notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

NOTICE OF ADOPTION

Modification of Service Classification No. 13 -- Negotiated Contracts

I.D. No. LPA-09-20-00011-A
Filing Date: 2020-05-26
Effective Date: 2020-05-26

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The Long Island Power Authority adopted modifications to its Tariff for Electric Service to allow Service Classification No. 13 in order to negotiate contracts with sewer districts participating in the Suffolk County Coastal Resiliency Initiative (SCCRI).

Statutory authority: Public Authorities Law, section 1020-f(u) and (z)

Subject: Modification of Service Classification No. 13 -- Negotiated Contracts.

Purpose: To update the Authority's Tariff and authorize a negotiated contract with the Suffolk County Department of Public Works.

Text or summary was published in the March 4, 2020 issue of the Register, I.D. No. LPA-09-20-00011-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Justin Bell, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 719-9886, email: tariffchanges@lipower.org

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

NOTICE OF ADOPTION

Smart Grid Small Generator Interconnection Procedures

I.D. No. LPA-09-20-00012-A
Filing Date: 2020-05-26
Effective Date: 2020-06-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The Long Island Power Authority adopted modifications to PSEG Long Island's Smart Grid Small Generator Interconnection Procedures consistent with recent changes to the New York State Standardized Interconnection Requirements.

Statutory authority: Public Authorities Law, section 1020-f(u) and (z)

Subject: Smart Grid Small Generator Interconnection Procedures.

Purpose: To be consistent with the New York State Standardized Interconnection Requirements.

Text or summary was published in the March 4, 2020 issue of the Register, I.D. No. LPA-09-20-00012-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Justin Bell, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 719-9886, email: tariffchanges@lipower.org

Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A revised regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and job impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

NOTICE OF ADOPTION

Long Island Choice Provisions of the Authority's Tariff

I.D. No. LPA-09-20-00013-A
Filing Date: 2020-05-26
Effective Date: 2020-05-26

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: The Long Island Power Authority adopted modifications to its Tariff for Electric Service to allow Community Choice Aggregation ("CCA") within the Authority's Long Island Choice Program.

Statutory authority: Public Authorities Law, section 1020-f(u) and (z)

Subject: Long Island Choice provisions of the Authority's Tariff.

Purpose: To enable Community Choice Aggregation in LIPA's service territory.

Text or summary was published in the March 4, 2020 issue of the Register, I.D. No. LPA-09-20-00013-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Justin Bell, Long Island Power Authority, 333 Earle Ovington Blvd., Suite 403, Uniondale, NY 11553, (516) 719-9886, email: tariffchanges@lipower.org

Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A revised regulatory impact statement, regulatory flexibility analysis, rural area flexibility analysis and job impact statement is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Metropolitan Transportation Agency

EMERGENCY RULE MAKING

Debarment of Contractors

I.D. No. MTA-23-20-00003-E
Filing No. 359
Filing Date: 2020-05-21
Effective Date: 2020-05-21

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of Part 1004 to Title 21 NYCRR.

Statutory authority: Public Authorities Law, sections 1265(5), 1266(4) and 1279-h

Finding of necessity for emergency rule: Preservation of general welfare.

Specific reasons underlying the finding of necessity: This emergency rule making is necessary to immediately implement the recent amendment to the Public Authorities Law, enacted as part of the 2020 Budget, which added a new Section 1279-h. That new statutory provision, effective immediately on enactment on April 12, 2019, requires the Metropolitan Transportation Authority to establish "pursuant to regulation" a process for debarment of contractors under certain circumstances specified in the statute.

Subject: Debarment of contractors.

Purpose: To comply with Public Authorities Law, section 1279-h, which requires the MTA to establish a debarment process.

Text of emergency rule: A new Part 1004 is added to read as follows:

Section 1004.1 Purpose

(a) This Part establishes rules and regulations governing the debarment of contractors by the Metropolitan Transportation Authority and its subsidiaries and affiliates, as required by Section 1279-h of the Public

Authorities Law, which was enacted on and made effective immediately as of April 12, 2019. Once adopted, it shall apply to all contracts that were in effect on, or entered into after, April 12, 2019.

(b) Nothing in this Part shall preclude or otherwise limit the Authority, as defined below, from assessing the responsibility of any bidder, contractor, subcontractor, or supplier pursuant to its All-Agency Responsibility Guidelines or from prohibiting any bidder, contractor, subcontractor, or supplier found to be not responsible from responding to new and future contract solicitations or from being awarded new and future contracts or subcontracts.

Section 1004.2 Definitions

As used in this Part, the following terms shall have the following meanings unless otherwise specified:

(a) Authority means the Metropolitan Transportation Authority, the Long Island Rail Road Company, the Metro-North Commuter Railroad Company, the Staten Island Rapid Transit Operating Authority, MTA Bus Company, MTA Capital Construction Company, the New York City Transit Authority, the Manhattan and Bronx Surface Transit Operating Authority, or the Triborough Bridge and Tunnel Authority, or any combination thereof.

(b) Contract means an enforceable agreement including a task order entered into by a contractor and the Authority for goods or services entered into after April 12, 2019, in connection with a capital element in an approved capital program plan or a non-capital related agreement, having a value in excess of $25 million. A contract does not include routine inventory purchases or any contract entered into by the Authority with a participant in the Authority's Small Business Mentoring Program.

(c) Contractor means any person, partnership, firm, corporation, or association, including any consultant, supplier or vendor, with whom the Authority has directly entered into a contract, but shall not include the federal government, a state agency, any public authority or public benefit corporation, or any unit of local government.

(d) Debar or debarment means the prohibition of a contractor from responding to any contract solicitation of or entering into any contract with the Authority for five years from ratification of a debarment determination as provided in section 1004.6 of this Part.

(e) Contract Modification means amendments, change orders, additional work orders, or modifications with respect to a contract that are executed in accordance with the terms and conditions of such contract including without limitation extensions of deadlines for excusable delay.

(f) Substantially Complete, unless otherwise defined in the contract at issue, means the contractor's completion of the work as necessary for the Authority's beneficial use of the applicable project or improvements or the Authority's acceptance of those goods or services required to be delivered by a deadline.

(g) Total adjusted time frame means the period that a contract provides for a contractor to substantially complete its obligations under the contract. With respect to a contract that includes both design and/or construction services and operation and /or maintenance services, the total adjusted time frame includes only the time that the contract provides for the contractor to substantially complete the design and/or construction services. With respect to contracts for services or for manufacture or supply of materials, equipment, or rolling stock, any of which must be delivered by a deadline, the total adjusted time frame applies to each period that the contract provides for such delivery. In all cases, the total adjusted time frame shall include any adjustments required by the contract for excusable delays, accelerations, scope increases and reductions, or unforeseen circumstances.

(h) Total adjusted contract value means the original awarded amount of the contract plus or minus the aggregate net amount of all contract modifications.

(i) Unforeseen circumstance means an unexpected event or situation that is not reasonably anticipated by a contractor exercising due diligence given existing knowledge of industry practice.

Section 1004.3 Grounds for Debarment

(a) The board of the Authority may debar a contractor pursuant to section 1004.6 if it approves a recommendation to debar by a hearing panel made pursuant to section 1004.5 and 1004.6, including that the contractor has:

(1)(i) failed to substantially complete all the work within the total adjusted time frame by more than ten percent of the total adjusted time frame, or (ii) failed to progress the work in a manner so that it will be substantially complete within ten percent of the total adjusted time frame and has refused or in the opinion of the Authority is unable to accelerate the work so that it will be substantially complete within ten percent of the total adjusted time frame, and such refusal or failure is an event of default under the contract; or (iii) with respect to contracts for services, or for manufacture or supply of materials, equipment, or rolling stock, as to any such services, materials, equipment or rolling stock that must be delivered by a deadline, materially failed to deliver such services, materials, equipment, or rolling stock by more than ten percent of the total adjusted time frame.

(2) asserted a claim or claims for payment of additional amounts beyond the total adjusted contract value and one or more of such claims are determined in whole or in part to be invalid under the contract's dispute resolution process or if no such process is specified in the contract in a final determination made by the chief engineer or otherwise by the Authority, and together the sum of any such invalid claims exceeds by ten percent or more the total adjusted contract value. An invalid claim is a claim or claims that cannot be supported by the facts or a nonfrivolous argument that it is warranted by the contract or existing law. A claim for payment of additional amounts to a subcontractor that a contractor is contractually obliged to submit to the Authority on behalf of such subcontractor that is determined to be invalid, shall not be deemed to be an invalid claim asserted by the contractor, and shall be deemed an invalid claim submitted by the subcontractor.

(3) The Authority shall initiate a debarment proceeding upon determining that one or more grounds for debarment exist under sections 1004.3(a)(1) or (a)(2), except that (i) if a contractor has made a good faith request for an extension of the total adjusted time frame because of excusable delay or otherwise, which request, if granted by the Authority, would eliminate grounds for debarment under provision (a)(1), the Authority shall defer initiating a debarment proceeding until it has evaluated and determined such request; and (ii) the Authority may defer initiating, or determine not to initiate or pursue, a debarment proceeding for good cause shown, provided that the determination to defer or to not initiate or pursue a debarment proceeding after grounds for debarment have been determined to exist is presented to the Authority's Board for ratification or nullification at the next regularly scheduled meeting thereof. The Authority's Finance Committee shall be notified immediately upon a determination to defer initiating or not initiate or pursue a debarment proceeding, and all such determinations to defer initiating or to not initiate or pursue a debarment proceeding for good cause shown shall be presented to the Authority's Finance Committee for recommendation before submission to the Board. In the event that a determination to defer initiating or to not initiate or pursue a debarment proceeding is rejected by the Board, Authority personnel shall immediately commence a debarment proceeding.

Section 1004.4 Notice of Intent to Debar and Written Response

(a) To commence a debarment proceeding, the Authority shall provide a written notice of intent to debar to the contractor, advising the contractor that it will hold a hearing to make a final determination as to whether a ground for debarment exists. At a minimum, the notice of intent to debar shall:

(1) state the facts upon which the Authority made its preliminary finding that one or both statutory grounds for debarment exists, including the basis for determining as provided in section 1004.3 of this Part that the contractor failed to timely Substantially Complete or the Authority's calculation of costs arising from claims determined to be invalid, and

(2) provide the contractor 30 calendar days after the date of the notice of intent to debar to respond.

(b) A contractor's written response must address each of the factual statements made by the Authority in its notice of intent to debar and state in detail any defenses including but not limited to force majeure.

(c) After submission by the contractor of a written response within the time permitted, or after the failure by the contractor to submit a written response within such time, a debarment hearing will be held, as provided in section 1004.5 of this Part.

(d) Subject to section 1004.1(b) of this Part, a contractor who has received a notice of intent to debar may respond to other contract solicitations issued by the Authority pending the ratification of a debarment determination by the board of the Authority, if any; provided, however, that if the Authority awards such contractor a new contract or contracts after having provided the contractor a notice of intent to debar, and such contractor is later debarred by the Authority pursuant to such notice, the Authority must view such debarment as cause for termination under such new contract or contracts.

Section 1004.5 Debarment Hearing

(a) A debarment hearing shall be conducted within:

(1) 21 calendar days from the Authority's receipt of a contractor's written response to a notice of intent to debar or within such further reasonable time that the authority shall proscribe; or

(2) 14 calendar days after the date the contractor's response was due, if no response is received from the contractor within the deadline, or within such further reasonable time that the authority shall proscribe.

(b) A recording or transcript of the debarment hearing shall be made.

(c) The debarment hearing shall be conducted by a panel of at least two managerial level employees of the MTA designated by majority vote of the Authority's board; provided that no employee who has taken part in the award of or was otherwise directly involved in the contract to such contractor that is the subject of the debarment hearing, or overseen such

contractor's performance on any Authority contract, may serve on a panel considering the debarment of such contractor. The debarment panel also shall include at least one neutral party drawn from the American Arbitration Association and independent of any state agency or authority to be chosen by the board of the Authority.

(d) A contractor shall have the right to appear by and be represented by counsel at the debarment hearing and any hearings in connection with other proceedings conducted pursuant to this Part.

(e) A contractor at the debarment hearing may assert any and all defenses in the debarment proceeding. Such defenses that may be asserted by the contractor include but are not limited to force majeure; unforeseen circumstances; good faith efforts to take remedial, corrective or disciplinary action; a lack of bad faith in connection with the contractor's conduct and other mitigating factors. The contractor may assert excusable delay and such other defenses at a debarment hearing irrespective of whether the Authority has previously ruled on such defenses.

(f) If a contractor fails to appear at a debarment hearing, the panel may proceed with the hearing based on the record before it and reach a determination without providing for any further appearance or submission by the contractor.

Section 1004.6 Debarment Determination and Ratification

(a) After consideration of the defenses raised by the contractor, and after the hearing is completed, the panel shall make a recommendation as to whether all of the facts and circumstances reasonably justify debarment.

(b) The panel's determination shall be by majority vote and set forth in writing. If the debarment determination is that the contractor shall be debarred, the panel shall recommend that the term of the contractor's debarment shall be five years from the date of the ratification of the debarment determination. The panel may, in its discretion, also seek to debar any of the following related entities or individuals: (i) if the panel finds that the contractor was created as a single or limited purpose entity to execute and perform the contract which is the subject of the debarment hearing; or (ii) if the panel finds a material and knowing causal connection between such entity or individual and the ground for the contractor's debarment:(1) the contractor's parent(s), subsidiaries and affiliates; (2) any joint venture (including its individual members) and any other form of partnership (including its individual members) that includes a contractor or a contractor's parent(s), subsidiaries, or affiliates of a contractor; (3) a contractor's directors, officers, principals, managerial employees, and any person or entity with a ten percent or more interest in a contractor; (4) any legal entity controlled, or ten percent or more of which is owned or controlled, by a contractor, or by any director, officer, principal, managerial employee of contractor, or by any person or entity with a 10 percent or greater interest in contractor, including without limitation any new entity created after the date of the notice of intent to debar. If the panel seeks to debar any such related entity or individual, it shall issue a written notice of intent to debar to each such entity or individual and provide each a reasonable opportunity to be heard on the issue of whether they had a material and knowing causal connection to the conduct and circumstances underlying the contractor's debarment.

(c) The panel's determination to debar any contractor and any related entity or individual shall be timely submitted to the board of the Authority for ratification. The board of the Authority shall review such determination and either: (i) ratify the determination or; (ii) remit the determination to the panel for further consideration of facts or circumstances identified in the remission. The facts or circumstances identified in the remission shall be reviewed by the panel who shall then, after reconsideration, make a determination. Such determination shall then be resubmitted to the Authority board for ratification or nullification. Upon initial Authority board ratification of a panel determination, or Authority board ratification or nullification of a panel determination made after reconsideration, such determination shall be deemed final.

(d) Timely and complete compliance with each and all of the requirements of this Part shall be a precondition to any legal challenge that the contractor or any related entity or individual may be permitted to bring arising out of its debarment pursuant to Section 1279-h of the Public Authorities Law.

(e) Pursuant to Executive Order No. 192, the Authority shall notify the New York State Office of General Services of any final debarment determination within five days of the date it is ratified by the board of the Authority.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires August 18, 2020.

Text of rule and any required statements and analyses may be obtained from: Peter Sistrom, Deputy General Counsel, Metropolitan Transportation Authority, 2 Broadway, 4th Floor, New York, NY 10004, (212) 878-7176, email: psistrom@mtahq.org

Regulatory Impact Statement

Statutory Authority:

Section 1266(4) of the Public Authorities Law provides that the Metropolitan Transportation Authority (MTA) may establish rules and regulations as it may deem necessary, convenient, or desirable for the use and operation of any transportation facility and related services operated by the MTA. Section 1279-h of the Public Authorities Law, enacted on April 12, 2019 and effective immediately, directs the MTA to establish pursuant to regulation a debarment process for its contractors.

Legislative Objectives:

The Legislature enacted the new Section 1279-h of the Public Authorities Law as part of the 2020 Budget. It requires the MTA to establish a process that will debar for five years any contractor who either fails to substantially complete the work within the time frame set by the contract, or in any subsequent change order, by more than ten percent of the contract term, or whose disputed work exceeds ten percent or more of the total contract cost where claimed costs are deemed to be invalid pursuant to the contractual dispute resolution process. And the statute requires that the debarment process ensures that contractors have notice and an opportunity to be heard including the opportunity to present as a defense acts such as force majeure. The proposed rule accords with this legislative objective by establishing a process for debarment of contractors.

Needs and Benefits:

The proposed rule is necessary to implement Section 1279-h of the Public Authorities, which expressly requires the MTA to establish a debarment process and specifies the circumstances under which MTA must debar a contractor. Contractors who are significantly late in performing their contractual work or in meeting contractual delivery dates or who assert substantial and unjustified claims for payment should not be allowed to compete to be awarded new contracts.

Costs:

(a) Regulated parties. This proposal does not impose new costs on contractors. It provides for a process for determining whether factual circumstances exist, which the Legislature has determined warrant debarment. The proposed rule establishes a process to ensure that contractors are provided notice and an opportunity to be heard.

(b) Local government. The proposed rule will impose no costs on local governments.

(c) MTA. The MTA will use existing resources including its existing procurement and legal staff to undertake debarments of contractors.

Paperwork:

The proposed rule will require the MTA to develop a notice to inform contractors that they might be debarred.

Local Government Mandates:

The proposed rule does not impose any new programs, services, duties, or responsibilities on local government.

Duplication:

The proposed rule does not duplicate, overlap, or conflict with any State or Federal rule.

Alternatives:

The Legislature has expressly directed the MTA to establish by regulation a debarment process for its contractors, so MTA has not considered not doing so.

Federal Standards:

The proposed rule does not exceed any Federal minimum standards.

Compliance schedule:

There is no compliance schedule imposed by this proposed rule. Once adopted, it will be effective immediately and will apply to contracts entered into after, the effective date of Section 1279-h of the Public Authorities Law, which was April 12, 2019.

Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A regulatory flexibility analysis for small business and local governments, a rural area flexibility analysis, and a job impact statement are not required for this rule making proposal because it will not adversely affect small businesses, local governments, rural areas, or jobs.

This proposed rule making will allow the Metropolitan Transportation Authority to debar a contractor under specified statutorily proscribed circumstances after giving such contractor notice and opportunity to be heard. Due to its narrow focus, this proposed rule will not impose an adverse economic impact or reporting, record keeping, or other compliance requirements on small businesses or local governments in rural or urban areas or on jobs and employment opportunities.