



Board Policy No. 468

Procurement Protest Procedures

ADOPTED: 11/89

RECENT AMENDMENT: 12/11/19

SEE ALSO: 465

SUBJECT CATEGORY: SECTION 400, OPERATIONS

SUBSECTION: PROCUREMENT AND MATERIALS

CONTROL DEPARTMENT: FINANCE, GENERAL COUNSEL

I. PURPOSE

The purpose of this policy is to provide procedures for the submittal and evaluation of protests relating to District procurement actions. This policy applies to all District procurement actions except purchases less than \$10,000 for services and public works and \$2,-500 for goods (Micro Purchases). Protests related to Micro Purchases will not be considered.

Potential bidders/proposers will be advised of the District's protest procedures in its solicitations for bids and requests for proposals. Failure to follow the District's protest procedures maywill result in the rejection of a protest.

II. PERSONS AFFECTED

All District employees involved in the procurement process as well as vendors responding to District issued solicitations.

III. DEFINITIONS

None.

IV. POLICY

A. Types of Protests

1. Protests Based Upon the Content of the Solicitation:

Protests based upon restrictive specifications or alleged improprieties in the bidding procedure or contract specifications, which are apparent or reasonably should be discovered prior to bid opening.

2. Protests Based Upon Grounds Other Than the Content of the Solicitation:

Protests based upon alleged improprieties that are not apparent or which could not reasonably have been discovered prior to bid opening, such as disputes over the staff recommendation for contract award.

B. Standing to Protest

In order to file a valid protest of a contract award, a protester must be an actual bidder, proposer or offeror ~~relative~~ to the specific procurement to which the protest is being filed. A subcontractor does not qualify as an "interested party". ~~in accordance with California Public Contract Code 20217 (f) (2) ("Interested and Affected Party"). Such requirement shall apply to all District procurements and not just those that are governed by the California Public Contract Code.~~

C. No Stay of Procurement Action During a Protest

Nothing in this Policy ~~will~~shall be deemed to prevent the District from proceeding with the subject procurement while a protest is pending.

D. Timeliness of Protests

In order to be considered timely, a protest ~~of a procurement action~~ must be filed after a solicitation is issued and meet the following time constraints:

1. Protests based upon the grounds set forth in Section IV.-A.-1- ~~content of the solicitation, including but not limited to terms and conditions of the solicitation, errors, omissions or prejudice in the bid specifications or documents~~ must be submitted at the time questions or requests for approved equals (RFI) due if included in the solicitation, or in the absence of a questions/RFI due date, at least five business days prior to the bid ~~opening~~ or ~~receipt of~~ proposals due date.
2. Protests based upon the grounds set forth in Section IV.-A.-2- ~~other than the content of the solicitation~~ must be filed within seven (7) business days after the issuance by the District's of the notice of intent to award, or notice of award, or notice of non-award, whichever occurs first.

E. Protest Submission

1. Protests not based upon the grounds set forth in Section IV.-A.-1- ~~content of the solicitation and~~ and filed by a bidder, proposer, or offeror that is not ~~other than~~ a -certified small business must be accompanied by a protest filing fee in the form of a \$250 certified check or money order made out to AC Transit, and be delivered by certified mail:

AC Transit
Director of Procurement and
and ~~Materials~~ Management
Director

1600 Franklin Street, 6th Floor
Oakland, CA 94612

2. The exterior of the envelope must be marked: "Attention: Protest Material" and reflect the pertinent IFB, RFQ or RFP number.
3. Protest filings by a bidder, proposer, or offeror that is a certified small businesses ~~must include a fifty-dollar (\$50) check or money order and made out to AC Transit and addressed to the District contact person above~~ do not require the submission of a protest filing fee.
4. The District shall refund filing fees of successful protests within sixty (60) ~~calendar business~~ days of final determination by either the General Manager or the Director of Procurement and Materials. Filings fees of unsuccessful protests will not be refunded.

F. Processing of Protests

Protests will be processed as follows:

1. Informal Resolution:

After receiving a protest, the Director of Procurement and Materials Management will contact the protesting party to seek informal resolution and/or to clarify the issues. In the event the protest is resolved informally, the Director of Procurement and Materials Management shall notify the protester of the decision in writing or the protestor may withdraw their protest in writing.

~~within ten (10) calendar days, and no other action will be needed. This informal process shall be used for both content of solicitation and grounds other than the content of solicitation.~~

2. Protests of contract award based on failure to meet Small Business Participation Goals and /or make Good Faith ~~Efforts~~ (GFE):

The Director of Procurement and Materials Management shall forward all protests involving small business participation or GFE requirements to the Contracts Compliance Administrator ("CCA") for review. Per board policies BP460: Disadvantaged Business Enterprise (DBE) Policy and BP466: Small and Small Local Business Enterprise Policy, the CCA shall convene the Administrative Review Committee (ARC) and examine the small business participation requirements for the protest. The ARC shall examine whether the protest has merit, and provide a detailed written analysis of the protest to the designated District staff person handling the protest. The CCA or ARC may contact the protestor or any other proposer or proposed subcontractor as necessary in order to investigate the basis~~contents~~ of the protest.

The summary assessment of the ARC shall be incorporated into the Director of Procurement and Materials' ~~Management decision, and~~ decision and sent to the protestor. If the ARC overturns the CCA's initial assessment regarding insufficient GFE, the decision shall be ~~final, and final and~~ entered into the contract file. However, if the ARC upholds the CCA's assessment and determines that the bidder has failed to meet its goal or make adequate good faith efforts, the protestor may file an "appeal of protest decisions" as outlined in this policy.

3. Where the District deems appropriate, the District may require the protesting party, the District staff involved in the procurement, the successful Offeror, or any other interested party, to address and/or submit further information with respect to ~~additional~~ issues raised by the District's review of the procurement or protest. Nothing herein shall preclude the District from obtaining information relevant to the procurement from any other credible source, as it may deem appropriate.
4. The Director of Procurement and Materials ~~Management~~ may call upon one or more experts, either from within or outside the District, to evaluate the merits of the protest.
5. The Director of Procurement and Materials ~~Management Director~~ shall deliver to the protester a decision that addresses relevant factual and legal allegations contained in the protest no later than ten (10) business days following the District's receipt of the protest. The District may dismiss any protest for failure to state clearly a legal or factual basis for protest. The protestor may file a response with the District within five (5) business days of receipt of the District's decision. Upon receipt of a response if any, the Chief Financial Officer (CFO) ~~Procurement and Materials Management Director~~ shall issue a final determination. ~~within ten (10) calendar days.~~ If not appealed, the CFO's ~~Director's~~ decision is the final administrative determination of the protest.

G. Appeal of Protest Decisions

1. Appeal of the decision of the ~~CFO, Director of Procurement and Materials Management:~~

A protester dissatisfied with the final written decision of the ~~CFO, Procurement and Materials Management Director~~ may appeal that decision to the District's General Manager (GM) no later than five (5) business days following receipt of the Director's decision. The ~~GM will not consider new grounds or evidence which could reasonably have been included in the original protest submission. The GM General Manager~~ will review the protest and ~~the~~ Director of Procurement and Materials ~~Manager's~~ decision and the CFO's decision and ~~issue a written response within ten (10) calendar days following the District's receipt of the appeal. The General Manager may, in at~~ his or her sole discretion, affirm the CFO's ~~Director's~~ decision or issue an alternate determination.

2. Appeal of General Manager's Decision:

A protester dissatisfied with the ~~GM's~~General Manager's decision may appeal that decision to the Board of Directors within five (5) business days following receipt of the GM's decision. ~~The Board of Directors shall have 30 business days to respond to the appeal, following receipt of the appeal.~~

The appeal initially shall be presented to the Board to determine whether to entertain the appeal. In the event there is no motion to entertain the appeal made by the Board, it shall be equivalent to the Board denying the appeal and affirming the decision of the GM. ~~A minimum of four (4) affirmative votes of the Board is required to consider the appeal. If there are not four affirmative votes of the Board to consider the appeal, the decision of the General Manager shall become final.~~ If the Board votes to consider the appeal, it will notify the protester of the date and time of the hearing. The Board has the discretion to specify the following:

- a. Length of documents to be submitted;
- b. Due dates of any documents to be submitted;
- c. The length of oral presentations for each side (District and protester); and
- d. Any additional parameters the Board feels are necessary.

The basis for the Board's decision on appeal shall be limited to determining whether (1) the District was grossly negligent in failing to follow the District's procurement policy (BP 465) or (2) the District failed to respond to the protest in a timely manner.

At the hearing on the appeal, the protesting party will be afforded a reasonable opportunity to present its ~~protest~~case. Unless otherwise permitted by the Board, presentations will be limited to oral argument and documentary evidence. ~~The Board will not consider new grounds~~ New documents or evidence that ~~could~~should have reasonably been provided during the original protest submission. ~~solicitation or previous appeal process shall not be admitted or reviewed.~~

Upon conclusion of the hearing, the Board will either ~~reject or allow the protest~~. Upon Board action, a written statement of the reasons and potential remedies therefore will be included in the record and written notice will be sent to all Bidders or Proposers ~~Proposers~~ advising of the Board's determination on the protest. A protester may not commence litigation prior to exhausting all administrative remedies. ~~render a decision or continue the matter for decision during the next regularly scheduled Board of Director's meeting, or at its discretion, the Board may call a special session to exclusively address and/or render a decision. The decision by the Board shall be rendered within 30 business days after the final hearing date. The decision by the Board is final and no other District appeals will be granted.~~

H. Protests ~~onto the~~ Federal Transit Administration (FTA) ~~for Federally~~ Funded Procurements

1. In cases where contracts and substantially funded by the FTA, as a best practice, the District will notify its FTA regional office when it receives a third-party contract protest, and keep FTA informed about the status of the protest. In accordance with the ~~provision of FTA Circular 4220-regulations~~^{1f}, the Director of Procurement and Materials~~Director~~, or designee, will be responsible for providing information regarding protests of only federally funded procurements to the CFOManager of Capital Planning/Grants Administration on ~~Non~~ a quarterly basis for inclusion in the FTA reports~~quarterlyProgress~~.
- ~~2. The FTA's review of protests is limited to (1) The District's failure to have or follow its protest procedures, or the District's failure to review a complaint or protest, or (2) violations of federal law or regulation. The FTA will exercise discretion and will not consider every appeal it receives.~~
- ~~3. A protester must exhaust all administrative remedies available through the District, including the Director of Procurement and Materials Management, the District's General Manager, and the District's Board of Directors before pursuing a protest with the FTA. Protest appeals to the FTA must be filed with the San Francisco Region IX Office within five (5) business days of the date the protester learned or should have learned of a final adverse decision by the District. Upon request, the FTA Region IX contact information for filing an appeal shall be provided in writing to the protester upon notice of the District's final adverse decision to the protest.~~

V. AUTHORITY

A. Board Authority

The ~~b~~Board of Directors may hear protests involving contract awarded by the Board as well as appeals of protests denied by the General Manager.

B. General Manager's Authority

The General Manager may hear protests involving a protest decision made by him/her involving contracts awarded by him/her as well appeals of protest denied by the Director of Procurement and Materials ~~or the CFODirector~~.

VI. ATTACHMENTS

None.