

CHAPTER 3. PROTEST PROCEDURES OF THE CONTRACT APPEALS BOARD

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300 PARTIES ENTITLED TO PROTEST

- 300.1 An aggrieved person may protest to the Board a solicitation issued by or for a District department or agency for the procurement of property or services, or a proposed award, or the award of such a contract.
- 300.2 For purposes of this chapter, an aggrieved person means an actual or prospective bidder or offeror who has suffered a loss or injury or has had a legal right violated as a result of adverse agency action.
- 300.3 The protester shall serve a copy of the protest, including relevant documents not issued by the contracting agency, on the contracting agency and shall furnish the Board with proof of service.

301 TIME FOR FILING PROTEST

- 301.1 All protests shall be filed with the Board not later than ten (10) working days after the basis of the protest is known or should have been known, whichever is earlier.
- 301.2 A protest concerning a procurement conducted by an independent agency shall be filed with the Board within the time prescribed by the independent agency's regulations.
- 301.3 Filing occurs when the protest is received by the Board.

302 **FORM AND CONTENT OF PROTEST**

302.1 All protests shall be in writing, addressed to the Board, and shall include the following:

- (a) The name, address, and telephone number of the protester;
- (b) The identity of the contracting agency, the number and date of the solicitation, and if a contract has been awarded, the number and date of the contract and to whom the contract was awarded, if known;
- (c) A clear and concise statement of the legal and factual grounds of the protest, including copies of relevant documents, and citations to statutes, regulations or contract provisions claimed to be violated;
- (d) A short statement concerning the timeliness of the protest; and
- (e) A statement of the remedy sought.

302.2 Protests shall be signed by the protester or by an authorized representative or attorney.

302.3 Protests are not required to be formal or technical but shall be logically arranged and legally sufficient.

303 **DOCKETING OF PROTESTS**

303.1 When a protest has been accepted for filing by the Board, it shall be docketed promptly.

303.2 The Board shall within five (5) working days provide the protester a written acknowledgement that the protest has been docketed, the case docket number, and the citation of the publication containing the current rules of the Board. In addition, the Board shall advise the protester of the identity of the persons furnished the acknowledgement as prescribed in subsection 303.3.

303.3 The Board shall send a copy of the acknowledgement, at the same time as prescribed in subsection 303.2, to:

- (a) The director of the contracting agency; and
- (b) The Corporation Counsel or the counsel for an independent agency.

303.4 The Board shall notify the contracting agency to file the agency report as prescribed in section 305.

304 INTERESTED PARTIES

304.1 Within five (5) days after it receives a copy of the protest, the contracting agency shall provide a copy of the protest to all interested parties, who are defined as follows:

(a) If the contract has not been awarded, to all relevant actual and prospective bidders or offerors who can reasonably be ascertained.

(b) If the contract has been awarded, to the contractor and to all bidders or offerors who appear to have a substantial and reasonable prospect of receiving an award if the protest is sustained.

304.2 The contracting agency shall provide interested parties with the date the protest was filed and the date the agency received notice of the protest from the Board, the solicitation number, the Board case docket number, and notice that further inquiries or communication shall be made directly to the Board; and shall promptly provide the Board in writing the names and addresses of all interested parties.

304.3 The contracting agency may request the Board by written motion to restrict or limit interested parties.

305 AGENCY REPORT

305.1 As expeditiously as possible but no later than twenty-five (25) days of receipt of the Board notice specified in subsection 303.4, the contracting agency shall file a report with the Board which shall include, where relevant:

- (a) The procurement solicitation;
- (b) The bid or proposal submitted by the protester;
- (c) The bid or proposal which is being considered for award, or which has resulted in an award, if any;
- (d) Bid tabulation sheets or proposal evaluation scores;
- (e) The contracting agency position and defense for each ground of the protest, including the facts, legal principles, and precedents supporting its position; and
- (f) Any other documents and exhibits that are relevant to the protest.

305.2 The contracting agency shall simultaneously provide a copy of the agency report to the protester and all interested parties.

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- 305.3 Copies of the agency report provided under subsection 305.2 shall include all relevant documents that would not give a competitive advantage to a party or that are not entitled to confidentiality by law or regulations. A list of withheld documents shall be furnished the Board and all parties, together with an explanation of why the document was withheld.
- 305.4 The Board may require either party to supplement the agency report by filing other documents and tangible things.
- 305.5 All exhibits in the agency report shall be considered, without further action by the parties, a part of the record upon which the Board will render its decision. However, a party may object, for reasons stated, to consideration of a particular document reasonably in advance of closing the record. If an objection is made, the Board shall remove the documents from the agency report and permit the party offering the document to move its admission as evidence.
- 305.6 Documents in the agency report may be originals or legible facsimiles or authenticated copies, and shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file.
- 305.7 Original copies of documents may be withdrawn from the agency report, with the Board's consent, if an acceptable copy is substituted.
- 305.8 The contracting agency may request, in writing, an extension of the twenty-five (25) day agency report submission time period and supply an explanation of why an extension is needed. Extensions are to be considered exceptional and will be granted only for good cause.
- 305.9 When a contracting department or agency fails to submit an agency report, the factual allegations contained in the protest may be treated as conceded by the Board.

306 DISPOSITIVE MOTION IN LIEU OF REPORT

- 306.1 In lieu of filing the agency report, the contracting agency may file a dispositive motion with the Board and serve it on all parties. If the motion is filed and denied by the Board in whole or in part, the agency report shall be filed no later than fifteen (15) days after receipt of the Board's ruling or within a lesser period as the Board may order.

307 COMMENTS ON AGENCY REPORT OR MOTION

- 307.1 Within seven (7) days after receipt of the agency report, or the dispositive motion prescribed in subsection 306.1, the protester and interested parties may file a reply or response

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to either which shall state the party's factual and legal agreement or opposition to the agency report or motion.

- 307.2 All parties shall be served with a copy of the comments and proof of service provided to the Board.
- 307.3 Failure of the protester to file comments, or to file a statement requesting that the case be decided on the existing record, or to request an extension of time for filing, shall result in closing the record of the case and may result in dismissal of the protest.
- 307.4 When a protester fails to file comments on any agency report, the factual allegations in the protest that are not admitted in the agency report, or otherwise corroborated on the record, may be disregarded.

308 SUMMARY DISPOSITION OF PROTESTS

- 308.1 When a protest is invalid on its face, or untimely filed, or otherwise not for consideration, the Board shall summarily dismiss the protest without requiring submission of an agency report.

309 DISCOVERY

- 309.1 Discovery in protest cases shall be permitted only with approval by the Board and is available only to the protester and the contracting agency.
- 309.2 The Board may permit a protester to engage in discovery if no agency report is filed in order to provide a sufficient factual basis for the fair and just resolution of the protest.
- 309.3 The cost of discovery pursuant to subsection 309.2 shall be borne by the contracting agency.

310 CONFERENCE

- 310.1 A conference may be held at the discretion of the Board upon its own motion or upon the request of the protester, the contracting agency or any interested party who filed comments on the agency report in accordance with section 307.
- 310.2 A request for a conference shall be made promptly in order to receive favorable consideration.
- 310.3 The protester, all interested parties who filed comments, and the contracting agency may attend the conference and the Board may request the attendance of other persons as it deems appropriate.

- 310.4 The conference shall be an informal meeting between the Board and the parties to discuss matters relevant to the protest without strict regard to formal rules of evidence or procedure. These matters may include:
- (a) Simplifying or clarifying the issues including the elimination of frivolous allegations or defenses;
 - (b) Stipulations, admissions, or agreements which will avoid unnecessary proof;
 - (c) Clarification of matters already in the record; and
 - (d) Any other matter which might aid in a just and expeditious disposition of the protest.
- 310.5 No direct or cross-examination shall be permitted at the conference.
- 310.6 The conference may be electronically recorded by the Board at its discretion. If the preparation of a transcript is ordered by the Board, any party desiring a copy of the transcript shall be responsible for obtaining one at the party's expense.
- 310.7 The Board may require or permit the submission of briefs, legal memoranda, or proposed findings of fact and conclusions of law after the conference has been completed. A party failing to attend the conference shall not be permitted to file a post-conference submission.

311 EVIDENTIARY HEARING

- 311.1 If the Board determines that there is a genuine issue of material fact which cannot be resolved on the written record, the Board may order an evidentiary hearing.
- 311.2 At the hearing, the Board shall receive from the parties probative evidence or relevant testimony under oath or affirmation. Direct and cross-examination of witnesses shall be allowed at the hearing.
- 311.3 The hearing shall be stenographically transcribed or electronically recorded. Stenographic transcriptions shall be arranged in accordance with subsection 211.5. Any party desiring a copy of the transcript shall be responsible for obtaining one at the party's expense.
- 311.4 At the conclusion of the hearing, the Board may order or permit the submission of proposed findings of fact and conclusions of law.

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312 DECISIONS

312.1 All decisions shall be in writing, based solely on the record and transmitted to each party who has participated in the protest before the Board.

313 RECONSIDERATION

313.1 The protester, the contracting agency or an interested party who filed comments on the agency report may by motion request the Board to reconsider a decision.

313.2 Motions for reconsideration shall be conducted in accordance with section 117 of these rules, except that the time periods contained in subsections 117.2 and 117.4 shall be shortened to fifteen (15) days.

314 REMEDIES

314.1 If the Board determines, in sustaining a protest, that the solicitation, proposed award, or award does not comply with the applicable law, regulations, or terms and conditions of the solicitation, the Board may order the contracting agency to do one or more of the following:

- (a) Terminate the contract for the convenience of the District government;
- (b) Refrain from exercising any options under the contract;
- (c) Reopen the contract;
- (d) Issue a new solicitation;
- (e) Award a contract consistent with the law and regulations;
or
- (f) Take such other action, except enjoining a contract award, as the Board may direct.

314.2 In determining the appropriate remedy, the Board shall consider the circumstances surrounding the procurement, including, but not limited to, the following factors:

- (a) Best interest of the District government;
- (b) Seriousness of the procurement deficiency or violation;
- (c) Existence of prejudice to other bidders or offerors;
- (d) Maintaining the integrity of the procurement system; or

(e) Good faith of District government officials and other parties.

314.3 In determining whether to terminate a contract, the Board shall consider the following additional factors:

- (a) Extent of contract performance;
- (b) Impact of termination on the contracting agency's activities and mission;
- (c) Costs to the government from termination; and
- (d) Urgent need for the procurement.

314.4 If the Board finds that the District government actions were arbitrary and capricious, the Board may, when requested, award the protester's reasonable bid or proposal preparation costs, but not legal fees.

314.5 A motion for bid or proposal preparation costs shall be submitted by the protester within twenty (20) days of receipt of the Board's decision.

314.6 The motion shall be accompanied by sufficient documentation supporting the requested costs and an appropriate proposed order for the Board.

314.7 The contracting agency may, within ten (10) days after its receipt of the protester's motion, file a written response to the motion.

314.8 At the request of the protester or the District government or on its own initiative, the Board may conduct a hearing on the motion before issuing a ruling.

399 DEFINITIONS

399.1 When used in chapters 1, 2 and 3, the following words and phrases shall have the following meaning:

Arbitrary and Capricious - action that is willful and/or unreasonable without consideration of or in disregard of the facts and circumstances.

Contracting Agency - a department or agency of the District of Columbia government which employs the contracting officer who has the authority to enter into a contract for construction, services, or supplies which is the subject of the solicitation or contract at issue before the Board.

De Novo - requirement that cases before the Board be heard anew, with facts found by the Board from the evidence, as if the case had not been considered before and determinations made by the contracting agency.

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Dispositive Motion - a motion which, if granted, would terminate part or all of a case on the merits or on procedural grounds.

Ex Parte Communication - oral or written communications to or from members of the Board and its staff, concerning the merits of any case pending before the Board, made by any persons directly or indirectly involved in the outcome of the case, that are not on the record and provided to all parties.

In Camera - submission of documents or exhibits to the Board for the judges' private review without the presence of parties or attorneys.

Independent Agency - any agency of the District of Columbia government with respect to which the Mayor and the City Council are not authorized by law to establish administrative procedures.