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White Collar Corner: Public contract debarment concerns for contractors in New York State

Contractors doing business with New York State should take heed of two state statutes that can result in disqualification from further work on state contracts: Labor Law § 220-b(3) and State Finance Law § 139-b(1).

New York State Labor Law § 220-b(3)

New York State Labor Law § 220-b(3) identifies several elements by which a contractor may be disqualified from bidding on or receiving a New York State public works contract. Several of these criteria are to be expected: criminal conviction for murder, bribery, or a variety of other felonies. Such a conviction results in that person, or their affiliated corporation or legal entity, being disqualified from contracts under Labor Law § 220-b(3)(b)(2). However, the broadest portion of this statute is section 220-b(3)(b)(3)(i), which disqualifies contractors or persons debarred by the Federal government. Disqualification also applies where the contractor or person is a "substantially owned-affiliated entity" of a contractor or individual disqualified under Labor Law § 220-b(3)(b)(3)(ii). (An exception to disqualification applies where a state agency determines that a "compelling reason" exists to award the contract.)

To understand the far-reaching effects of Labor Law § 220-b(3)(i), it is necessary to understand what warrants federal debarment. Among the most common grounds for federal debarment are kickbacks and bid rigging, which represents the violation of an antitrust statute relating to the submission of offers. 48 C.F.R. § 9.406-2 provides for federal debarment based on the violation of either a federal antitrust statute — such as the Sherman Act — as well as an antitrust statute for any state. As a result, the violation of any antitrust statute could ultimately result in federal debarment which, pursuant to Labor Law § 220-b(3), would likewise debar the contractor from New York state contracts as well.

By ALAN J. BOZER

While Labor Law § 220-b(3)(b)(3)(i) is extensive, its future is uncertain. This section only came into effect on March 18, 2018, for a three-year period, and was extended at the last moment to sunset on March 18, 2024. It remains to be seen what will become of this law after that date.

State Finance Law § 139-b(1)

State Finance Law § 139-b(1) disqualifies "[a]ny person who, when called before a grand jury, head of a state department, temporary state commission, or other state agency … empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation [into a] contract … with the state … refuses to sign a waiver of immunity against subsequent criminal prosecution or … answer any relevant question." N.Y. State Fin. Law § 139-b(1) (Westlaw through L.2021, ch. 1 to 152). Put simply, a person called to testify in an investigation into a state contract who refuses to waive his immunity or to testify is thereafter disqualified from bidding on future state contracts for five years. Moreover, if an individual was subpoenaed and refused to cooperate, the disqualification would apply to any firm, partnership or corporation of which they are a member. This disqualification may be appealed by any firm, partnership or corporation that was disqualified as a result of one of their member's non-cooperation under State Finance Law § 139-c(1); however it requires the filing of a petition in Supreme Court and requires the firm, partnership or corporation's cooperation in the investigation.

The constitutionality of State Finance Law § 139-b(1) has not been challenged and the law remains in effect, but a virtually identical statute, New York General Municipal Law § 103-b, was held unconstitutional by the Court of Appeals in 1973. General Municipal Law § 103-b likewise disqualified any person who refused to cooperate with a subpoena by waiving immunity and testifying in an investigation into a public contract from bidding or contracting with municipal governments. This similarly disqualified "any firm, partnership or corporation of which [the individual] is a member." The Court of Appeals held in *People v. Avant*, 33 N.Y.2d 265, 270-71 (1973) that this statute violated the constitutional "privilege against self-incrimination," noting that while "[t]he State may compel a[] person [holding] a public trust to account for [their] activities and terminate [employment if the person] refuses … testimony compelled … under [the] threat of loss of public employment, may not be used as a basis for subsequent prosecution."

Given the nearly identical language of the statutes, a similar argument would likely succeed if State Finance Law § 139-b(1) were to be challenged. A word of warning, however: Avant does not stand for the proposition that the State may not disqualify State contractors or bidders for their non-compliance with an investigation into their conduct. On the contrary, it specifically authorizes the State to compel a contractor "to account for his activities and … terminate his [employment] if he refuses." Avant, 33 N.Y.2d at 271. However, the State may not require that the employee waive immunity with respect to self-incrimination in order to remain eligible for employment.

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