

STANDARD

Procurement must ensure that a protest policy is established and documented for the entity. Understanding the context and motivation for the filing of a protest may be as important as the specific protest issue. The procurement professional should ensure that the legal department or legal counsel is aware of and may advise on action regarding protests. Throughout the solicitation process, Procurement and stakeholders should employ procurement best practices that promote transparency, accountability (NIGP 2010), and maximize competition. Conducting a protest closeout assessment after a protest has been resolved supports continual improvement in the procurement process.

Protests must be filed by an interested party. An interested party, in the context of administrative bid or proposal protest procedures, is “an actual or prospective [bidder or proposer] whose direct economic interest would be affected by the award of a contract or by the failure to award a contract” (FAR 33.1).

Definition

Protest: A written objection by an interested party to a solicitation or an award of a contract with the intention of receiving a remedial result.

Element 1: Procurement must establish a protest policy.

A protest policy establishes the foundation for procedures that thoroughly and openly investigate complaints and allow the procurement process to expeditiously move forward (Gordon, 2006). Protest policy must be based on law and referenced in the solicitation document. Procedures are based on laws and policies. The policy must be made available publicly (e.g., entity’s website). At a minimum, a protest policy must:

- State the right of an interested party to protest.
- State the mandatory filing procedures (e.g., timing and format).
- Describe roles and responsibilities of the entity for handling a protest.

Element 2: Public procurement professionals should understand the reasons that underlie and contribute to the filing of a protest.

The filed protest may result from the circumstance or attitude of the offeror. Some potential protests may stem from:

- Emotion. The offeror may need to vent or complain.
- Confusion. The offeror may genuinely misunderstand or misinterpret some requirements or the scope of work.



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- Anticipation of an unfavorable decision.
 - Information gained at the public bid opening may lead an offeror to believe they will not win the award
 - A strategy employed by the offeror to cause the entity to reissue the solicitation, believing that politics will sway the eventual award to the protesting offeror
- Strategic or economic reasons. The incumbent supplier may wish to extend the current contract.
- Industry or company culture. Some industries or companies traditionally protest unfavorable decisions if not awarded the contract.
- Conduct. An offeror may suspect a conflict of interest or that statutes, regulations, or policies were not followed appropriately.

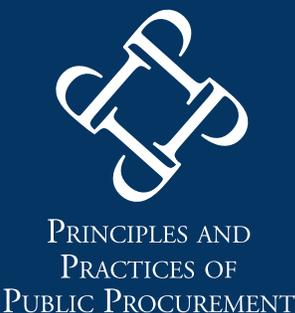
According to the General Accountability Office (GAO 2015), “the most prevalent reasons for sustaining protests during the 2015 fiscal year were: (1) unreasonable cost or price evaluation; (2) unreasonable past performance evaluation; (3) failure to follow evaluation criteria; (4) inadequate documentation of the record; and (5) unreasonable technical evaluation.”

Protests pertaining to the solicitation document are generally filed for:

- Overly restrictive requirements.
- Lack of clarity or vague requirements in the specification.
- Specification modification with no addendum issued.
- Unfair or biased specifications that resemble a manufacturer’s literature or a particular product.
- Unreasonable requirements that severely limit competition.
- Rating factors or evaluation criteria that place an offeror at a disadvantage.
- Use of a sole source (Oblon 2013) or multi-step process.
- Unclear or vague award processes.

Protests pertaining to entity decisions may result from:

- A declaration of an offer to be non-responsive and/or not responsible.
- A declaration of an offer as “late.”
- A delay or failure by the entity to provide sufficient information with adequate time for the offeror to respond (Zeigler 2006).
- An award that is perceived to be:
 - Arbitrary or involving an abuse of discretion
 - Noncompliant with constitutional, statutory, or regulatory provisions
 - Non-conforming to stated process or procedures
 - Not awarded in accordance with the solicitation requirements
 - Containing computation errors in the evaluation score
 - Lacking transparency
 - The result of unfair or unequal treatment
 - Influenced by bias of the evaluation committee through consensus team scoring or individual member scoring
 - A conflict of interest by an evaluation committee involving the selected bidder or proposer



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Element 3: Throughout the solicitation process, Procurement and stakeholders should follow procurement best practices to avoid or mitigate potential protests.

Suggested practices include:

- Providing offeror education specific to conducting business with the entity.
- Contacting other entities that may have issued a similar solicitation.
- Collaborating between Procurement and stakeholders to develop a well-written specification and scope of work (CIPS & NIGP 2016).
- Holding a pre-solicitation conference.
- Issuing Letters of Intent to Award to all responsive and responsible offerors.
- Conducting debriefings as soon as practicable (UK 2003).

The entity may choose to consider the appropriateness and impact of requiring a protest bond as part of the protest policy (NASPO 2013).

Element 4: The procurement professional should follow the steps of the protest procedure.

Immediately upon receipt of a protest, the procurement professional should:

1. Alert procurement managers, clients, the legal department, and interested parties.
2. Ensure that the entity is in compliance with the appropriate requirements of:
 - a. A dedicated procurement professional that must receive, process, and resolve protests.
 - b. Directing communication to the designated procurement professional
 - c. Maintaining confidentiality of proprietary information.
3. Conduct a fair and independent review of all written supplier concerns regarding the solicitation or entity decisions (Zeigler 2006).
4. Determine whether the protest will move forward.
5. Determine whether the solicitation or award of contract should be suspended until an administrative resolution is reached.

The designated procurement official should respond in writing to the protesting offeror with the decision of the entity. If a protest is received after the documented protest period ends, a written response is required denying the protest. The response should be timely, signed by the designated procurement official, and addressed to the protester. If the offeror is not satisfied with the decision of the Chief Procurement Officer (CPO), the offeror may appeal to an independent authority, depending upon applicable law or the procedures of the entity.

Throughout the protest process, procurement professionals must keep accurate and thorough documentation. Complete and maintained files serve to justify the protest decision, provide access to communication records, and ensure that the response to the protest is legally defensible.

Element 5: Conduct a protest closeout assessment.

Suggested practices include determining:

- The root cause of the protest.
- The impact of the protest on stakeholders.
- If the protest process was conducted correctly.
- If any changes to the solicitation process need to be made.



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Background

Traditionally viewed as a negative force that diverts valuable entity resources, protests may be viewed as a positive force that can bolster the practice of good public procurement. Exercising the right to protest benefits the “transparency, accountability, education, and protection of the integrity” of the procurement process (Gordon 2013).

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