



September 13, 2021

The Honorable Kathy Hochul
 Governor of New York State
 Executive Chamber
 Albany, New York 12224

Dear Governor Hochul:

On January 15, 2019, Governor Cuomo issued Executive Order 192, radically upending the current system of reviewing vendor responsibility, placing contractors and all vendors doing business with the State at overwhelming and unmanageable new risk. Executive Order 192 applies to any finding of “non-responsibility” by an agency to all agencies, public authorities and “state funded entities” (i.e., local governments, school districts and potentially private entities receiving state funding). This essentially amounts to a back-door debarment.

Previously, vendor responsibility was determined on a contract-by-contract basis. Effectively, this Executive Order debars contractors and other companies doing business with the State of New York found “non-responsible” from being awarded public contracts for a period of at least five years, with relief only through litigation or issuance of a “waiver” from the Counsel to the Governor through a completely opaque and questionable process that denies contractors’ due process. Indeed, to the extent there is a process, the contractor or vendor is not part of it.

The trouble is, “non-responsibility” is wholly subjective and has been weaponized by the prior Administration to mean “do what we say, when we say it, without questions,” or be threatened with a finding of non-responsibility.

Under Executive Order 192, the Office of General Services (OGS) is directed to post a list of the non-responsibility and debarment determinations on the OGS public website. Such names of debarred contractors, vendors, or grantees shall remain posted on the OGS website for the period designated in the relevant statutory provision allowing for such debarment. In all other cases, determinations shall remain on the list until OGS receives notice of a finding by a court that the non-responsibility or debarment determination was in error or until such time as a waiver has been approved by the Counsel to the Governor.

All State Entities and their state-approved directors must rely on the determination made by other State Entities in ascertaining the responsibility, ineligibility, or debarment of a contractor, vendor, or grantee in current and future procurements. Any commissioner, agency or department head, or member of a board of directors of a State Entity who selects, absent an approved waiver, a contractor, vendor, or grantee, who has been deemed non-responsible, debarred, or otherwise ineligible shall be breaching their duty as a public officer and/or fiduciary duty as a board member—thus forfeiting their pension.

Executive Order 192 is selectively being applied retroactively, with companies who have had the Executive Order used against them for agency determinations that pre-dated the issuance of the Executive Order. At least one of them has faced the loss of project awards—even though they have been granted a “waiver” by the Counsel to the Governor for other contract awards.

Companies have been threatened with Executive Order 192 “non-responsibility” in the course of the regular back and forth with public owners in the course of a project or performance of a contract. Furthermore, it represents a total denial of due process—and the waiver “process,” as it exists, is curious at best. Why should the Counsel to the Governor be the sole arbiter of vendor responsibility on myriad individual contracts under an Executive Order 192 appeal? The potential for conflict, or at least the appearance of a conflict, for the Executive Chamber is substantial.

Executive Order 192 should be rescinded and the existing vendor responsibility protocols that have served the State of New York well should be relied upon and, where appropriate, improved. At a minimum, receipt of a waiver under the Executive Order 192 “process” should result in removal from the required OGS public posting, as a firm’s continued presence on this list even after getting the “all clear” from the Governor’s Counsel does ongoing, unwarranted harm both to their reputation as well as to their commercial viability. And, that process should include participation by the affected company.

Thank you in advance for your consideration.

The Honorable Kathy Hochul

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Very truly yours,

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Building Industry Employers of NYS

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CC: The Honorable Karen Persichilli Keogh, Secretary to the Governor
The Honorable Elizabeth Fine, Esq., Counsel to the Governor