

Honorable Board of Supervisors
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February 18, 2003

The Honorable Board of Supervisors
County of Los Angeles
383 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012

Dear Supervisors:

**DEBARMENT OF MTS ADVANCED CORPORATION
(ALL DISTRICTS AFFECTED) (3 VOTES)**

IT IS RECOMMENDED THAT YOUR BOARD:

1. Adopt the proposed findings, decision, and recommendations of the Contractor Hearing Board to debar MTS Advanced Corporation and its principal owner, Mr. Emir Khan from bidding on, being awarded, and/or performing work on any projects for the County of Los Angeles for a period of four months from the date of your Board's approval.
2. Instruct the Executive Officer, Board of Supervisors, to send notice to Mr. Emir Khan and MTS Advanced Corporation, advising of the debarment action taken by your Board.
3. Instruct the Director of Internal Services to enter this determination to debar MTS Advanced Corporation and Mr. Emir Khan into the Contract Data Base.

PURPOSE/JUSTIFICATION OF RECOMMENDED ACTION

The purpose of the recommended debarment action against the contractor, MTS Advanced Corporation (MTS), and its principal owner Mr. Emir Khan (Khan), is to ensure the County of Los Angeles (County) contracts only with responsible contractors who comply with the terms and conditions of their County contracts, and with any relevant Federal, State, and local laws.

Implementation of Strategic Plan Goals

The recommended actions are consistent with the County's Vision which supports shared values of integrity, professionalism, and accountability, and envisions the County as the premier organization for those working in the public's interest with a pledge to always work to earn the public trust.

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FISCAL IMPACT/FINANCING

Not applicable.

FACTS AND PROVISIONS/LEGAL REQUIREMENTS

The Contractor Non-Responsibility and Debarment Ordinance

The Contractor Non-Responsibility and Debarment Ordinance, County Code Chapter 2.202, provides the County with the authority to terminate contracts and debar contractors when the contractor has violated any term of the contract or committed specified offenses that indicate a lack of honesty, business integrity, or capacity to perform County contracts. In considering debarment, the County may consider the seriousness and extent of the contractor's acts, omissions, patterns, or practices and any relevant mitigating factors.

Contractor Hearing Board (CHB) Responsibilities

County Code Chapter 2.202, the Contractor Non-Responsibility and Debarment Ordinance, established the CHB to provide an independent review of the contracting department's recommendation to debar a contractor. The CHB is chaired by a representative from the Chief Administrative Office (CAO) and includes one representative from the Office of Affirmative Action Compliance (OAAC) and the Departments of Internal Services (ISD) and Public Works (DPW), respectively. The CAO is a nonvoting member except in the event the debarment action is initiated by the OAAC, ISD, or DPW. In such instances, the CAO exercises its vote and the CHB member from the department bringing the debarment action must recuse himself/herself from any participation in the hearing. In this particular debarment hearing, the representative from ISD did not sit on the CHB as the debarment action was initiated against an ISD contractor. Therefore, the CAO representative voted.

MTS Alleged Breach of Contract

ISD requested the CAO to convene the CHB to initiate debarment proceedings against MTS and its principal owner(s) for material breach of the Information Technology Support Services Master Agreement (ITSSMA) between MTS and the County, specifically for subcontracting "time and materials" work orders while representing the subcontractors to be employees of the contractor. The ITSSMA prohibits subcontracting for time and materials work orders and Subparagraph 32 A provides for termination for default when a contractor has violated a provision or has otherwise materially breached the Master Agreement. ISD exercised its right to terminate the ITSSMA, effective August 31, 2002.

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On November 5, 2002, ISD sent a certified letter to Khan, notifying him of their intent to initiate debarment proceedings against the company and its principal owner(s) at a hearing scheduled for December 9, 2002 at 1:00 p.m., in Room 374, of the Kenneth Hahn Hall of Administration (Attachment I). ISD received a request from Ms. Evelyn Jeanette Gruen, attorney for Khan, requesting a continuance of the hearing which was subsequently rescheduled for January 13, 2003 at 1:00 p.m. in Room 374, of the Kenneth Hahn Hall of Administration.

The hearing was conducted and concluded on January 13, 2003. The proceedings were recorded and an audiotape is available upon request, as well as all documents entered into the record as exhibits during the hearing.

- Attachment II is a listing of the exhibits that were entered into the record.
- Attachment III provides copies of Certification of Employee Status forms signed by Khan, for three subcontractors.
- Attachment IV is a listing of CHB members, ISD investigators, participating attorneys and witnesses.

FINDINGS

The documentary and testimonial evidence entered into the record before the CHB demonstrated by the preponderance of evidence that MTS and Khan violated the terms of the contract with the County and committed acts or omissions that demonstrated a lack of business integrity or business honesty sufficient to warrant a debarment recommendation. The CHB also determined that there were mitigating circumstances which influenced its decision to recommend a relatively brief period of debarment, as discussed below.

1. ITSSMA Prohibition of Subcontracting for Time and Materials Work Orders - Breach of Contract

A preponderance of evidence showed that in three instances during the period April 20, 2001 through April 19, 2002, MTS and Khan violated Subparagraph 6.6.2 of the ITSSMA, which specifies:

“CONTRACTOR personnel selected to perform on a “time and materials” work order must be employees of the CONTRACTOR.”

A contractor who uses subcontractors can potentially under bid a competitor who uses its own employees. A business with employees generally has higher costs, e.g., personnel operations, withholding applicable State and Federal income taxes, FICA, unemployment insurance

premiums, and potentially other employee benefits. The prohibition against subcontracting levels the playing field for "time and materials" procurements which are based on the lowest responsible bid.

ISD staff reviewed eight ITSSMA work orders issued to Khan during the audit period and found that in three instances MTS used subcontractors (or independent contractors) and represented these persons as employees of MTS. This is documented by Khan's personal signature on the required "Certification of Employee Status" forms for the three subcontractors (Attachment IV) attesting that:

"1) I am an officer or partner of the CONTRACTOR; 2) The individual(s) named below are employees of this organization; 3) Applicable State and Federal income tax, FICA, unemployment insurance premiums and worker's compensations insurance premiums, in the correct amounts required by State and Federal law will be withheld as appropriate, and paid by CONTRACTOR for the individual(s) named below for the entire time period covered by the attached Work Order."

Furthermore, during the compliance audit in April and May 2002, Khan acknowledged that he used three subcontractors who were independent contractors. For each of these subcontractors, Khan provided copies of their pay checks without pay stubs or mandatory payroll deductions, Federal 1099-Miscellaneous Income forms, billings/invoices to MTS for their work, and MTS Independent Contractor Questionnaires, indicating the type of each subcontractor's independent business. Mr. Khan testified that he did not know that this was wrong. He also testified that he did not believe he gained any competitive advantage from using subcontractors, rather than employees, but could not provide details to support this belief.

Khan testified that the ITSSMA, executed December 27, 2000, was his first County and government contract; his other experience has been in the private sector where there was no prohibition of subcontracting as long as "all the paperwork was in order," that is, Federal W2 or 1099-Miscellaneous forms were on file. He acknowledged that he relied on a Project Manager to manage the ITSSMA and perfunctorily signed documents, without reading them, when presented to him by the Project Manager. Khan further testified that the Project Manager left his employ taking with him all files pertaining to MTS' operations pursuant to the ITSSMA including all copies of the Master Agreement and purging all in-house computer files. No legal action was taken against the former Project Manager because there was no way to prove the theft.

- The CHB noted that signing forms, under penalty of perjury, without reading them was poor business practice and inconsistent with the high standards required of County contractors by the Board of Supervisors.

Khan testified that he assumed the Project Manager duties in December 2001 without having a copy of the Master Agreement and that he was thus unaware of the requirement that candidates for "time and materials" work orders be employees of the contractor and affirmed that he would have corrected the situation had he known. Khan referenced unsuccessful attempts to secure a copy of the ITSSMA from ISD.

- The CHB noted that conducting business without knowing the requirements of the ITSSMA was poor business practice.

Khan testified, and ISD confirmed, that after the audit there was no meeting with him to explain the findings or give him an opportunity to correct the situation. ISD explained that it was their standard practice to take audit findings back to the office for management to review and determine follow-up action. In this case, ISD management determined there had been a material breach of the contract and, thus, no opportunity to cure would be provided to the contractor. Accordingly, ISD sent Khan a notice to terminate the ITSSMA for material breach of the Master Agreement and all work orders effective August 31, 2002.

- The CHB expressed concern that there was no conversation between ISD and Khan to review the findings prior to issuing a termination notice.

Khan's attorney noted that "material breach" is not defined in the ITSSMA and disputed ISD's determination that the three instances of subcontracting amounted to a "material breach." Khan professed no intent to mislead or defraud the County, only a lack of understanding.

- It was noted that under the ITSSMA, any attempt to subcontract without the prior express written consent of the County may be deemed a "material breach." It was also undisputed that MTS entered into subcontracts without the requisite consent of the County. As such, the CHB did not consider it necessary to revisit ISD's determination of "material breach" of the ITSSMA.
- The CHB was unable to conclusively discern Khan's level of intent to mislead or defraud the County, but found the falsification of the Certification of Employee Status forms and his inattention to detail inexcusable and demonstrative of a lack of business integrity.

2. Magnitude and Extent of the Contract Breach

MTS was awarded a total of eight work orders with the County valued at \$892,000. Approximately \$434,000 of this amount was paid to MTS prior to termination of the Master Agreement. The balance was a financial loss to MTS. A preponderance of evidence, including the testimony of Khan, showed that MTS and Khan used subcontractors or independent contractors to perform services on three of the eight work orders and misrepresented the status of these subcontractors as company employees. The three subcontractors worked two weeks, three months, and eight months respectively, before the ITSSMA was terminated.

- The CHB found that the Agreement violations were limited in time and scope and did not demonstrate a continuing practice. Some CHB members indicated that they believed Khan's testimony that he did not know that he was in violation of the ITSSMA by using subcontractors, but this did not excuse Khan's lack of knowledge of the requirements which demonstrates poor business practice, a lack of business integrity, and capacity.
- The CHB found the fact that Khan had no prior contracting experience with the County to be a mitigating circumstance because the County's contracting program requirements are complex and can be confusing. Khan's frank discussion and acknowledgement of his mistakes and his desire to comply with County requirements were also considered by the CHB.

3. Period of debarment

By a vote of two to one, the CHB recommends a debarment period of four months, effective from the date of your Board's approval. The dissenting vote would have recommended "time served" as the period of debarment, that is, the damage to the business and loss of revenue since the Master Agreement was terminated August 31, 2002 as sufficient penalty. The majority vote considered the mitigating circumstances and the penalty already paid by Khan since the ITSSMA was terminated, but also found the acts and omissions of the contractor sufficient to warrant an additional penalty period. The total recommended period of "time served" plus the relatively brief penalty of four months of actual debarment would result in a total "penalty" of nearly ten months during which the contractor could not procure any work from the County.

IMPACT ON CURRENT PROJECTS

The ITSSMA with MTS was terminated effective August 31, 2002. Subparagraph 32.2 of the Agreement provides that:

"County, upon commercially reasonable terms consistent with County procurement policies, may procure goods and/or services equivalent to those so terminated (herein, any and all monetary expenses of doing so are collectively referred to as "Cover Costs"). Contractor shall be liable to County for any and all Cover Costs incurred by County."

ISD advises that the County will invoke this clause in the event any terminated work orders must be rebid and there are Cover Costs associated with the resultant rebids.

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CONCLUSION

The Contractor Non-Responsibility and Debarment process is working as your Board intended to help assure that the County contracts only with responsible contractors who comply with all relevant laws, as well as the terms and conditions of their contracts. The process has also identified potential areas for County contracting program improvements to promote a better understanding of contracting requirements.

Respectfully submitted,

MARTIN K. ZIMMERMAN
Chair, Contractor Hearing Board
Assistant Division Chief, Chief Administrative Office

MKZ:Nf:nl

Attachments (4)

c: David E. Janssen, Chief Administrative Officer
Dennis A. Tafoya, Affirmative Action Compliance Officer
J. Tyler McCauley, Auditor-Controller
Lloyd W. Pellman, County Counsel
Joan Ouderkirk, Director of Internal Services
James A. Noyes, Director of Public Works
Emir Khan, Owner of MTS Advance Corporation
Evelyn J. Gruen, Attorney at Law

EXHIBITS ENTERED INTO THE RECORD OF THE DEBARMENT HEARING OF MTS ADVANCED CORPORATION AND ITS PRINCIPAL OWNER, MR. EMIR KHAN

County of Los Angeles, Internal Services Department:

Debarment Brief, consisting of:

- ❖ Fact Sheet
- ❖ Termination Letter
- ❖ Master Agreement Contract
- ❖ Amendment
- ❖ Audit Summary
- ❖ 23 Exhibits, including work orders at issue; signed Certification of Employee Status forms and Contractor Employee Acknowledgement Confidentiality and Copyright Agreement forms; invoices to MTS from the subcontractors; Federal 1099 - Miscellaneous Income forms for subcontractors; MTS Independent Contractor Questionnaires from each subcontractor documenting ownership of other businesses.
- ❖ Administrative Status Report
- ❖ Miscellaneous Documents, including the notice of the debarment hearing and the on-site monitoring visit

MTS Advanced Corporation:

- ❖ Debarment Hearing Brief prepared for MTS by Evelyn J. Gruen, Attorney at Law, including: Facts and Statement of the Case and Applicable Law
- ❖ Exhibits A and B – providing copies of recommendations from two County staff for two individuals recruited by Khan.

Attachment III

CERTIFICATION OF EMPLOYEE STATUS FORMS SIGNED BY EMIR
KHAN, PRINCIPAL OWNER OF MTS ADVANCED CORPORATION,
CERTIFYING THREE SUBCONTRACTORS TO BE COMPANY EMPLOYEES

**PARTICIPANTS IN THE CONTRACTOR HEARING BOARD DEPARTMENT PROCEEDINGS FOR
MTS ADVANCED CORPORATION**

JANUARY 13, 2003

1:00 P.M.

**374 KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET
LOS ANGELES, CA 90012**

CONTRACTOR HEARING BOARD

MARTIN ZIMMERMAN, CHAIR, ASSISTANT DIVISION CHIEF, CHIEF ADMINISTRATION OFFICE
MARCUS CASTRO, SENIOR DEPUTY, OFFICE OF AFFIRMATIVE ACTION COMPLIANCE
KERRY VOSBURG, SUPERVISING ADMINISTRATIVE ASSISTANT III, CONTRACTING SERVICES,
DEPARTMENT OF PUBLIC WORKS
NANCY TAKADE, LEGAL ADVISOR TO THE CHB, SENIOR DEPUTY COUNTY COUNSEL

INTERNAL SERVICES DEPARTMENT

LINDA M. NOLAN, MANAGER, CONTRACTS COMPLIANCE SECTION
VICKI H. LANE, LEAD CONTRACT PROGRAM MONITOR
SANDRA P. ISSAKHANIAN, CONTRACT PROGRAM MONITOR
VICTORIA MANSOURIAN, COUNSEL FOR THE INTERNAL SERVICES DEPARTMENT,
ASSOCIATE COUNTY COUNSEL

MTS ADVANCED CORPORATION

EMIR KHAN, OWNER, MTS ADVANCED CORPORATION
EVELYN J. GRUEN, ATTORNEY AT LAW