

Chapter 7

Protest and Post Award Disputes

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Chapter 7

Protest and Post Award Disputes

Overview

Introduction This chapter describes what buyers may be faced with if a supplier protests requirements during a competitive solicitation or challenges the contract award, for both non-IT goods and IT goods and services solicitations. Refer to the SCM, Vol. 1, for protests and post-award disputes for non-IT services that are non-LPA.

Also included in this chapter is a discussion regarding supplier disputes once a contract has been executed.

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Topic 1 – Protest Basics

7.1.0 Definition

A protest is a challenge brought by a supplier during the competitive solicitation process, asserting that the solicitation requirements are restrictive or unclear or that the protestant should have been selected for award.

Although referred to by different names (complaint, exception, initial protest, protest of the requirements, and protest of proposed award) there are basically two types of protests. For the purposes of purchasing authority, protests will be referred to as either a “protest of requirements” or a “protest of proposed award”.

Protest of requirements: is a challenge by a supplier against the technical, administrative, or cost requirements described in the competitive solicitation and is limited to IT goods and services in excess of \$100,000.

Protest of proposed award: is a challenge by a bidder against the proposed contract award for non-IT goods in excess of \$25,000 or IT goods and services in excess of \$100,000.

7.1.1 Protest statutes

Applicable protest statutes and regulations regarding challenges and protests are contained within the following:

- Protest of proposed award for non-IT contracts (PCC section 10306).
 - Protest of requirements and proposed awards for IT goods and service contracts – PCC section 12102 (h).
 - Victim Compensation and Government Claims Board – Board Hearing Regulations, CCR, Title 2, Division 2, Chapter 1 sections 870.1 – 874.1
 - Alternative Protest Pilot Project – PCC section 12125 et seq.
 - Office of Administrative Hearings – Arbitration Regulations - CCR, Title 1 Division 2, Chapter 5 section 1400 et seq.
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Topic 1 – Protest Basics, Continued

7.1.2 Authority over protests

The DGS/PD Deputy Director must review and render a final decision for protests of requirements in IT competitive solicitations.

The Victim Compensation and Government Claims Board (VCGCB) must review and render a final decision for protests of proposed awards that are not withdrawn.

The Office of Administrative Hearings arbitrates and renders a final decision for each protest conducted under the Alternative Procurement Pilot Program in which the protestant first meets their protest filing obligations.

DGS/PD does not delegate its authority to manage protests. Therefore, whenever a department is notified of a protest, regardless of the type of protest, the department shall contact the DGS/PD Dispute Resolution Section (DRS) immediately (the same day or within 24 hours).

Note: Refer to the SCM, Vol. 1, for information regarding protests of non-IT services solicitations that are not a non-LPA transaction.

7.1.3 No further action occurs

Unless the purchase is conducted under the APPP where an award can be made while the award is under protest, no further action (i.e. award) can occur until a protest is withdrawn or resolved by the entity authorized to render a decision regarding the protest.

7.1.4 Dispute Resolution Section

DRS facilitates and mediates resolution of protests against IT solicitation requirements, protests against proposed awards, both non-IT goods and IT goods and services, and contract disputes.

[Click](#) here to access the DRS web page.

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Topic 1 – Protest Basics, Continued

7.1.5 Protest provisions in standard solicitation language

The DGS/PD solicitation language provides suppliers with the process for protesting a competitive solicitation, both non-IT goods and/or IT goods and services. This language is found in the following:

- Bidder instructions, Article # 12-Specification Concerns and Article # 21--Protests
- Section II, Rules Governing Competition (IT Formal Solicitation)

[Click](#) here to access DGS/PD solicitation language.

7.1.6 Solicitation identifies key action dates

The competitive solicitation will provide key action dates that will notify bidders of specific times and dates to adhere to for filing protests of the solicitation requirements for IT goods and services or for the last day to file a protest of the proposed contract award for non-IT goods valued over \$25,000.00 or IT goods and services valued over \$100,000.00.

Topic 2 - Protests of Requirements – IT Goods and Services

7.2.0 Defining protests of solicitation requirements

A protest of requirements is a supplier's challenge or objection to any administrative or technical requirement(s) contained in a formal IT competitive solicitation.

Note: A supplier may express its concern regarding specifications contained in a formal non-IT competitive solicitation in accordance with the State's Bidders Instructions, Article # 12.

7.2.1 Who can file a protest of solicitation requirements and when

Any supplier may file a protest of IT solicitation requirements. Protests of solicitation requirements must be received in writing by the soliciting department by the date established in the solicitation document.

7.2.2 Handling a protest of requirements

The table below describes the process that shall be followed when an intent to protest or a protest of solicitation requirements has been received.

Stage	Description
1	A supplier notifies the buyer identified in the solicitation by telephone, fax, e-mail, letter or in person of its protest or intent to protest a technical or administrative requirement contained in the solicitation.
2	The buyer, having knowledge of or having received a written notice of protest of requirements will <u>immediately</u> notify the DGS/PD DRS by phone, fax or electronic mail: Susan Chan, Manager • PH: 916/375-4600 • FAX: 916/375-4614 • E-mail: susan.chan@dgs.ca.gov
3	The buyer stops any further action on the solicitation until the intent or protest of the solicitation requirements has been resolved.

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Topic 2 - Protests of Requirements – IT Goods and Services, Continued

7.2.2 Handling a protest of requirements (continued)

Stage	Description
4	Dispute Resolution staff: <ul style="list-style-type: none"> • Acknowledge the protest of requirements to the supplier. • Conduct an independent review of the protest of requirements in relationship to the solicitation document. • Seek legal advice as necessary. • Maintain communication with the department receiving the protest.
5	The buyer and the DRS staff work together to resolve the protest of requirements by initiating and coordinating a response to the supplier. Issues to be considered are: <ul style="list-style-type: none"> • Defending the solicitation's technical or administrative requirements or • Agreeing that the supplier has raised a valid issue and provide clarification or change to the solicitation through an addendum to the solicitation or • Determining whether or not the concern raised by the supplier is so great that it is in the State's best interest to cancel the solicitation.
6	The buyer <u>drafts</u> a written response to the supplier and obtains DRS concurrence. The buyer sends the DRS-approved response to the supplier and provides a copy to DRS.
7	Dependent upon the resolution, the buyer continues with the competitive bid process through contract award <u>or</u> the buyer cancels the solicitation.
8	The buyer documents the procurement file with the resolution actions.

7.2.3 Adjustment of bid due date may be required

If the resolution results in an addendum to the solicitation and the addendum requires additional time for suppliers to respond, then the solicitation due date shall be adjusted to allow additional time for suppliers to respond to the solicitation.

Topic 3 - Protests of Proposed Award

7.3.0 Defining protests of proposed award

A protest of proposed award is a challenge by a bidder against the proposed contract award and applies to both non-IT goods contracts exceeding \$25,000 and IT contract awards exceeding \$100,000.

7.3.1 Who can file protests of proposed award and when

Any bidder that submits a bid may protest the proposed award of a contract on the grounds that their bid is responsive to the requirements of the solicitation and that their bid should have been selected for award. Filing of a protest of proposed award shall occur as follows:

- Non-IT goods shall be filed during the 24-hour period (excluding Saturday, Sunday, and legal holidays) following a bidder's requested posting of the contract award or prior to award.
 - IT goods and services shall be filed during the five (5) day period (must exclude Saturday, Sunday, and legal holidays) specified in the public posting of the "Intent to Award" notice.
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7.3.2 Handling a protest of proposed award

The table below describes the process that shall be followed when a notice of intent or protest of proposed award has been received:

Stage	Description
1	The bidder notifies the buyer identified in the solicitation in writing of an objection to the selection of the intended award. The bidder/protester must provide relevant facts and evidence to support their claim that includes citing pertinent laws, rules, regulations or procedures on which the protest is based.
2	The buyer immediately upon having knowledge of or having received a written notice of intent to protest the proposed award notifies DRS by phone, fax or electronic mail: Susan Chan, Manager <ul style="list-style-type: none"> • PH: 916/375-4600 • FAX: 916/375-4614 • E-mail: susan.chan@dgs.ca.gov
3	The buyer stops any further action of the proposed contract award until resolution of the protest of proposed award has occurred.

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Topic 3 - Protests of Proposed Award, Continued

7.3.2 Handling a protest of proposed award (continued)

Stage	Description
4	Department provides DRS with copies of all documents relating to the solicitation including, though not limited to, the solicitation and all addenda, the evaluation and selection analysis, the recommendation for award, and any other documentation or information used to determine the proposed awardee.
5	DRS staff prepares formal documentation of their review and analysis to CVCGCB
6	CVCGCB reviews all submitted documentation and will determine notification and hearing dates to be scheduled as necessary. Hearings are held by CVCGCB, which result in a final decision regarding the protest.

Topic 4 - Alternative Protest Pilot Project

7.4.0 Alternative Protest Pilot Project

The Alternative Protest Pilot Project (APPP) was implemented in 1998 in accordance with PCC section 12125, et seq., to decrease the number of frivolous protests occurring in information technology procurements.

7.4.1 Procurements eligible for participation

Pursuant to PCC section 12125, et. seq., any formal non-IT goods and/or IT goods and services competitive solicitation may include the alternative protest procedure.

Departments may request to include the APPP in formal competitive solicitations. Requests to include the APPP in a formal competitive solicitation must be submitted to and approved by the DGS/PD Alternative Protest Pilot Coordinator. Procurements that include the APPP must be conducted by DGS/PD.

7.4.2 Contact the DRS

Departments interested in participating in the APPP shall contact the DGS/PD Dispute Resolution Manager, who acts as the pilot coordinator.

Topic 5 - Post Award Disputes

7.5.0 Definition A post award dispute is a disagreement or conflict between a supplier/contractor and a department after a purchase document has been executed. Most often, contract disputes arise due to contract performance issues on the part of either the contractor or the State.

7.5.1 Occurrences Disputes can occur in any purchasing authority type, non-IT goods and IT goods and services or in any purchasing category. It makes no difference whether the purchase document was the result of a competitive solicitation, LPA order or an NCB contract.

Disputes may also result from not having a clear understanding of the State's General Provisions or Terms and Conditions or a Statement of Work that is not clearly defined.

7.5.2 Buyers' responsibility Buyers are responsible for managing contract performance by monitoring compliance with contract requirements and communicating to department contract administrators the importance of communicating and documenting all performance issues.

Refer to [Chapter 11](#) – Contract Administration

7.5.3 Dispute provisions The DGS/PD general provisions provide suppliers with the process for disputing after an award has been executed. This language is found in:

- General Provisions-Information Technology (GSPD-401IT), Article #41-Disputes
- General Provisions – Non-IT Commodities (GSPD-401), Article #38-Disputes

[Click](#) here to access DGS/PD general provisions.

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Topic 5 - Post Award Disputes, Continued

7.5.4 Deal in good faith

Departments and suppliers/contractors encountering a dispute should deal with one another in good faith and attempt to resolve potential disputes informally.

Whenever a dispute occurs, buyers will strive to resolve conflicts quickly and fairly, as disputes are disruptive and expensive to all parties involved.

Note: As stated within the DGS/PD General Provisions for both non-IT goods and IT goods and services, the supplier agrees to continue performance of the contract pending final resolution of the dispute. Failure to do so is considered a material breach of the contract.

7.5.5 Steps in resolving disputes

Disputes, regardless of magnitude, shall always be documented in the procurement file. When informal discussions and negotiations fail to render a satisfactory resolution for all parties, buyers shall follow the process identified below.

Step	Action
1	Buyer documents all conflicts or disagreements that affect contract performance.
2	Discussions shall occur with all principles (supplier, buyer, contract administrator, project manager, etc.) involved in the conflict.
3	Review dispute language contained within the General Provisions (non-IT or IT) and any additional contract provisions that may impact the dispute.
4	Strive to reach an agreement that is acceptable to all participants.
5	Prepare written summaries of the major points of the dispute.
6	Involve department management and/or department legal counsel as appropriate.
7	If the dispute resolution: <ul style="list-style-type: none"> Requires clarification or change to the purchase document, prepare an amendment to document the action and process expeditiously. <p>Is unsuccessful, then the supplier must submit a written demand for final decision to the department director or designee. The written demand must present all facts of the dispute and be signed by a company officer.</p>
8	The department director or designee renders a final decision within a timely manner not to exceed 90 days of receiving the supplier's demand.
9	If the supplier is not satisfied with the department's final decision, then the supplier may appeal the decision to DGS/PD DRS for resolution.