6. CONTRACT AWARD PROTESTS

6.00 • INTRODUCTION

(Rev 11/12)

The protest process covered in this chapter applies only to non-IT services or consulting services contracts that are awarded through an Invitation for Bid (IFB) or Request for Proposal (RFP) process.

Legal references: PCC §§ 10341 - 10345 and Title 2 California Code of Regulations §§ 1195 - 1195.6.

Some information about the rules to be followed in deciding a protest may be helpful. It is generally the rule that the party challenging the decisions of an administrative agency bears the burden of proof that the awarding agency has committed an error in the bid process sufficiently material to justify invalidation of its proposed award, or that its decisions are lacking a rational basis and are, therefore, arbitrary and capricious. An example of a material error would be, among others, failure of the awarding agency to follow pertinent State statutes and regulations or the provisions of its own bid document. When scores of an Evaluation Committee are at issue, more than the opinion of the protestant that scores should have been different, or that different scores could have been awarded based on the same information, is required to invalidate scoring decisions. In view of these parameters, the focus of the reviewing authority (here, DGS) is usually whether the protestant has met its burden of proof that the awarding agency has committed a material error in the conduct of the bid process.

6.01 • TABLE OF CONTENTS

(Rev 11/12)

DESCRIPTION	SECTION
Introduction	6.00
Table of Contents	6.01
Grounds for Protest	6.02
Protest Exclusions	6.03
Role of DGS in Contract Protest Hearings	6.04
Protest Affecting Vital Services	6.05
Procedure for Protesting an Award	6.10
Oral Hearing Guidelines	6.15
Decision on the Hearing	6.18
Costs of the Proceeding	6.19
Protests on Other Types Of Solicitations	6.30
Notification of the Right to Protest	6.35
Minimizing Protest Exposure	6.40

6.02 • GROUNDS FOR PROTEST
(Rev 11/12)

A. Those who may protest are as follows:

1. For IFBs, any proposer who claims it is the lowest responsible bidder meeting the specifications for the contract.
2. For RFPs, any proposer who claims that the State agency failed to follow the procedures specified in either subdivision (b) or (c) of PCC § 10344.

B. There is no basis for protest if the awarding agency rejects all bids or proposals, based on the best interests of the State.

6.03 • PROTEST EXCLUSIONS
(Rev 11/12)

There is no jurisdiction for the DGS to consider a protest if:

A. The protestant was not a bidder or proposer;

B. The protestant has not alleged that it was the lowest responsible bidder or the highest-scored proposer;

C. The protestant is not in a position to make a supportable assertion that it was the lowest responsible bidder or should have been the highest-scored proposer;

D. The protest was not submitted timely;

E. The grounds for the protest do not meet the permissible grounds stated in the PCC; or

F. The contract award is for a type of contract not subject to the protest procedures. This category includes public works contracts awarded under the State Contract Act (PCC §10100 et seq.); contracts for professional architecture or engineering services under GC § 4525; contracts awarded under GC §§ 14838.5 and 14838.7.

6.04 • ROLE OF DGS IN CONTRACT PROTEST HEARINGS
(Rev 11/12)

If the protest is based on permissible grounds, DGS will decide the protest and prepare a written decision. Following confirmation by staff that legal prerequisites have been met for a protest, the Director of DGS appoints a hearing officer who will:

A. Determine whether to review and decide the issues by written submission or oral hearing.

B. Render a written decision within 30 days of the final submission of evidence.

6.05 • PROTEST AFFECTING VITAL SERVICES
(Rev 11/12)

If a protest is filed and cannot be resolved before the need for vital services occurs, the agency may extend an existing contract for up to six months at the same or lower rates. The extension should indicate an end date of up to six months or the award of a new contract, whichever occurs first. If there is no existing contractor, if the existing contractor does not wish to continue, or if a longer extension is needed, an NCB would be required.

6.10 • PROCEDURE FOR PROTESTING AN AWARD
(Rev 11/12)

A. A contract award may not be made until one of the following occurs:

1. (IFB process) If the contract is not being awarded to the low bidder, the agency must notify the low bidder at least five working days prior to award that the contract is not being awarded to the low bidder. The notification must be by telegram, facsimile transmission, overnight courier, Internet transmission or personal delivery.
2. (IFB process) On written request from any bidder, the awarding agency must post a notice of the proposed contract award in a place accessible by the general public, including any Internet site identified in the IFB at least five (5) working days prior to awarding the contract.
3. (RFP process) The agency must post a notice of the proposed contract award in a place accessible by the general public, including any Internet site identified in the RFP for at least five (5) working days prior to awarding the contract.

B. Inspection of bids is required as follows:

1. (IFB process) After bid opening, all bids shall be available for public inspection.
2. (RFP process) All proposals and all evaluation and scoring sheets shall be available for public inspection at the conclusion of the committee scoring process.

C. There are time limits in which to file a protest. A protest must be filed with the agency and DGS after notice of intent to award the contract if notice was required, but before the actual award.

D. Once a protest is filed, the contract may not be awarded until the protest is withdrawn or DGS has rendered a decision.

E. After filing a protest, the protestant has five (5) calendar days to file a detailed written statement of the protest grounds if the original protest did not contain the complete grounds for the protest.

F. Upon receipt of a protest, DGS/OLS:

1. Sends the protestant an acknowledgement letter which includes copies of the protest statutes and regulations and informs the protestant that it must submit a full and complete statement specifying grounds of protest within five (5) calendar days of filing of the notice of protest.
2. Faxes to the awarding agency a request for information regarding the proposed contract and agency contact person. The agency should complete and return the form to DGS/OLS within 24 hours. Failure to promptly complete and return the form will delay the protest process. In addition, if the agency is aware of any reason that the protest should not go forward, this would be communicated to DGS/OLS at this time (See SCM 1, section 6.03).
3. Reviews the protest to determine whether DGS has jurisdiction. If DGS does not have jurisdiction, DGS/OLS issues a written notice of dismissal.
4. Assigns a Hearing Officer to the protest if DGS has jurisdiction. The Hearing Officer determines whether the protest will be resolved by written submission or public oral hearing.

a. Written Submission Process: DGS/OLS sends a Hearing Notice to all interested parties, setting the due date for written submissions.

b. Oral Hearing Process: DGS/OLS sends a Hearing Notice to all interested parties of the date, time and place of the hearing at least five (5) calendar days before the hearing date. The Hearing Notice will also include a due date for written submissions. DGS/OLS will arrange for the hearing to be recorded.

6.15 • ORAL HEARING GUIDELINES
(Rev 11/12)

A. The hearing is conducted as a fair hearing;

B. Informal procedures are followed;

C. No oath is given;

D. Witnesses and participants are advised to be truthful, accurate, and to the point;

E. Liberal rules of evidence apply;

F. Comments must be relevant to the protest issues;

G. Statements may be allowed from the interested parties, their witnesses, or authorized representatives;

H. Cross-examination may be permitted at the discretion of the hearing officer; and

I. All interested parties are given the opportunity to present their positions.

6.18 • DECISION ON THE HEARING
(Rev 11/12)

The hearing officer's decision is a final administrative decision based on the record produced. The decision will recite the basis for the hearing officer's decision. DGS has no jurisdiction to consider any appeal to the hearing officer's decision.

6.19 • COSTS OF THE PROCEEDING
(Rev 11/12)

A. All DGS costs of the protest proceeding are charged to the State agency involved.

B. For Oral Hearings, any interested party may arrange with the reporter to have a transcript prepared at the party's cost.

6.30 • PROTESTS ON OTHER TYPES OF SOLICITATIONS
(Rev 11/12)

A. Protests about contracts for commodities, telecommunications, and IT goods and services are made to the Victim Compensation and Government Claims Board, or to the Office of Administrative Hearings per PCC § 12125.

B. Protests about contracts for public works, grants, A&E services, repair or maintenance of personal property, or any other type of solicitation not specifically covered by another statute may be heard by DGS if both parties agree to its jurisdiction.

6.35 • NOTIFICATION OF THE RIGHT TO PROTEST
(Rev 11/12)

A. Agencies should include information for protesting the award of contracts in all IFBs and RFPs. This should advise protestants' that the initial protest letter and a detailed, written statement of protest, including the IFB/RFP number, and the name of the State agency involved and the agency contract person, should be submitted to both of the following:

- Department of General Services
  Office of Legal Services
  Attention: Protest Coordinator
  707 Third Street, 7th Floor, Suite 7-330
  West Sacramento, CA 95605
  FAX: (916) 376-5088
- The awarding agency [insert address]

B. Protests may be sent by regular mail, facsimile, courier or personal delivery. Protestants should include their fax numbers if they have one.

6.40 • MINIMIZING PROTEST EXPOSURE
(Rev 11/12)

To minimize protest exposure and to enhance the likelihood of prevailing at a hearing, the agency should ensure that:

1. All solicitation packages are prepared with the appropriate clauses, phrases, and documents, and each is in compliance with all statutory and policy requirements;
2. All solicitation packages are written with clear and easily understood instructions;
3. Evaluators are carefully instructed on the evaluation approach to be used;
4. Sound decisions are made when determining a bidder's responsiveness to IFB or RFP requirements;
5. All bidders are treated fairly and impartially;
6. All bidders are given access to identical information and facts about the bid documents, statement of work, and qualification requirements;
7. The waiver of immaterial defects in any one bid or proposal does not unduly prejudice other bids or proposals or affect the price;
8. Bidders are given timely and prompt access to all applicable IFB or RFP evaluation materials following the posting of a notice of intent to award; and
9. All inquiring bidders are informed of the reasons their bids or proposals are deemed nonresponsive.