



## **Board Policy No. 468**

### **Procurement Protest Procedures**

**ADOPTED:** 11/89

**RECENT AMENDMENT:** 5/10/2017

**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 establish formal procedures for the filing and adjudication of protests in connection with District procurement activities. All protests shall be processed in accordance Federal law and the procedures established herein.

These protest procedures shall apply to all types of procurement activities conducted by the District. 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 may result in the rejection of a protest.

The District shall notify and keep the Federal Transit Administration (FTA) informed of the status of all protests involving FTA funded third-party contracts and potential third-party contracts that:

- Have a value exceeding \$100,000 or
- Involve a controversial matter, irrespective of amount, or
- Involve a highly publicized project, irrespective of amount.

#### **II. PERSONS AFFECTED**

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

#### **III. DEFINITIONS**

**“Protest”** means an allegation made with respect to a particular procurement action that asserts that the District, in performing that action:

- Failed to follow or comply with applicable federal or state law or regulation, District policy or procedure relative to developing, soliciting, evaluating, negotiating and/or awarding a procurement contract.
- Failed to comply with the relevant requirements and procedures contained in the solicitation.
- Failed to follow District protest procedures.

#### **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 or offeror relative to the specific procurement to which the protest is being filed in accordance with California Public Contract Code 20217 (f) (2).

**C. 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 content of the solicitation must be submitted prior to bid opening or receipt of proposals.
2. Protests based upon grounds other than the content of the solicitation must be filed within fifteen (15) calendar days after the District's notice of intent to award, or notice of award, or notice of non-award, whichever occurs first.

**D. Content of Protests**

Protests must be submitted in writing and all relevant referenced material supporting the protest must be attached in order to be considered. Protests should include the following:

1. The IFB (Invitation for Bids) or Request for Proposals (RFP) number. If any addendum or addenda issued by the District in connection with a solicitation is the basis for a protest, the protest must also identify that addendum. If any other District communication is the basis for a protest, it should also be identified.
2. The name and address of the protester. If the name or address is different than that shown on any bid or proposal of the protestor, the protest should include a reference to the original name and/or address. Because standing to protest may be an issue, protests filed under a name other than the name stated on the bid or proposal submitted should indicate the basis supporting standing to protest.

3. A full and complete statement specifying in detail the grounds for the protest, including identification of any laws, regulations, or procedures violated, and providing all pertinent facts in support of the protest.
4. The specific remedy requested by the protester.
5. Identification of person(s) and address(es) of those to whom District communications on the matter of the protest should be directed.

#### **E. Protest Submission**

1. Protests not based on the content of the solicitation and filed by 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 directed to:

AC Transit  
Procurement and Materials Director  
1600 Franklin Street, 6<sup>th</sup> Floor  
Oakland, CA 94612

2. The exterior of the envelope must be marked: "Attention: Protest Material" and reflect the pertinent IFB or RFP number.
3. Protest filings by certified small businesses must include a \$50 check or money order and made out to the address and District contact person above.
4. The District shall refund filing fees of successful protests within 60 days of final determination. Filings fees of unsuccessful protests will not be refunded.

#### **F. Processing Of Protests**

Protests will be processed as follows:

1. Protests based upon the Content of the Solicitation:

The Procurement and Materials Director will issue a written decision prior to the opening date for bids or closing date for the submission of proposals. If the decision cannot be made within these time periods, the bid opening or proposal submission date for the procurement may be extended by the District.

2. Protests based on grounds other than the Content of the Solicitation:

If the contract is within the General Manager's authority, the Procurement and Materials Director will forward the protest to him/her. The General Manager will issue a written

response within ten (10) business days after the receipt of the protest by the District. If a decision cannot be rendered within this time period, the Procurement and Materials Director will notify the protester of a date when a decision on the protest will be issued

If the General Manager upholds the protest, a decision will include a remedial action to be taken.

If the General Manager denies the protest, the written notice of the decision will include notice of the protester's appeal rights.

If the contract is within the Board of Director's authority, the Procurement and Materials Director will forward the protest to the District Secretary to place the item on the next possible agenda. The Procurement and Materials Director and the General Counsel shall be prepared to answer questions by the Board about the protest. The Board of Directors will issue a written response within five (5) business days of the Board meeting at which the protest was heard. If a decision cannot be rendered within this time period, the Procurement and Materials Director will notify the protester of a date when a decision on the protest will be issued.

If the Board of Directors upholds the protest, a decision will include a remedial action to be taken.

If the Board of Directors denies the protest, the written notice of the decision will include notice of protester's appeal rights.

## **G. Appeal of Protest Decisions**

### **1. Appeal of Decision of Procurement and Materials Director:**

Protesters may appeal an adverse decision by the Procurement and Materials Director to the District's General Manager by submitting an appeal in writing, within five (5) business days after the date of issuance of the Procurement and Materials Director's decision. The appeal must state the basis for disputing the decision while not introducing new information that was not provided in the initial protest. An appeal of the Purchasing and Materials Director's decision must include a copy of the adverse decision and be sent to:

AC Transit Executive Coordinator  
1600 Franklin Street, 10<sup>th</sup> Floor  
Oakland, CA 94612  
Ref: Protest Appeal (Insert Project/Procurement Number Here)

The District's General Manager shall respond in writing to the appeal within ten (10) business days with a decision or notice of an extended period of up to five (5) additional business days in which to render a decision.

## 2. Appeal of Decision of General Manager

Protesters may appeal an adverse decision by the General Manager to the District Board of Directors by submitting an appeal, in writing, within five (5) business days after the date of issuance of the General Manager's decision. The appeal must state the grounds for disputing the decision of the General Manager.

An appeal of the General Manager's decision must include copies of the ~~two~~ preceding adverse decision(s) (Procurement and Materials Director response and/or General Manager's response) and be sent to:

AC Transit District Secretary  
1600 Franklin Street, 10<sup>th</sup> Floor  
Oakland, CA 94612  
Ref: Protest Appeal (Insert Project/Procurement Number Here)

## 3. Appeal of Initial Decision of Board of Directors

Protesters may appeal an adverse initial decision by the Board of Directors by submitting an appeal, in writing, within five (5) business days after the date of issuance of the Board of Directors' decision. The appeal must state the grounds for disputing the decision. The appeal shall be sent to:

AC Transit District Secretary  
1600 Franklin Street, 10<sup>th</sup> Floor  
Oakland, CA 94612  
Ref: Protest Appeal (Insert Project/Procurement Number Here)

## 4. Board of Directors Appeal Process

All appeals to the Board of Directors shall be processed as follows:

- a. As soon as practicable as the matter may be heard but within 45 business days following the receipt of a notice of appeal of the General Manager or Board of Directors' decision, the Board of Directors will consider whether it wishes to entertain the appeal and schedule an appeal hearing to be heard by the Board of Directors at a future Board meeting. The decision whether to hear the appeal will be based on the Board's review of the following documents: the protest submitted by the protester, the first level decision denying the protest, the appeal submitted by the protester, and any additional documentation submitted by staff to the Board. If at least four of the Board member votes against entertaining the appeal, the first level decision will become final.

- b. A minimum of four affirmative votes of the Board is required to consider the appeal, and if that minimum is satisfied, the Board will notify the protester of the date and time of the hearing. The Board shall set the parameters of the hearing process, including the following:
  - i. Length of documents submitted;
  - ii. Due dates of any documents to be submitted;
  - iii. The length of oral presentations for each side (District and protester)
  - iv. Any additional parameters the Board feels are necessary.

If there are not four affirmative votes of the Board to consider the appeal, the first level decision shall become final.

- c. At the hearing on the appeal, the protesting party will be afforded a reasonable opportunity to present its case. Unless otherwise permitted by the Board, presentations will be limited to oral argument and documentary evidence. The Board may allow for a question and answer period following presentation of the appeal.
- d. Upon conclusion of the hearing, the Board will either render a decision or continue the matter for decision at the next regularly scheduled Board of Directors' meeting or at its discretion, the Board may call a special session to exclusively address and/or render a decision.

#### **H. Protests to the Federal Transit Administration (FTA)**

- 1. In accordance with the provision of FTA Circular 4220.1f, the Procurement and Materials Director, or designee, will be responsible for providing information regarding protests of federally funded procurements to the Manager of Capital Planning/Grants Administration on a quarterly basis for inclusion in the FTA quarterly Progress.
- 2. Reviews of protests by the FTA are 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, i.e., the Director of Procurement and Materials, 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) working days of the date the protester learned or should have learned of an adverse decision by the District. 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 protester.

**V. AUTHORITY****A. Board Authority**

The Board of Directors may hear protests involving contracts 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 protests denied by the Procurement and Materials Director.

**VI. ATTACHMENTS**

None