



- Board of Directors
Engineering and Operations Committee

11/8/2011 Board Meeting

7-2

Subject

Amend Metropolitan Water District Administrative Code to add or revise provisions relating to contractor debarment rules, the procurement of materials, products, or services by a specific brand or trade name and contractor responsibility determinations

Description

As part of its periodic review of the Administrative Code, Metropolitan staff, in consultation with the General Counsel's office, has determined that various provisions of Division VIII, Chapter 1 of the Code involving competitive procurement and contractor non-responsibility determinations should be updated in order to clarify the existing standards and procedures. In addition, staff recommends the adoption of contractor debarment procedures to protect Metropolitan from the financial, legal, and operational consequences of doing business with dishonest, unethical, or otherwise irresponsible contractors. The recommended additions and revisions discussed below are set forth in [Attachment 1](#). [Attachment 2](#) sets forth the sections as they would now appear in the Administrative Code.

Contractor debarment rules - As provided in Section 8141 of its Administrative Code, and as required by law, Metropolitan uses a competitive procurement process to award public works contracts estimated to cost \$25,000 or more. Under the process mandated by the Administrative Code, Metropolitan must issue a public Notice Inviting Bids (NIB) for these public works projects and, upon a finding that the bidder is responsible and its bid is responsive, award the contract to the lowest bidder. This competitive procurement process ensures that all potential contractors have proper notice and that their bids are evaluated in a transparent, objective, and unbiased manner.

While the process for awarding contracts for public works projects promotes fairness and eliminates bias, it is not, by its nature, well-suited to disqualifying unscrupulous contractors. Under Section 8142 of the Administrative Code, the General Manager is empowered to prescribe certain minimum qualification requirements in the NIB; however, the process limits his discretion, and the bases for finding a bidding contractor non-responsible are inflexible. For example, a criminal conviction might serve as an objective basis for disqualification, but a firm's practice of falsifying documents, submitting inflated claims, or gross negligence on prior Metropolitan projects might not.

The proposed additions to the Administrative Code would address this problem by creating a process through which Metropolitan could prohibit contractors found to have engaged in well-identified, disqualifying conduct from bidding on public works projects for up to ten years. A contractor debarment procedure would also eliminate the need for repeated findings of non-responsibility for the same contractor. The purpose of the proposed process for contractor debarment is to protect Metropolitan and its ratepayers from the financial, legal, and operational consequences of doing business with dishonest, unethical, or otherwise irresponsible contractors, and to promote contractor compliance with Metropolitan processes and regulations. The proposed rules are similar to those adopted by numerous public agencies, including certain member agencies, and they provide more than the minimum due process required by law.

The rules provide that, upon the identification of specified contractor violations in Section 8142, the General Manager may initiate a debarment process against a contractor. The bases for debarment include the following:

- (1) A criminal conviction of the contractor in connection with obtaining, attempting to obtain, or performing a public contract or transaction;
- (2) A civil judgment for fraud or the commission of a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or transaction;
- (3) Falsification of any document relating to a bid in response to a Metropolitan solicitation for the procurement of goods and services or a public work contract;
- (4) A pattern or practice by the contractor of submitting false claims, certifications, or statements or fraud in performance or billing;
- (5) A pattern or practice by the contractor of submitting frivolous or overstated contract claims; and
- (6) Willful failure by the contractor to perform in accordance with the terms and conditions of one or more public contracts with Metropolitan.

Upon the contractor's request, the Chair of the Board of Directors would appoint a panel comprised of three board members to adjudicate a debarment hearing. The adjudication process provides the contractor ample time to submit responsive documentation to challenge the alleged basis or bases for debarment and a modified judicial process in which the contractor may submit oral or documentary evidence and cross examine opposing witnesses. The panel would evaluate the evidence and make a recommendation to the Chair of the Board, who would then render a decision. The rules also permit a debarred contractor, any time two years or more after the Board's decision, to seek an early termination of debarment based upon the contractor's corrective actions.

Procurements by brand or trade name - Amendments to the competitive procurement exceptions set forth in Administrative Code Section 8140 are proposed to clarify the circumstances in which the procurement of a material, product, thing or service by a specific brand or trade name is appropriate. The designation in a bid or procurement of an article by a specific brand or trade name may be necessary if the article is patented, copyrighted, or otherwise unique, as provided in existing Section 8140(d). Sole-source procurement may also be required to maintain warranties for existing products, to replace parts for existing equipment or systems, to ensure that existing systems will be compatible with required upgrades and enhancements, and in other circumstances enumerated in the proposed subsection 2 of Section 8140. The proposed amendments require that the General Manager or the General Manager's designee certify that the sole-sourced article will best serve the purpose of Metropolitan and provide the reasons for this conclusion.

Contractor responsibility determinations- Staff recommends making minor revisions to Section 8142 of the Administrative Code in order to clarify the process for making and reviewing contractor responsibility determinations. Section 8142(a)(vii) limits non-responsibility findings by the General Manager to factors that have been set forth in the notice inviting prequalification information. Since there is no legal requirement that a non-responsibility finding be restricted in this manner, staff proposes to eliminate the limitation. Staff also recommends revising Sections 8142(d) and (e) to clarify that contractors may appeal non-responsibility determinations directly to the Board and that the Board may, in its discretion, delegate its authority to review such determinations to either a standing or ad hoc committee of the Board.

Policy

Metropolitan Water District Administrative Code Sections 8100 et seq: Contracts and District Property

California Environmental Quality Act (CEQA)

CEQA determination for Option #1:

The proposed action is not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may

have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

The CEQA determination is: Determine that the proposed action is not subject to CEQA pursuant to Sections 15378(b)(2) and 15061(b)(3) of the State CEQA Guidelines.

CEQA determination for Option #2:

None required

Board Options

Option #1

Adopt the CEQA determination and approve the additions to the Metropolitan Water District of Southern California Contracting Rules (new Administrative Code Sections 8170-8180) and amendments to Administrative Code Sections 8140 and 8142 as set forth in [Attachment 1](#).

Fiscal Impact: None

Business Analysis: Changes are required to protect The Metropolitan Water District of Southern California from financial and legal risks associated with non-responsible contractors that submit bids on multiple projects. Changes clarify when products, materials, things or services can be obtained by a specific brand or trade name.

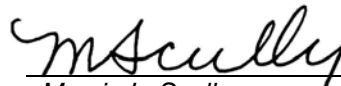
Option #2

Take no action, thereby retaining the current Contracting Rules (Administrative Code Sections 8100 et seq.)

Fiscal Impact: No short-term impact. Metropolitan will continue to disqualify non-responsible bidders on a project-by-project basis and obtain products, materials, things or services by specific brand or trade name using current contracting procedures.

Staff Recommendation

Option #1



 Marcia L. Scully
 Interim General Counsel

10/26/2011

 Date



 Jeffrey Lightlinger
 General Manager

10/27/2011

 Date

Attachment 1 – The Metropolitan Water District Administrative Code, Division VIII, Chapter 1, Article 3 – Award of Contracts and Article 5 - Contractor Debarment (strikeover version)

Attachment 2 – The Metropolitan Water District Administrative Code, Division VIII, Chapter 1, Article 3 – Award of Contracts and Article 5 - Contractor Debarment (proposed final version)

Article 3 AWARD OF CONTRACTS

Sec.

- 8140. Competitive Procurement
- 8141. Competitive Sealed Bidding
- 8142. Prebid Procedures for Competitive Sealed Bidding
- 8143. Specifications and Drawings for Competitive Sealed Bidding
- 8144. Posting and Advertising for Competitive Sealed Bidding
- 8145. Evaluation of Bids
- 8146. Rejection of Bids
- 8147. Execution
- 8148. Delegation of Hearing Power
- 8149. Best Value Procurement

§8140. Competitive Procurement

1. All contracts estimated to cost \$25,000 or more shall be made upon a competitive procurement method of either competitive sealed bidding or best value procurement as provided in this Chapter, except:

(a) Contracts for miscellaneous services, such as telephone, telegraph, light, power and water, where rates or prices are fixed by legislation or by federal, state, county or municipal regulations.

(b) Contracts deemed to be for an emergency under the procedures set forth in §8122(b) and in accordance with Public Contract Code Section 21567.

(c) Contracts executed in lieu of bringing an action in eminent domain, to reimburse an owner for the owner's costs of relocating or protecting facilities affected by District construction projects.

~~(d) If the articles wanted are patented, copyrighted or otherwise unique and not on sale by dealers generally, but only at a fixed and uniform price by their owner or the owner's agents or assigns. When such an article is to be purchased, the General Manager's designee preparing the specifications shall certify that the particular article will best serve the purpose of the District, and reasons for such conclusion shall be set forth.~~

(ed) If competitive procurement could not produce an advantage, or it is impracticable to obtain what is required subject to the competitive procurement provisions because of the unique, exploratory, or experimental nature of the work. Prior to award of contract, the General Manager's designee proposing such contract shall certify that the contract is exempt from competitive procurement and shall set forth in the certificate reasons for that determination.

(fe) If, within six months previous to the date of execution of a proposed contract, advertising or posting for identical articles, or articles of the same general character, has failed to secure responsive proposals and, in the opinion of the General Manager, further advertising or posting will not alter this result.

(~~g~~f) If the purchase is of used equipment which, in the opinion of the General Manager, is satisfactory for the work of the District.

(~~h~~g) If the contract is with any governmental agency.

(~~h~~) Contracts for insurance or for services of a professional, artistic, scientific, or technical character.

(~~i~~) Change orders.

(~~k~~j) Contracts for the handling of District airline ticketing, lodging, automobile rental reservations, and miscellaneous travel-related services.

(~~k~~) Contracts to buy or sell non-firm power on an hour-to-hour basis and other contracts of durations up to one year to furnish power or transmission capability to the District or dispose of power or transmission capability available to the District.

(~~m~~l) Transactions pursuant to contracts secured by other public corporations which, in the opinion of the General Counsel, substantially comply with the competitive procurement requirements of this Chapter.

2. A designated product, material, thing, or service by a specific brand or trade name may be exclusively requested, either as a sole source or for competitive procurement, for any of the following purposes:

(a) If the articles wanted are patented, copyrighted, or otherwise unique.

(b) In order that a field test or experiment may be made to determine the designated product's suitability for future use.

(c) For replacement parts or for equipment where replacement parts or components from another supplier could compromise the safety or reliability of the product, or would void or invalidate a manufacturer's warranty or guarantee, as set forth in the certificate provided below.

(d) For replacement parts or components of equipment, where parts or components obtained from another supplier, if available, will not perform the same function in the equipment as the part or component to be replaced, as set forth in the certificate provided below.

(e) For upgrades, enhancement or additions to hardware or for enhancements or additions to software, where equipment or software from different manufacturers or developers will not be as compatible as equipment or software from the original manufacturer(s) or developer(s), as set forth in the certificate provided below.

When such an article is to be purchased, the General Manager's designee preparing the request for bids or proposals shall certify that the particular article will best serve the purpose of the District, and reasons for such conclusion shall be set forth.

§8142 Prebid Procedures for Competitive Sealed Bidding.

(a) As used in this Section 8142, the term "applicants" includes prospective bidders and lower-tier contractors for contracts to be performed for the District.

(b) The notice inviting bids shall provide for the District's right to reject any and all proposals.

(c) The contracting procedure may provide one or more of the following:

(1) That, the General Manager shall determine the responsibility of applicants in advance of receipt of bids and that bidding shall be restricted to bidders determined by the General Manager to be responsible or that the performance of lower-tier contracts shall be restricted to lower-tier contractors determined by the General Manager to be responsible. In determining responsibility, the General Manager may consider:

(i) An applicant's experience in the design, construction, fabrication, assembly, or manufacture of works or materials similar to what will be called for under the contract documents;

(ii) The experience of others with the applicant in the construction, fabrication, assembly, or operation of similar works or materials designed, constructed, fabricated, or assembled by the applicant;

(iii) The physical plant, facilities, and equipment the applicant proposes to employ in the performance of a proposed contract or lower-tier contract;

(iv) The experience and expertise of an applicant's responsible managing personnel, key staff members, and other employees who would be assigned to the work if the applicant were awarded the contract or lower-tier contract;

(v) As to prospective bidders, the extent to which any part of the contract is to be performed by lower-tier contractors or suppliers;

(vi) The financial capability and resources of the applicant to perform the proposed contract or lower-tier contract; and

(vii) Any other factor bearing on the responsibility of an applicant, ~~which factor shall be set forth in the notice inviting pre-qualification information.~~

(2) That, subject to standards to be set forth in the contract documents, each prospective bidder shall submit a technical proposal to the District and the responsiveness to the specifications of such proposal shall be determined by the General Manager in advance of receipt of bids and bidding shall be restricted to bidders determined by the General Manager to have furnished a technical proposal determined by the General Manager to be responsive.

Provisions implementing this Section 8142(c)(2) shall not be included in the contract documents unless the General Manager finds the following conditions to be true:

(i) There are no sufficiently definite or complete specifications or purchase descriptions available to permit free competition without engineering evaluation and discussion of the technical aspects of the procurement;

(ii) Criteria do exist for evaluating technical proposals, such as design, manufacturing, testing, and performance requirements; and special requirements for operational suitability and ease of maintenance; and

(iii) It is expected that more than one technically qualified source will be available, both initially and after technical evaluation.

(3) That, as a condition to submitting a bid or performing a specified portion of the proposed contract, an applicant shall comply with any and all conditions precedent determined by the General Manager to be necessary to enable the applicant to submit a bid to the District or to any other applicant, as the case may be, which takes into account all factors affecting performance of the work or portion of the work to be performed by the applicant.

(4) The General Manager may determine that an applicant is responsible to perform more than one contract for which notices inviting bids are to be posted and advertised after the date of the General Manager's determination. In the event of such prior determination, the General Manager may, at any time thereafter:

(i) Determine that an applicant is no longer responsible, or

(ii) Advertise and post additional notices requesting pre-qualification information and determine that additional applicants are responsible to perform contracts subsequent to the contract for which pre-qualification information is initially requested.

(d) In the event any applicant is determined by the General Manager not to be responsible or no longer responsible after previously having been determined to be responsible, or a prospective bidder's proposal is determined by the General Manager not to be technically responsive to the contract documents, or the General Manager determines that a bidder or an applicant has failed to comply with a condition precedent, the General Manager shall set forth his or her determination in writing together with his or her reasons therefore and shall serve a copy of the determination and reasons on the bidder or applicant. The bidder or applicant may, within 10 days after service of the General Manager's decision, file with the Board Executive Secretary a notice of protest and demand for hearing by ~~the Executive Committee of~~ the Board.

(e) Any hearing requested pursuant to Section 8142(d) shall be conducted by the Board in accordance with the procedures provided for in Section 8148. The Board may, in its discretion, delegate its authority under Section 8142(d) or Section 8148 to a standing or ad hoc committee of the Board.

(f) In the event a decision on a bidder's or applicant's protest is made less than 20 days before the date set for the opening of proposals, such opening shall be postponed to a date not less than 20 days after the date of decision.

(g) Notwithstanding any provision to the contrary in this Section 8142, there shall be no right to a hearing on a bidder's or applicant's protest when the Executive Committee determines that award of contract is of an emergency.

Division VIII, Chapter 1, Article 5
CONTRACTOR DEBARMENT

Sec.

8170. Definitions

8171. Purpose of Debarment

8172. Bases of Debarment

8173. Initiation of Debarment Actions

8174. Respondent Request for a Hearing

8175. Conduct of the Hearing

8176. Respondent's Failure to Appear at the Hearing

8177. Rights of Parties

8178. Evidence

8179. Decision

8180. Early Termination of Debarment

Section 8170. Definitions.

- (a) "Affiliate" means one of two entities and/or persons that, directly or indirectly, controls the other or has the power to control the other, or a third person or entity that has the power to control both.
- (b) "Civil Judgment" means a decision in a civil action at the trial or appellate level by any court of competent jurisdiction, whether entered by verdict, settlement, stipulation, or any other means that creates a civil liability for the wrongful acts complained of.
- (c) "Contractor" means persons, partnerships, corporations, joint ventures and their constituent parties, and other entities, including such entities' officers, principals, employees, and agents, that contract directly or indirectly (e.g. as a subcontractor or through an Affiliate) with, or are seeking to contract with, the District to provide goods and services for, or on behalf of, the District pursuant to this Chapter. Contractor does not include persons, partnerships, corporations, joint ventures, or other entities contracting with the District to provide professional and technical services pursuant to this Chapter.
- (d) "Debarment" means an exclusion from bidding in response to a District solicitation for the procurement of goods and services, from being awarded a public work contract pursuant to this Chapter, or from working on a public work contract awarded pursuant to this Chapter.
- (e) "Debarring Official" means the Chair of the Board of Directors of the District, who is responsible for establishing debarment proceedings and making final determinations with respect to debarment actions.
- (f) "District" means the Metropolitan Water District of Southern California, acting through its Board of Directors or through any officer with powers delegated by the Board of Directors. "Executive Review Panel" means a three-member panel consisting of present members of the Board of Directors designated by the Debarring Official to preside over contractor debarment hearings. Members of the panel shall not have been involved in the investigation of the grounds for debarment or have a financial interest in the matters giving rise to the debarment action or a financial relationship with the Respondent.
- (g) "Ex Parte Communication" means any communication with a decision-maker, whether direct or indirect, oral or written, concerning the merits of a pending proceeding which is made by one party in the absence of the other party.

- (h) "Hearing Officer" means a member of the Executive Review Panel designated by the Debarring Official to preside over the debarment proceedings.
- (i) "Initiating Official" means the General Manager, or his/her designee, who is responsible for initiating and prosecuting debarment actions. "Preponderance of the Evidence" means evidence which is of greater weight or more convincing than the evidence offered against it.
- (j) "Respondent" means any Contractor that has been served a written notice of proposed debarment pursuant to these regulations.

Section 8171. Purpose of Debarment.

The purpose of debarment from contracting with the District is two-fold: to protect the District and its rate-payers from the financial, legal, and operational consequences of doing business with dishonest, unethical, or otherwise irresponsible contractors and to ensure Contractor compliance with District regulations and generally applicable law. The District shall have the authority to debar a Contractor through the procedures described in this Article.

Section 8172. Bases for Debarment.

The District may debar a Contractor upon a finding of non-responsibility based on one or more of the following:

- (a) A criminal conviction of the Contractor in connection with obtaining, attempting to obtain, or performing a public contract or transaction;
- (b) A civil judgment involving fraud, the commission of a criminal offense, or a violation of the False Claims Act (California Government Code §§ 12650 et seq.), unfair competition laws, contractor licensing laws, or subcontractor listing laws, in connection with obtaining, attempting to obtain, or performing a public contract or transaction;
- (c) A violation by the Contractor of state or federal regulations pertaining to any aspect of the performance of a public contract or transaction resulting in a threat to the health or safety of the contractor's employees, any other persons involved with the contract or transaction, or the general public;
- (d) A violation by the Contractor of state or federal antitrust statutes or of any law, regulation, or agreement relating to conflict of interest, including but not limited to price fixing, bid rigging, or bid collusion, with respect to government-funded procurement.
- (e) Noncompliance by the Contractor with state or federal laws or regulations pertaining to labor and employment standards, including those involving workplace safety and prevailing wages;
- (f) Falsification of any document relating to a bid in response to a District solicitation for the procurement of goods and services or a public work contract entered into pursuant to this Chapter;
- (g) Concealment, withholding, and/or destruction by the Contractor of records it is required by law or contract to maintain;
- (h) A pattern or practice by the Contractor of false claims, certifications, or statements or fraud in performance or billing;
- (i) A pattern or practice by the Contractor of submitting frivolous or overstated contract claims;
- (j) A pattern or practice by the Contractor of seeking or knowingly accepting non-public information relating to a solicitation in advance of the District's public disclosure of the information, in violation of the terms of that solicitation and in an attempt to gain a competitive advantage in the District's solicitation process;
- (k) Willful failure by the Contractor to perform in accordance with the terms and conditions of one or more public contracts with the District;
- (l) Gross negligence by the Contractor in its performance under one or more public contracts with the District; or

(m) Debarment of the Contractor by any other governmental agency.

Section 8173. Initiation of Debarment Actions.

The Initiating Official shall initiate a debarment proceeding by serving upon the Respondent a written notice of proposed debarment by certified mail or personal service. The notice shall include the following:

- (a) A statement that debarment is being considered;
- (b) A listing of the bases for the proposed debarment, a detailed discussion of the facts underlying each basis, and documentary evidence supporting those facts;
- (c) The proposed period of debarment and the proposed effective date;
- (d) A statement regarding whether, upon good cause shown, the Respondent shall be temporarily excluded from bidding in response to District solicitations for the procurement of goods and services, pending the outcome of the debarment action;
- (e) A statement that the debarment will not become effective until after a hearing if such hearing is requested within thirty (30) days by the Respondent following receipt of the notice; and
- (f) A statement that, if no hearing is requested within thirty (30) days following receipt of the notice, an Executive Review Panel shall render a recommended decision to the Debarring Official based on the submissions of the Initiating Officer and the Contractor.

Section 8174. Respondent Request for a Hearing.

- (a) The Respondent may file a written response and, if desired, request a hearing before an Executive Review Panel. The written response shall be served within 30 days following receipt of a notice of proposed debarment, and shall include a concise statement admitting, denying, or explaining each of the allegations set forth in the notice. The Respondent may also include copies of any supporting documentary evidence pertinent to the proposed debarment and may also include a request for discovery that concisely identifies information sought from the District. For good cause shown, the Debarring Official shall permit limited discovery within prescribed time limits and /or a supplemental response to the Notice of Proposed Debarment. The written response shall be addressed to the Debarring Official, delivered by certified mail or personal service to the Chair of the Board of Directors, Metropolitan Water District of Southern California, Box 54143, Los Angeles, California 90054-0153. A copy of the written response shall be served upon the Initiating Official by certified mail or personal service at the address indicated on the Initiating Official's Notice of Proposed Debarment.
- (b) Not more than 15 days following service of the Respondent's written response, the Initiating Official may submit to the Hearing Officer and the Respondent a reply to the materials submitted by the Respondent in its response to the Notice of Proposed Debarment, and may request a hearing before an Executive Review Panel.
- (c) Within 15 days of a timely request seeking a hearing, the Debarring Official shall issue an order granting the request, appointing an Executive Review Panel and a hearing officer, establishing the date, time and location of the hearing, and stating that the hearing will proceed and debarment may result even if the Respondent does not appear. The hearing date shall be no less than 30 days and no more than 60 days from the date of the issuance of the order granting the request for a hearing.
- (d) If the Respondent does not serve a timely written response to the Notice of Proposed Debarment, the Executive Review Panel shall render a recommended decision to the Debarring Official based upon the submission of the Initiating Officer within 45 days following service of the Notice of Proposed Debarment on the Contractor. If the Respondent serves a timely written response to the Notice of Proposed Debarment, the Executive Review Panel shall render a recommended decision to the Debarring Official within 30 days after receipt of all timely written submissions, or within 30 days after completion of the scheduled hearing, whichever last occurs.

Section 8175. Conduct of the Hearing.

The Hearing Officer shall have authority to:

- (a) Regulate the course of the hearing and the conduct of the parties;
- (b) Administer oaths and affirmations;
- (c) Receive evidence and examine witnesses;
- (d) Rule upon offers of proof, admissibility of evidence, and matters of procedure;
- (e) Maintain discipline and decorum and exclude from the hearing any person acting in an indecorous manner;
- (f) Render, on behalf of the Executive Review Panel, a final recommended decision to the Debarring Official; and
- (g) Take any further action as may be necessary to properly preside over the debarment proceeding and render a final recommended decision.

Section 8176. Rights of Parties.

All parties to the proceeding shall have the right to do any or all of the following:

- (a) Present evidence, orally or through the submission of documents, relevant to the issues;
- (b) Cross examine opposing witnesses on any matter relevant to the issues;
- (c) Impeach any witness irrespective of which party first called the witness to testify; and
- (d) Rebut evidence submitted by the other party.

Section 8177. Evidence.

- (a) Oral testimony shall be taken only on oath or affirmation.
- (b) Evidence presented at the hearing shall be limited to the bases for debarment stated in the Initiating Official's notice of proposed debarment.
- (c) The parties shall exchange, and provide copies to the Executive Review Panel, all exhibits each party intends to offer at the hearing (other than exhibits exclusively used for impeachment or rebuttal) and a list of all witnesses to be called at least five (5) days in advance of the hearing.
- (d) Unless otherwise ordered by the Hearing Officer, parties must provide the Hearing Officer four (4) copies of all documentary evidence presented at the hearing.
- (e) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence, including hearsay, shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. The rules of privilege shall be effective to the same extent that they are recognized in civil actions, and irrelevant and unduly repetitious evidence shall be excluded.
- (f) Ex parte communications with the Executive Review Panel and the Debarring Official are prohibited throughout the debarment proceedings.

Section 8178. Decision.

- (a) The Executive Review Panel shall review all evidence submitted in the proceeding and determine, by majority vote, whether debarment of the Respondent is appropriate and the period of such debarment. The period of debarment shall not exceed ten (10) years.
- (b) The standard of proof to be employed by the Executive Review Panel is Preponderance of the Evidence. The Initiating Official has the burden of proving that one or more bases for debarment exist. If the alleged

basis for debarment is a criminal conviction or a Civil Judgment under Section 8172(a) or (b), the Initiating Official's burden will be met by submitting evidence of the criminal conviction or civil judgment.

- (c) The Hearing Officer shall, on behalf of the Executive Review Panel and within fifteen (15) days after the conclusion of the hearing, submit a final recommended decision to Debarring Official. Such decision shall include a summary of the evidence, a determination with respect to debarment, and the conclusions underlying the decision.
- (d) Within thirty (30) days of receiving the final recommended decision of the Executive Review Panel, the Debarring Official shall review the recommendation and affirm, reject, or modify it. Debarment may only be imposed upon a finding that a (1) cause for debarment exists and (2) debarment is necessary to protect the District's interests. The Debarring Official's decision shall be in writing, signed by the Debarring Official, and transmitted by to the Respondent by certified mail.
- (e) The period of debarment shall be based upon (1) the actual or potential harm that resulted or may result from the Contractor's actions or inactions, (2) the frequency, number, and duration of the incidents giving rise to the debarment, and (3) whether the Contractor's conduct involve gross negligence, willful misconduct, or a reckless disregard for the consequences of that conduct.

Section 8179. Early Termination of Debarment

Anytime after two (2) years from the date a Contractor has been debarred from doing business with the District, the Contractor may request to be removed from the list of debarred contractors. The request to terminate debarment must be submitted to the Debarring Official and must detail corrective actions the Contractor has taken to address the conduct leading to its debarment. Evidence of these corrective actions must be submitted with the request and must establish that the corrective actions taken by the Contractor has adequately remedied the problems leading to the debarment and that the Contractor has, since its debarment, satisfactorily performed for other entities the same type of services for which it was originally debarred. Upon receipt of the request to terminate debarment, the Debarring Official shall appoint a three-member panel, consisting of present members of the Board of Directors, to review the request and determine by majority vote if a termination of the debarment is in the best interests of the District. The Debarring Official shall provide the Contractor with written notice of the decision of the panel within sixty (60) days of the receipt of the request to terminate debarment.

Article 3
AWARD OF CONTRACTS

Sec.

- 8140. Competitive Procurement
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(b) Contracts deemed to be for an emergency under the procedures set forth in §8122(b) and in accordance with Public Contract Code Section 21567.

(c) Contracts executed in lieu of bringing an action in eminent domain, to reimburse an owner for the owner's costs of relocating or protecting facilities affected by District construction projects.

(d) If competitive procurement could not produce an advantage, or it is impracticable to obtain what is required subject to the competitive procurement provisions because of the unique, exploratory, or experimental nature of the work. Prior to award of contract, the General Manager's designee proposing such contract shall certify that the contract is exempt from competitive procurement and shall set forth in the certificate reasons for that determination.

(e) If, within six months previous to the date of execution of a proposed contract, advertising or posting for identical articles, or articles of the same general character, has failed to secure responsive proposals and, in the opinion of the General Manager, further advertising or posting will not alter this result.

(f) If the purchase is of used equipment which, in the opinion of the General Manager, is satisfactory for the work of the District.

- (g) If the contract is with any governmental agency.
 - (h) Contracts for insurance or for services of a professional, artistic, scientific, or technical character.
 - (i) Change orders.
 - (j) Contracts for the handling of District airline ticketing, lodging, automobile rental reservations, and miscellaneous travel-related services.
 - (k) Contracts to buy or sell non-firm power on an hour-to- hour basis and other contracts of durations up to one year to furnish power or transmission capability to the District or dispose of power or transmission capability available to the District.
 - (l) Transactions pursuant to contracts secured by other public corporations which, in the opinion of the General Counsel, substantially comply with the competitive procurement requirements of this Chapter.
2. A designated product, material, thing, or service by a specific brand or trade name may be exclusively requested, either as a sole source or for competitive procurement, for any of the following purposes:
- (a) If the articles wanted are patented, copyrighted, or otherwise unique.
 - (b) In order that a field test or experiment may be made to determine the designated product's suitability for future use.
 - (c) For replacement parts or for equipment where replacement parts or components from another supplier could compromise the safety or reliability of the product, or would void or invalidate a manufacturer's warranty or guarantee, as set forth in the certificate provided below.
 - (d) For replacement parts or components of equipment, where parts or components obtained from another supplier, if available, will not perform the same function in the equipment as the part or component to be replaced, as set forth in the certificate provided below.
 - (e) For upgrades, enhancement or additions to hardware or for enhancements or additions to software, where equipment or software from different manufacturers or developers will not be as compatible as equipment or software from the original manufacturer(s) or developer(s), as set forth in the certificate provided below.

When such an article is to be purchased, the General Manager's designee preparing the request for bids or proposals shall certify that the particular article will best serve the purpose of the District, and reasons for such conclusion shall be set forth.

§8142 Prebid Procedures for Competitive Sealed Bidding.

(a) As used in this Section 8142, the term "applicants" includes prospective bidders and lower-tier contractors for contracts to be performed for the District.

(b) The notice inviting bids shall provide for the District's right to reject any and all proposals.

(c) The contracting procedure may provide one or more of the following:

(1) That, the General Manager shall determine the responsibility of applicants in advance of receipt of bids and that bidding shall be restricted to bidders determined by the General Manager to be responsible or that the performance of lower-tier contracts shall be restricted to lower-tier contractors determined by the General Manager to be responsible. In determining responsibility, the General Manager may consider:

(i) An applicant's experience in the design, construction, fabrication, assembly, or manufacture of works or materials similar to what will be called for under the contract documents;

(ii) The experience of others with the applicant in the construction, fabrication, assembly, or operation of similar works or materials designed, constructed, fabricated, or assembled by the applicant;

(iii) The physical plant, facilities, and equipment the applicant proposes to employ in the performance of a proposed contract or lower-tier contract;

(iv) The experience and expertise of an applicant's responsible managing personnel, key staff members, and other employees who would be assigned to the work if the applicant were awarded the contract or lower-tier contract;

(v) As to prospective bidders, the extent to which any part of the contract is to be performed by lower-tier contractors or suppliers;

(vi) The financial capability and resources of the applicant to perform the proposed contract or lower-tier contract; and

(vii) Any other factor bearing on the responsibility of an applicant.

(2) That, subject to standards to be set forth in the contract documents, each prospective bidder shall submit a technical proposal to the District and the responsiveness to the specifications of such proposal shall be determined by the General Manager in advance of receipt of bids and bidding shall be restricted to bidders determined by the General Manager to have furnished a technical proposal determined by the General Manager to be responsive.

Provisions implementing this Section 8142(c)(2) shall not be included in the contract documents unless the General Manager finds the following conditions to be true:

(i) There are no sufficiently definite or complete specifications or purchase descriptions available to permit free competition without engineering evaluation and discussion of the technical aspects of the procurement;

(ii) Criteria do exist for evaluating technical proposals, such as design, manufacturing, testing, and performance requirements; and special requirements for operational suitability and ease of maintenance; and

(iii) It is expected that more than one technically qualified source will be available, both initially and after technical evaluation.

(3) That, as a condition to submitting a bid or performing a specified portion of the proposed contract, an applicant shall comply with any and all conditions precedent determined by the General Manager to be necessary to enable the applicant to submit a bid to the District or to any other applicant, as the case may be, which takes into account all factors affecting performance of the work or portion of the work to be performed by the applicant.

(4) The General Manager may determine that an applicant is responsible to perform more than one contract for which notices inviting bids are to be posted and advertised after the date of the General Manager's determination. In the event of such prior determination, the General Manager may, at any time thereafter:

(i) Determine that an applicant is no longer responsible, or

(ii) Advertise and post additional notices requesting pre-qualification information and determine that additional applicants are responsible to perform contracts subsequent to the contract for which pre-qualification information is initially requested.

(d) In the event any applicant is determined by the General Manager not to be responsible or no longer responsible after previously having been determined to be responsible, or a prospective bidder's proposal is determined by the General Manager not to be technically responsive to the contract documents, or the General Manager determines that a bidder or an applicant has failed to comply with a condition precedent, the General Manager shall set forth his or her determination in writing together with his or her reasons therefore and shall serve a copy of the determination and reasons on the bidder or applicant. The bidder or applicant may, within 10 days after service of the General Manager's decision, file with the Board Executive Secretary a notice of protest and demand for hearing by the Board.

(e) Any hearing requested pursuant to Section 8142(d) shall be conducted by the Board in accordance with the procedures provided for in Section 8148. The Board may, in its discretion,

delegate its authority under Section 8142(d) or Section 8148 to a standing or ad hoc committee of the Board.

(f) In the event a decision on a bidder's or applicant's protest is made less than 20 days before the date set for the opening of proposals, such opening shall be postponed to a date not less than 20 days after the date of decision.

(g) Notwithstanding any provision to the contrary in this Section 8142, there shall be no right to a hearing on a bidder's or applicant's protest when the Executive Committee determines that award of contract is of an emergency.

Division VIII, Chapter 1, Article 5**CONTRACTOR DEBARMENT**

Sec.

- 8170. Definitions
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Section 8170. Definitions.

- (a) "Affiliate" means one of two entities and/or persons that, directly or indirectly, controls the other or has the power to control the other, or a third person or entity that has the power to control both.
- (b) "Civil Judgment" means a decision in a civil action at the trial or appellate level by any court of competent jurisdiction, whether entered by verdict, settlement, stipulation, or any other means that creates a civil liability for the wrongful acts complained of.
- (c) "Contractor" means persons, partnerships, corporations, joint ventures and their constituent parties, and other entities, including such entities' officers, principals, employees, and agents, that contract directly or indirectly (e.g. as a subcontractor or through an Affiliate) with, or are seeking to contract with, the District to provide goods and services for, or on behalf of, the District pursuant to this Chapter. Contractor does not include persons, partnerships, corporations, joint ventures, or other entities contracting with the District to provide professional and technical services pursuant to this Chapter.
- (d) "Debarment" means an exclusion from bidding in response to a District solicitation for the procurement of goods and services, from being awarded a public work contract pursuant to this Chapter, or from working on a public work contract awarded pursuant to this Chapter.
- (e) "Debarring Official" means the Chair of the Board of Directors of the District, who is responsible for establishing debarment proceedings and making final determinations with respect to debarment actions.
- (f) "District" means the Metropolitan Water District of Southern California, acting through its Board of Directors or through any officer with powers delegated by the Board of Directors. "Executive Review Panel" means a three-member panel consisting of present members of the Board of Directors designated by the Debarring Official to preside over contractor debarment hearings. Members of the panel shall not have been involved in the investigation of the grounds for

debarment or have a financial interest in the matters giving rise to the debarment action or a financial relationship with the Respondent.

- (g) “Ex Parte Communication” means any communication with a decision-maker, whether direct or indirect, oral or written, concerning the merits of a pending proceeding which is made by one party in the absence of the other party.
- (h) “Hearing Officer” means a member of the Executive Review Panel designated by the Debarring Official to preside over the debarment proceedings.
- (i) “Initiating Official” means the General Manager, or his/her designee, who is responsible for initiating and prosecuting debarment actions. “Preponderance of the Evidence” means evidence which is of greater weight or more convincing than the evidence offered against it.
- (j) “Respondent” means any Contractor that has been served a written notice of proposed debarment pursuant to these regulations.

Section 8171. Purpose of Debarment.

The purpose of debarment from contracting with the District is two-fold: to protect the District and its rate-payers from the financial, legal, and operational consequences of doing business with dishonest, unethical, or otherwise irresponsible contractors and to ensure Contractor compliance with District regulations and generally applicable law. The District shall have the authority to debar a Contractor through the procedures described in this Article.

Section 8172. Bases for Debarment.

The District may debar a Contractor upon a finding of non-responsibility based on one or more of the following:

- (a) A criminal conviction of the Contractor in connection with obtaining, attempting to obtain, or performing a public contract or transaction;
- (b) A civil judgment involving fraud, the commission of a criminal offense, or a violation of the False Claims Act (California Government Code §§ 12650 et seq.), unfair competition laws, contractor licensing laws, or subcontractor listing laws, in connection with obtaining, attempting to obtain, or performing a public contract or transaction;
- (c) A violation by the Contractor of state or federal regulations pertaining to any aspect of the performance of a public contract or transaction resulting in a threat to the health or safety of the contractor’s employees, any other persons involved with the contract or transaction, or the general public;
- (d) A violation by the Contractor of state or federal antitrust statutes or of any law, regulation, or agreement relating to conflict of interest, including but not limited to price fixing, bid rigging, or bid collusion, with respect to government-funded procurement.
- (e) Noncompliance by the Contractor with state or federal laws or regulations pertaining to labor and employment standards, including those involving workplace safety and prevailing wages;
- (f) Falsification of any document relating to a bid in response to a District solicitation for the procurement of goods and services or a public work contract entered into pursuant to this Chapter;
- (g) Concealment, withholding, and/or destruction by the Contractor of records it is required by law or contract to maintain;

- (h) A pattern or practice by the Contractor of false claims, certifications, or statements or fraud in performance or billing;
- (i) A pattern or practice by the Contractor of submitting frivolous or overstated contract claims;
- (j) A pattern or practice by the Contractor of seeking or knowingly accepting non-public information relating to a solicitation in advance of the District's public disclosure of the information, in violation of the terms of that solicitation and in an attempt to gain a competitive advantage in the District's solicitation process;
- (k) Willful failure by the Contractor to perform in accordance with the terms and conditions of one or more public contracts with the District;
- (l) Gross negligence by the Contractor in its performance under one or more public contracts with the District; or
- (m) Debarment of the Contractor by any other governmental agency.

Section 8173. Initiation of Debarment Actions.

The Initiating Official shall initiate a debarment proceeding by serving upon the Respondent a written notice of proposed debarment by certified mail or personal service. The notice shall include the following:

- (a) A statement that debarment is being considered;
- (b) A listing of the bases for the proposed debarment, a detailed discussion of the facts underlying each basis, and documentary evidence supporting those facts;
- (c) The proposed period of debarment and the proposed effective date;
- (d) A statement regarding whether, upon good cause shown, the Respondent shall be temporarily excluded from bidding in response to District solicitations for the procurement of goods and services, pending the outcome of the debarment action;
- (e) A statement that the debarment will not become effective until after a hearing if such hearing is requested within thirty (30) days by the Respondent following receipt of the notice; and
- (f) A statement that, if no hearing is requested within thirty (30) days following receipt of the notice, an Executive Review Panel shall render a recommended decision to the Debarring Official based on the submissions of the Initiating Officer and the Contractor.

Section 8174. Respondent Request for a Hearing.

- (a) The Respondent may file a written response and, if desired, request a hearing before an Executive Review Panel. The written response shall be served within 30 days following receipt of a notice of proposed debarment, and shall include a concise statement admitting, denying, or explaining each of the allegations set forth in the notice. The Respondent may also include copies of any supporting documentary evidence pertinent to the proposed debarment and may also include a request for discovery that concisely identifies information sought from the District. For good cause shown, the Debarring Official shall permit limited discovery within prescribed time limits and /or a supplemental response to the Notice of Proposed Debarment. The written response shall be addressed to the Debarring Official, delivered by certified mail or personal service to the Chair of the Board of Directors, Metropolitan Water District of Southern California,

Box 54143, Los Angeles, California 90054-0153. A copy of the written response shall be served upon the Initiating Official by certified mail or personal service at the address indicated on the Initiating Official's Notice of Proposed Debarment.

- (b) Not more than 15 days following service of the Respondent's written response, the Initiating Official may submit to the Hearing Officer and the Respondent a reply to the materials submitted by the Respondent in its response to the Notice of Proposed Debarment, and may request a hearing before an Executive Review Panel.
- (c) Within 15 days of a timely request seeking a hearing, the Debarring Official shall issue an order granting the request, appointing an Executive Review Panel and a hearing officer, establishing the date, time and location of the hearing, and stating that the hearing will proceed and debarment may result even if the Respondent does not appear. The hearing date shall be no less than 30 days and no more than 60 days from the date of the issuance of the order granting the request for a hearing.
- (d) If the Respondent does not serve a timely written response to the Notice of Proposed Debarment, the Executive Review Panel shall render a recommended decision to the Debarring Official based upon the submission of the Initiating Officer within 45 days following service of the Notice of Proposed Debarment on the Contractor. If the Respondent serves a timely written response to the Notice of Proposed Debarment, the Executive Review Panel shall render a recommended decision to the Debarring Official within 30 days after receipt of all timely written submissions, or within 30 days after completion of the scheduled hearing, whichever last occurs.

Section 8175. Conduct of the Hearing.

The Hearing Officer shall have authority to:

- (a) Regulate the course of the hearing and the conduct of the parties;
- (b) Administer oaths and affirmations;
- (c) Receive evidence and examine witnesses;
- (d) Rule upon offers of proof, admissibility of evidence, and matters of procedure;
- (e) Maintain discipline and decorum and exclude from the hearing any person acting in an indecorous manner;
- (f) Render, on behalf of the Executive Review Panel, a final recommended decision to the Debarring Official; and
- (g) Take any further action as may be necessary to properly preside over the debarment proceeding and render a final recommended decision.

Section 8176. Rights of Parties.

All parties to the proceeding shall have the right to do any or all of the following:

- (a) Present evidence, orally or through the submission of documents, relevant to the issues;
- (b) Cross examine opposing witnesses on any matter relevant to the issues;
- (c) Impeach any witness irrespective of which party first called the witness to testify; and
- (d) Rebut evidence submitted by the other party.

Section 8177. Evidence.

- (a) Oral testimony shall be taken only on oath or affirmation.
- (b) Evidence presented at the hearing shall be limited to the bases for debarment stated in the Initiating Official's notice of proposed debarment.
- (c) The parties shall exchange, and provide copies to the Executive Review Panel, all exhibits each party intends to offer at the hearing (other than exhibits exclusively used for impeachment or rebuttal) and a list of all witnesses to be called at least five (5) days in advance of the hearing.
- (d) Unless otherwise ordered by the Hearing Officer, parties must provide the Hearing Officer four (4) copies of all documentary evidence presented at the hearing.
- (e) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence, including hearsay, shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. The rules of privilege shall be effective to the same extent that they are recognized in civil actions, and irrelevant and unduly repetitious evidence shall be excluded.
- (f) Ex parte communications with the Executive Review Panel and the Debarring Official are prohibited throughout the debarment proceedings.

Section 8178. Decision.

- (a) The Executive Review Panel shall review all evidence submitted in the proceeding and determine, by majority vote, whether debarment of the Respondent is appropriate and the period of such debarment. The period of debarment shall not exceed ten (10) years.
- (b) The standard of proof to be employed by the Executive Review Panel is Preponderance of the Evidence. The Initiating Official has the burden of proving that one or more bases for debarment exist. If the alleged basis for debarment is a criminal conviction or a Civil Judgment under Section 8172(a) or (b), the Initiating Official's burden will be met by submitting evidence of the criminal conviction or civil judgment.
- (c) The Hearing Officer shall, on behalf of the Executive Review Panel and within fifteen (15) days after the conclusion of the hearing, submit a final recommended decision to Debarring Official. Such decision shall include a summary of the evidence, a determination with respect to debarment, and the conclusions underlying the decision.
- (d) Within thirty (30) days of receiving the final recommended decision of the Executive Review Panel, the Debarring Official shall review the recommendation and affirm, reject, or modify it. Debarment may only be imposed upon a finding that a (1) cause for debarment exists and (2) debarment is necessary to protect the District's interests. The Debarring Official's decision shall be in writing, signed by the Debarring Official, and transmitted by to the Respondent by certified mail.
- (e) The period of debarment shall be based upon (1) the actual or potential harm that resulted or may result from the Contractor's actions or inactions, (2) the frequency, number, and duration of the incidents giving rise to the debarment, and (3) whether the Contractor's

conduct involve gross negligence, willful misconduct, or a reckless disregard for the consequences of that conduct.

Section 8179. Early Termination of Debarment

Anytime after two (2) years from the date a Contractor has been debarred from doing business with the District, the Contractor may request to be removed from the list of debarred contractors. The request to terminate debarment must be submitted to the Debarring Official and must detail corrective actions the Contractor has taken to address the conduct leading to its debarment. Evidence of these corrective actions must be submitted with the request and must establish that the corrective actions taken by the Contractor has adequately remedied the problems leading to the debarment and that the Contractor has, since its debarment, satisfactorily performed for other entities the same type of services for which it was originally debarred. Upon receipt of the request to terminate debarment, the Debarring Official shall appoint a three-member panel, consisting of present members of the Board of Directors, to review the request and determine by majority vote if a termination of the debarment is in the best interests of the District. The Debarring Official shall provide the Contractor with written notice of the decision of the panel within sixty (60) days of the receipt of the request to terminate debarment.