravention of any evidentiary privilege recognized under applicable law, including, but not limited to, the Fifth Amendment privilege against self-incrimination under the Constitution of the United States of America and the attorney-client privilege.

18. Scope of Debarment

- A. Debarment of a contractor and its affiliates under this Ordinance constitutes debarment of all its specifically identified principals, individuals, divisions and other organizational elements from all covered transactions and related transactions with the Authority, unless the debarment decision is limited by its terms to one or more principals, individuals, divisions or other organization elements or to specific types of transactions.
- B. As may be appropriate, the debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond.
- C. The debarment of a contractor and its affiliates under this Ordinance may include the debarment of any other business that is, has been or will be controlled or owned by the contractor and its affiliates or by any entity owned or controlled by a person or persons who own a controlling interest in a contractor and its affiliates then or at the time the debarment was imposed.

19. Period of Debarment

- A. Debarments shall be for a period commensurate with the seriousness of the Respondent's conduct, up to a maximum of five (5) years.

20. Debarment Decision

- A. The debarment decision shall be made within 45 days after conclusion of the hearing, unless the Executive Review Panel extends this period for good cause.
- B. In debarment actions where respondent(s) fail(s) to provide any submission in opposition by the time provided in Section 9A, the Executive Review Panel may, in its discretion, decide against the Respondent, and notice shall be provided by the Debarring Official;
- C. Written findings of fact shall be prepared if requested by the parties. The

Executive Review Panel shall base its decision on the facts as found, together with any information and argument submitted by the parties and any other information in the administrative record.

- D. If the Executive Review Panel decides to impose debarment, it shall forward its recommendation to the Debarring Official.
- E. The Debarring Official shall review the recommendation of the Executive Review Panel and either affirm or modify the recommendation.
- F. The Debarring Official shall, within 45 days of the close of the hearing, provide notice to the Respondent which notice shall include, but not be limited to, the following:
 - i. Reference to the notice of proposed debarment;
 - ii. Whether the cause for debarment has been established;
 - iii. If the cause for debarment has been established:
 - (1) Specifying the reasons for debarment;
 - (2) Stating the period of debarment, including effective dates;
 - (3) Advising of the scope of the debarment;
 - (4) The time period in which the Respondent may submit an appeal under this Section.
- G. The notice to the Respondent shall be in writing, signed by the Debarring Official, and transmitted by certified mail, return receipt requested. The Office of the General Counsel will be consulted on all debarment actions prior to the notice being sent to the Respondent.

21. Appeal of Final Determination

- A. Any party may request review of the debarment decision by filing a written appeal with the Debarring Official within twenty-one (21) days of receipt of the final debarment decision. The appeal shall specifically identify the issues and the basis upon which the party seeks review and shall be served in accordance with Section 10 of this Ordinance.

- B. Any party to the debarment hearing opposing the appeal may submit a response opposing review. The response must be submitted to the Debarring Official and served in accordance with Section 10 within fourteen (14) days of the receipt of the appeal.
- C. Each complete and timely filed appeal shall be reviewed by the Debarring Official whose determination shall result in one of the following findings:
 - i. affirming the decision of the Executive Review Panel;
 - ii. overturning the decision of the Executive Review Panel;
 - iii. directing a modification of the decision, including, but not limited to, the scope of duration of any debarment; or
 - iv. referring the matter back to the Executive Review Panel for additional investigation or findings.
- D. The Debarring Official shall issue a determination within thirty (30) days of submission of the appeal, unless notice is given to the Executive Review Panel and the parties extending the period for submitting a determination. The Debarring Official's review shall be limited to the factual record produced before the Executive Review Panel. The determination of the Debarring Official need not be a formal written determination; rather a letter, served upon all parties in accordance with Section 10, setting forth the determination of the appeal.
- E. The submission of an appeal shall have no effect on the decision of the Executive Review Panel, unless and until the Debarring Official issues a determination modifying the Executive Review Panel's determination.

22. Review of Debarment Period

- A. After the period for appeal has lapsed, a debarred Respondent may request that the Debarring Official withdraw or modify the terms of the debarment, if any of the following circumstances arise:
 - i. newly discovered material evidence;
 - ii. reversal of a conviction or civil judgment upon which a debarment was based;
 - iii. a meaningful change in ownership or management;

- iv. elimination of other causes for which the debarment was imposed; or
- v. any other reason that is in the best interests of the Authority.

B. A request for review shall be in writing, supported by documentary evidence and served in accordance with Section 10 of this Ordinance.

23. The Parties Excluded From Procurement Programs List

- A. The Authority shall maintain a Parties Excluded From Procurement Programs List. Such list shall contain the names of all contractors that have been suspended or debarred by the Authority or any local, state or federal agency and the period of the suspension (if applicable) or debarment.
- B. The Authority shall periodically, but in no case less than twice annually, forward to the appropriate agency with the State and Federal Government the then current Parties Excluded from Procurement Programs List.

24. Effect of Suspension or Debarment

- A. Persons suspended or debarred, are excluded from covered transactions and related transactions as either participants or principals, and the Authority shall not solicit or accept offers from, award contracts to, or consent to subcontracts with these persons. Persons suspended or debarred are also excluded from conducting business with the Authority as agents, or affiliates of other persons. For purposes of this Section, such persons are referred to as "Listed Persons".
- B. Persons included on the List of Parties Excluded from Procurement Programs as having been declared ineligible from receiving contracts from the Authority, and if applicable, subcontracts, are ineligible under the conditions and for the period set forth in the Parties Excluded From Procurement Programs List. The Authority shall not solicit offers from, award contracts to, or consent to subcontracts with these persons under those conditions and for that period.
- C. Persons debarred or suspended are excluded from acting as individual sureties to any person, contractor, principal or participant.
- D. After opening the bids or receipt of proposals, the contracting officer shall review the list of Parties Excluded from Procurement Programs.
- E. Bids received from any Listed Person in response to an invitation for bids shall be rejected.

- F. Proposals, quotations, or offers received from any Listed Person shall not be evaluated for award nor shall discussions be conducted with a Listed Person during a period of ineligibility. If the period of ineligibility expires or is terminated prior to award, the contracting officer may, but is not required to, consider such proposals, quotations or offers.
- G. Immediately prior to award, the contracting officer shall again review the list of Parties Excluded from Procurement Programs to ensure that no award is made to a person on such list.
- H. Persons who participate in Authority transactions during the period of their debarment will not be paid for goods and services provided and their contracts shall be deemed void.

25. Imputed Conduct

- A. The conduct of the type described in paragraph 7(A) above by an officer, director, shareholder, partner, employee, principal, affiliate or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance or duties for or on behalf of the contractor, or with the contractor's knowledge, approval or acquiescence. The contractor's acceptance of the benefits derived from the conduct shall constitute evidence of such knowledge, approval or acquiescence.
- B. The conduct of the type described in paragraph 7(A) above by a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.
- C. The conduct of the type described in paragraph 7(A) above by one contractor participating in a joint venture or similar arrangement may be imputed to the other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval or acquiescence.

26. Continuation of Current Contracts

- A. Notwithstanding the debarment, suspension or proposed debarment or suspension, the Authority may continue contracts or subcontracts in existence at the time the person was debarred, suspended or proposed for suspension or debarment unless the Chief Executive Officer of the Authority, or his/her designee, directs otherwise. A decision as to the type of termination action, if any, to be taken

should be made only after review by Authority contracting and technical personnel and by the Office of the General Counsel to ensure the propriety of the proposed action.

- B. The Authority shall not award options to contracts or in any way extend the duration of current contracts, or consent to additional subcontracts, with persons who have been debarred, suspended, or proposed for debarment or suspension, or who are Listed Persons unless specifically approved in writing by the Chief Executive Officer of the Authority for good cause shown.

27. Restrictions on Subcontracting

- A. When a person is debarred, suspended or proposed for suspension or debarment is proposed as a subcontractor for any subcontract subject to Authority consent, contracting officers shall not enter into subcontracts with such persons.

28. Actions Other Than Debarment

- A. In the event that it is determined that the Respondent's acts or omissions are insufficient to warrant debarment, one or more of the following actions may be taken:

- i. **Voluntary Exclusion**

- (1) The Authority and a contractor may agree to a voluntary exclusion of the contractor and any of its principals and/or affiliates from Authority activities and transactions of a period of up to five (5) years.
 - (2) Contractors and any of its principals and/or affiliates who are voluntarily excluded from participation in Authority transactions shall be placed on the Parties Excluded From Procurement Programs List.
 - (3) Contractors and any of its principals and/or affiliates who participate in Authority transactions during the period of their voluntary exclusion will not be paid for goods and services provided, and may be considered for debarment.

- ii. **Consent Decree**

- (1) Contractors and any of its principals and/or affiliates found to be in violation of one or more provisions of this Ordinance enter into a

settlement in the form of a consent decree with the Authority. The consent decree will specifically provide that the person will refrain from the act(s) or omission(s) that had been found to be in violation of this Ordinance. A consent decree may be entered into alone or in conjunction with one or more of the procedures described in this section.

iii. **Warning Letter**

- (1) Where there appears to be an act or omission in violation of this Ordinance, a warning letter shall be issued to the contractor and any of its principals and/or affiliates. In all subsequent transactions between the contractor and any of its principals and/or affiliates and the Authority, the warning letter will be considered notice concerning such acts or omissions and may be evidence in a subsequent debarment proceeding.

29. **Suspension of Contractors**

- A. The Suspending Official may, to protect the public interest, suspend a contractor or contractor's affiliate suspected, upon sufficient evidence, of committing of any act described in Section 7 or indictment for any of the causes set forth in Section 7.
- B. The Authority may modify or terminate the suspension at any time. The Authority reserves the discretion to lift a suspension on the basis that it finds no reasonable grounds to proceed with debarment.
- C. Suspension is a serious action to be imposed on the basis of sufficient evidence, pending completion of an investigation or legal proceedings, when it has been determined that immediate action is necessary to protect the Authority's interest.
- D. Suspension constitutes suspension of all divisions or other organizational elements of the contractor, unless the suspension decision is limited by its terms to specific divisions or organizational elements. The Suspending Official may extend the suspension decision to include any affiliates of the contractor if they are:
 - i. Specifically named;
 - ii. Given written notice of the suspension and an opportunity to respond.

30. **Notice of Suspension**

A. When a contractor is suspended, it and their bonding companies shall be immediately notified of the suspension by certified mail, return receipt requested. The Notice of Suspension shall include the following information:

- i. That the contractor has been suspended and that the suspension is based upon an indictment or other sufficient evidence that the contractor has committed an act described in Section 7:
 - (1) of a serious nature in business dealings with the Authority, or
 - (2) seriously reflecting on the propriety of further Authority dealings with the contractor.
- ii. A Sufficient description of the actions of the contractor giving rise to the suspension to place the contractor on notice without disclosing the Authority's evidence.
- iii. That the suspension is for a temporary period pending the completion of an investigation and such legal proceedings as may ensue;
- iv. The effect of the suspension;
- v. That, within 30 days after receipt of the Notice of Suspension, the contractor may submit, in writing, information and argument in opposition to the suspension.
- vi. Except for suspensions based upon an indictment, that additional proceedings shall be conducted if the contractor disputes any material facts supporting the suspension.

31. **Suspension Procedures**

- A. Following the imposition of suspension, the contractor may, within 30 days, submit written information and argument to the Suspending Official in opposition to the suspension. If it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the suspension, the Suspending Official shall:
- i. Constitute the Executive Review Panel or appoint a retired judge;
 - ii. Notify the contractor as to the date certain of the hearing on the facts supporting the suspension.

- B. The suspended contractor shall, no later than 10 days before the hearing before the Executive Review Panel or retired judge, provide a written list of proposed witnesses to be presented at the hearing and a description of each writing to be submitted for consideration by the Executive Review Panel or retired judge. Failure by the suspended contractor to provide the required information within the time required by this subsection shall be sufficient cause for continuance of the hearing.
- C. The suspended contractor and/or attorney or other authorized representative shall be given an opportunity to appear at the suspension hearing and to submit documentary evidence, present witnesses, and offer rebuttal evidence at the hearing. All testimony provided at the hearing shall be under oath. Failure to dispute all the bases for the suspension either in writing or at the time of the hearing shall be deemed an admission that each undenied basis for suspension is true.
- D. At the request of either the suspended contractor or the Authority the proceedings shall be transcribed by an authorized court reporter. The cost of the transcript of the proceedings shall be paid by the party requesting the transcript, or in the event both parties request the transcript, the cost shall be divided evenly between them.
- E. The cause for suspension must be established by a preponderance of the evidence. Where the proposed suspension is based upon a conviction or civil judgment, the standard shall be deemed to have been met.
- F. Once the Executive Review Panel or retired judge deems the hearing to be concluded there shall be no further proceedings before it or evidence accepted by it relating to the suspension.

32. **Suspension Decision**

- A. Within 10 days of the conclusion of the suspension hearing, the Executive Review Panel or retired judge shall submit to the Suspending Official recommendations whether the suspension shall be upheld, modified or terminated.
- B. The Suspending Official shall review the findings of the Executive Review Panel or retired judge and may uphold or modify the recommendation.
- C. The notice to the suspended contractor and any affiliates and bonding companies shall be in writing, signed by the Suspending Official, and transmitted by certified mail, return receipt requested. The Office of the General Counsel will be consulted on all suspension actions prior to any notices being sent to the

respondent.

33. Period of Suspension

- A. Suspension shall be for a temporary period pending the completion of the Authority's investigation and any ensuing legal proceedings, unless sooner terminated by the Suspending Official.
- B. If the Authority does not initiate debarment proceedings within twelve (12) months after the date of the suspension notice, the suspension will terminate automatically unless there are pending legal proceedings. However, once debarment proceedings have been initiated, the suspension may continue indefinitely pending resolution of the debarment proceeding.

34. Scope of Suspension

- A. The scope of suspension shall be the same as that for debarment.

35. Pre-emption.

- A. In the event any contract is subject to federal and/or state laws that are inconsistent with the terms of this Ordinance, such laws shall control.

36. Severability.

- A. If any section, subsection, subpart or provision of this Ordinance, or the application thereof to any person or circumstances, is held invalid, the remainder of the provisions of this Ordinance and the application of such to other persons or circumstances shall not be affected thereby.

37. Judicial Review.

- A. Judicial review of any final decision reached by the Authority under this ordinance shall be conducted by the Superior Court of the County of Los Angeles, Central District, pursuant to an administrative writ of mandate as described under Section 1094.5 of the Code of Civil Procedure (CCP), but only if the petition for writ of mandate is filed within the time limits set forth in CCP Section 1094.6.
- B. In every final decision reached under this Ordinance, notice of such final decision shall only be given directly to the Respondent and its bonding companies and such notice shall explain that CCP Section 1094.6 governs the time period within which judicial review of any such final decision must be sought. Final notice to the applicant/party and its bonding companies shall conclude with the following

statement:

THE MTA HAS REACHED A FINAL DECISION IN THE ADMINISTRATIVE MATTER PENDING BEFORE THE MTA. IF YOU CHOOSE TO SEEK JUDICIAL REVIEW OF MTA'S FINAL DECISION IN THIS MATTER, SUCH ACTION SHALL BE INITIATED UNDER CCP SECTION 1094.5 AND TIME LIMITS FOR FILING SUCH AN ACTION ARE SET FORTH IN CCP SECTION 1094.6. IT IS YOUR SOLE RESPONSIBILITY TO TAKE WHATEVER ACTION YOU DEEM APPROPRIATE IN RESPONSE TO THIS NOTICE.

Publication of Ordinance. Upon adoption this Ordinance shall be signed by the Chairperson of the Board of Directors of the Los Angeles County Metropolitan Transportation Authority. The Secretary of the Board of Directors shall cause the publication of this Ordinance once, within fifteen days of its adoption, in a newspaper of general circulation printed and published within the area served by the Los Angeles County Metropolitan Transportation Authority and the Secretary of the Board of Directors shall attest to such adoption and publication of this Ordinance.

Chairperson, Board of Directors

Date Adopted: _____

Date Published: _____

Secretary, Board of Directors