

Guidance for Implementation of Executive Order No. 192: Imposing Continuing Vendor Integrity Requirements in State Contracts

I. Background

The State must conduct business only with responsible entities. New York law and public policy have long required that entities wishing to bid for State contracts be found to be responsible at the time of contract award. In addition, contractors that have been debarred under State law are ineligible to bid on or be awarded a State contract. As part of the vendor responsibility review process, State agencies and authorities are required to determine that contract awardees are not debarred and should be aware of prior findings of non-responsibility. In addition, by Memorandum dated April 3, 2013 (the “2013 Memorandum”), the Secretary to the Governor directed State agencies and authorities to include provisions in State contracts requiring that contractors remain responsible throughout the term of their contracts. These contract provisions also give agencies and authorities: (i) the right to suspend work under the contract if information is discovered that calls into question the responsibility of the contractor and, (ii) the right to terminate the contract if the agency or authority makes a determination that the contractor is not responsible.

While every State agency and authority should already have in place a robust vendor responsibility review process, vendor responsibility reviews are generally conducted on a contract-by-contract basis, and some agencies and authorities may give greater or lesser weight to prior findings of non-responsibility and the facts and circumstances surrounding such findings. In order to ensure that there is a greater uniformity in how these prior findings are evaluated, the Governor has issued Executive Order No. 192 (“EO 192”). This document provides guidance to New York State agencies and authorities on the implementation of EO 192 and responsibilities and duties surrounding compliance.

II. Legal Authority

As noted above, New York law and public policy have long required that contracts be awarded to responsible bidders. Many agencies and authorities have also adopted policies and procedures for conducting vendor responsibility reviews. Pursuant to Executive Law § 6, the Governor is authorized at any time “to examine and investigate the management and affairs of any department, board, bureau or commission of the state.” The “management and affairs” that the Governor may review clearly include the manner in which agencies and authorities conduct their responsibility reviews. Establishing uniform practices for those reviews will ensure that agencies and authorities take full account of debarments and prior findings of non-responsibility in their evaluation of bidders and contractors.

III. Scope

EO 192 applies to all agencies and departments over which the Governor has executive authority and as defined in State Finance Law § 2-a (3) and all public benefit corporations, public authorities, boards, and commissions for which the Governor appoints the Chair, the Chief Executive, or at least 50% of the Board Members and as defined in Public Authorities

Law § 2(1), except the Port Authority of New York and New Jersey (hereinafter referred to as “State Entities”).

As used in this guidance:

The term “contract” means any contract, lease, grant, or equivalent legal instrument.

The term “bidder” means an entity that responds to an invitation for bid, request for proposal, request for application, application for a grant, or other solicitation for a contract or grant with a State Entity.

The term “contractor” means an entity that has been awarded a contract or grant by a State Entity.

The term “vendor” may mean either a bidder or a contractor depending on the context.

IV. Posting of Debarment and Non-Responsibility Determinations

EO 192 requires the Office of General Services (“OGS”) to post a list of debarment and non-responsibility determinations on the OGS public website.

STATUTORY DEBARMENTS

In order to assist OGS, State Entities must use the attached spreadsheet to submit a list of bidders or contractors that the State Entity has debarred. This list should be limited to contractors and bidders that have been debarred by a State Entity pursuant to State law. The field on the spreadsheet labeled “Debarment Statute” has a pulldown menu listing the State laws that permit debarment. There is no need to list bidders or contractors that have been debarred pursuant to Labor Law arts. 8 and 9 or Workers Compensation Law § 141 because OGS has obtained that information from the Department of Labor. Please provide a list of any currently debarred bidders or contractors to OGS by April 30, 2019. If a State Entity debar a bidder or contractor any time thereafter, the State Entity must provide such information to OGS within five days of the determination. Debarred entities shall remain on the list until the debarment period ends in accordance with the relevant law, unless a court of competent jurisdiction determines that the debarment determination was in error. There is no waiver process for bidders that are debarred.

NON-RESPONSIBILITY DETERMINATIONS

State Entities must also use the attached spreadsheet to submit a list of bidders or contractors that the State Entity has found non-responsible. Please provide a list of any currently non-responsible bidders or contractors to OGS by April 30, 2019. If a State Entity finds a bidder or contractor non-responsible any time thereafter, the State Entity must provide such information to OGS within five days of the determination. Consistent with the look-back period on the Vendor Responsibility Questionnaire, non-responsible entities shall remain on the list for five years, unless a court of competent jurisdiction determines that the non-responsibility

determination was in error. However, the State Entity may request a waiver from the Counsel to the Governor, as described in Section VI below.

V. Vendor Responsibility Review

A. *Prior to Contract Award*

EO 192 does not alter the fact that a State Entity must determine that a bidder is responsible prior to contract award, and State Entities should continue to follow their current process for reviewing vendor responsibility. In many cases, this means that the State Entity will require bidders to submit a Vendor Responsibility Questionnaire, either by using a paper form or by using the online VendRep System established by the Office of the State Comptroller (“OSC”).

EO 192 requires a State Entity to check the OGS website at <https://ogs.ny.gov/debarred-and-non-responsible-entities> to determine if the bidder is debarred under State law or is included on the non-responsibility list. If a bidder is debarred, then the State Entity should determine the scope and duration of the debarment. For example, some statutory debarments limit the debarment to contracts for public work only. If the contract to be awarded falls within the scope of the debarment, the State Entity may not award the contract to that bidder until the debarment period has expired. There is no waiver process for State-debarred bidders. State Entities should also bear in mind that pursuant to Labor Law § 220-b(3)(b)(3), any bidder that has been debarred by the federal government may not be awarded a public work contract unless the State Entity determines, after public notice and comment, that there is a compelling reason to allow the bidder to be awarded the relevant public work contract. For the convenience of State Entities, the OGS website provides a link to the federal debarment database.

If the bidder is on the non-responsibility list, the State Entity is precluded by EO 192 from awarding the contract to the bidder unless the State Entity obtains a waiver from the Counsel to the Governor, as described in Section VI below.

If the bidder is not debarred or on the non-responsibility list, the State Entity should complete the review process by carefully examining the Vendor Responsibility Questionnaire and confirming the correctness of the information provided (through the internet and other searches of publicly available information). The State Entity must then complete a Vendor Responsibility Profile, either using OSC’s form AC3273-S or its equivalent. If the review has uncovered any adverse issues, the State Entity must (i) identify those issues, (ii) describe the State Entity’s assessment of those issues and their relevance to the bidder’s responsibility for the specific procurement, and (iii) describe any corrective or mitigating actions taken by the State Entity or the bidder in response to the adverse issues.

If the vendor responsibility review uncovers no adverse issues, or the State Entity determines that the adverse issues are not relevant to the bidder’s responsibility for the relevant procurement or have been addressed through corrective or mitigating actions, the State Entity signs the Vendor Responsibility Profile or its equivalent to show that the bidder

has been found responsible. If the State Entity is unable to find that the bidder is responsible, the State Entity shall observe due process requirements by notifying the bidder and providing the bidder with an opportunity to be heard prior to making a final

determination that the bidder is non-responsible. If the State entity makes a final determination of non-responsibility, the State Entity shall notify the bidder and notify OGS within five days of that determination.

B. *During Contract Performance*

If the contract includes provisions requiring that the contractor remain responsible throughout the term of the contract, and the State Entity discovers adverse information indicating that the contractor may no longer be responsible, then the State Entity shall conduct an investigation as outlined in the 2013 Memorandum. Here again, the State Entity must observe due process requirements by notifying the contractor and providing the contractor with an opportunity to be heard prior to making a final determination that the contractor is non-responsible. If the State Entity makes a final determination of non-responsibility, the State Entity shall notify the contractor and notify OGS within five days of that determination.

VI. Waiver Requests

If a State Entity wishes to award a contract to a bidder that is on the non-responsibility list, the State Entity must submit a waiver request to the office of the Counsel to the Governor (the “Chamber”) using the attached form. Information regarding the identity of the bidder **must not** be disclosed or provided.

The Chamber will, upon review and approval of any proposed conditions, grant a waiver for purposes of award, upon the full satisfaction that any conditions imposed upon the contractor will appropriately ensure ongoing vendor responsibility during the performance of the contract.

VII. Additional Vendor Responsibility Resources

OSC resources: https://www.osc.state.ny.us/vendrep/resources_docreq_agency.htm

Attachments:

Spreadsheet of Debarred and Non-Responsible Entities

Application for Waiver