Chapter 7

Protest and Post Award Disputes

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## Chapter 7

## Protest and Post Award Disputes

### Overview

### Introduction

This chapter describes the processes and possible outcomes when a supplier protests requirements during a competitive solicitation or challenges the contract award for Information Technology (IT) goods and services solicitations. Refer to the SCM Vol. 2 for protests of non-IT delegated procurements and post award disputes for non-IT goods.

Also included in this chapter is information regarding supplier disputes once an IT contract has been executed.

## 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 this chapter, protests will be referred to as either an “initial protest” or a “protest of proposed award. “

Initial Protest (also known as protest of requirements): is a challenge by a supplier against the technical, administrative, or cost requirements described in a formal IT competitive solicitation.

Protest of proposed award: is a challenge by a bidder against the proposed contract award for IT goods and services.

### 7.1.1 Protest statutes

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

* Initial protests and protest of proposed awards for IT goods and service contracts – Public Contract Code (PCC) section 12102 (h).
* Victim Compensation and Government Claims Board (VCGCB) – Board Hearing Regulations, California Code of Regulations (CCR), Title 2, Division 2, Chapter 1 sections 870.1 – 874.1
* Alternative Protest Process (APP) - PCC section 12125 et seq.
* Office of Administrative Hearings (OAH) – Arbitration Regulations - CCR, Title 1 Division 2, Chapter 5 section 1400 et seq.

### 7.1.2 Authority and role over protests

The DGS/PD Deputy Director must review and render a final decision for initial protests, also known as protests of requirements, for formal IT competitive solicitations.

The VCGCB must review and render a final decision for protests of solicitations conducted under PCC section 12102(h), also known as a traditional protest of proposed award, when they are not withdrawn.

The OAH arbitrates and renders a final decision for protests of solicitations conducted under PCC section 12125 et seq., also known as the APP, which requires protestants to meet regulatory filing requirements and potential bond submissions to retain the right to continue into a hearing.

The DGS/PD cannot delegate its authority to manage protests. Therefore, whenever a department is notified of a protest of IT goods and services, regardless of the PCC under which the solicitation is conducted, the department shall contact the DGS/PD/Dispute Resolution (DR) immediately (the same day or within 24 hours).

**Note**: See SCM, Vol. 1 and Vol. 2 for information regarding protests of non-IT services and non-IT goods respectively.

### 7.1.3 Ability to award during protest

Unless the purchase is conducted under the APP, no awards may be made until the protest is withdrawn, the State cancels the solicitation thereby ending the protest, or it is resolved by the VCGCB. If the purchase is conducted under the APP, the DGS Director may authorize an award(s) while the proposed award is under protest and pending resolution at the OAH.

### 7.1.4 Dispute resolution (DR)

The DGS/PD/DR facilitates resolution of protests against IT solicitation requirements, protests against proposed awards for IT goods and services, and IT contract disputes.

Click here to access the [DGS/PD/DR web page](https://www.dgs.ca.gov/PD/About/Page-Content/PD-Branch-Intro-Accordion-List/Policy-Training-and-Customer-Service/Dispute-Resolution-Unit).

### 7.1.5 Protest provisions in standard solicitation language

The DGS/PD solicitation document provides suppliers with the information for initial protests or protest of proposed awards for IT competitive solicitations. This language is found in the following:

* Bidder Instructions, Article # 12-Specification Concerns
* Bidder Instructions, Article # 21—Protests (PCC section 12102(h))
* Alternative Protest Process (PCC section 12125 et seq.)
* Section II, Rules Governing Competition (IT Formal Solicitation)
* Required language for IT RFQs that exceed $100,000 (see Chapter 4)

### 7.1.6 Solicitation identifies key action dates

When applicable, the competitive solicitation will provide key action dates that notify bidders of specific times and dates to which bidders must adhere to file initial protests and protests of the proposed award for IT goods and services.

## Topic 2 – Initial Protests – IT Goods and Services

### 7.2.0 Terminology

An initial protest (also known as a protest of requirements) is a supplier’s challenge or objection to any administrative, technical or cost specification/requirement(s) contained in a formal IT competitive solicitation.

### 7.2.1 Who can file and when to file an initial protest

Any supplier may file an initial protest of IT requirements for solicitations conducted under PCC section 12102(h) or solicitations conducted under PCC section 12125 et seq. that contain provisions for protests of requirements. Protests of requirements must be received in writing by the soliciting department by the date and time established in the solicitation document.

### 7.2.2 Handling an initial protest

When a buyer receives an initial protest or a supplier has notified the buyer of their intent to lodge an initial protest:

1. A supplier shall lodge an initial protest in written format via facsimile, e-mail, or letter to the buyer identified in the solicitation by the time and date identified in the solicitation. If a supplier notifies the buyer verbally via telephone or in person of intent to protest, the buyer must notify the supplier that a written protest is required to start the resolution process. The buyer will notify the DGS/PD/DR of receipt of the written initial protest and confirm whether or not the initial protest is timely submitted. The Deputy Director has final authority to resolve the protest. If prior to receiving the written version of a verbal protest, a buyer has reason to believe the protest has merit or should be investigated prior to opening the bids, the buyer shall advise management.
2. When an initial protest has been received, the buyer is to immediately notify the DGS/PD/DR by phone and by fax or electronic mail:
	* Protest Coordinator, Dispute Resolution
	* Phone: (916) 375-4581
	* FAX: (916) 376-6226
	* Email: PDProtest@dgs.ca.gov
3. Any further action on the solicitation must stop until the initial protest has been resolved either through a withdrawal of the protest or a written final determination by the DGS.
4. The DGS/PD/DR staff:
	* The initial protest shall be acknowledged
	* An independent review of the initial protest in relationship to the solicitation document shall be conducted immediately
	* Legal advice will be sought
	* Communication with the buyer receiving the protest shall be maintained
	* A written final resolution shall be sent to the supplier who filed the initial protest
5. The buyer and the DGS/PD/DR staff shall work together to resolve the initial protest by initiating and coordinating a response to the supplier. Issues to be considered are whether or not:
	* The solicitation’s technical, administrative, or cost requirements can be defended or
	* The supplier has raised a valid issue and clarification or change to the solicitation can be provided through an addendum to the solicitation or
	* The concern raised by the supplier has merit and it is in the State’s best interest to cancel the solicitation.
6. The buyer will draft a written response to the supplier, and the DGS/PD/DR will assist in the draft, review and comments as necessary to ensure the response appropriately reflects the concurrence that is reached. The buyer will send the approved response to the supplier and to the DGS/PD/DR.
7. Dependent upon the resolution, the buyer:
	* Continues with the competitive bid process through contract award without amendment when the initial protest is resolved by the Deputy Director or
	* Cancels the solicitation or
		+ Amends the solicitation to change the solicitation to reflect the initial protest in part or in whole

### 7.2.3 Adjustment of bid due date may be required

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

## Topic 3 – Protests of Proposed Award

### 7.3.0 Definition

A protest of proposed award is a challenge conducted under PCC 12102(h) or PCC 12125 et seq. by a participating bidder against the proposed contract award for solicitations.

### 7.3.1 Who can file protests of proposed award and when

Any supplier that submits a final bid (called a participating bidder) may protest the proposed award of a contract.

For procurements conducted under PCC 12102, the protestant may protest on the grounds that their bid is responsive to the requirements of the solicitation and that their bid should have been selected for award in accordance with the selection criteria in the solicitation document. Protests of proposed award under 12102(h) 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.

For Major Information Technology Acquisition procurements conducted under PCC 12125, the protestant may protest on the grounds that there was a violation of the solicitation procedures and their bid should have been selected. For all other acquisitions conducted under PCC 12125 et seq., the protestant may protest on the grounds their bid or proposal was responsive to the requirements and should have been selected in accordance with the selection criteria in the solicitation. Protests of proposed award under 12125 et seq. shall be filed during the timeframe specified in the solicitation document which will be no less than 1 and no more than 5 working days after the posting of the Notice of Intent to Award.

### 7.3.2 Procurements eligible for participation in the APP

The APP was implemented in 1998 in accordance with PCC section 12125 et seq., to speed the resolution time of IT protests and to decrease the number of frivolous protests occurring in IT procurements.

Pursuant to PCC section 12125 et seq., an IT goods and services competitive solicitation may include the alternative protest procedure.

An APP Application must be completed and submitted for approval in order to be conducted under the APP. Department’s interested in participating in the APP shall contact the DGS/PD/DR Manager, who acts as the DGS/PD/APP Protest Coordinator.

For additional information refer toOAH Arbitration Regulations - CCR, Title 1 Division 2, Chapter 5 section 1400 et seq.

### 7.3.3 Protest of proposed award under PCC 12102(h), Traditional process

The following describes the process that shall be followed when a notice of protest has been received under PCC 12102(h):

1. The participating bidder notifies the buyer identified in the solicitation of an objection to the selection of the intended award. The notification may or may not include the grounds for the protest or the details related to the protest.
2. The buyer immediately upon having knowledge of or having received a written notice of intent to protest the proposed award, notifies the DGS/PD/DR by phone, fax or electronic mail:
	* Phone: (916) 375-4581
	* FAX: (916) 376-6226
	* Email: PDProtest@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.
4. The buyer provides the DGS/PD/DR with copies of all documents meeting the regulatory definition of the solicitation file 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. The DGS/PD/DR works with the buyer to validate documents to be submitted.
5. The DGS/PD/DR staff prepares and transmits all required formal documentation to meet regulatory notification and submission of the protest to the VCGCB.
6. Within ten calendar days after filing the intent to protest, the bidder/protestant, in their detailed statement of protest, must provide relevant facts and evidence to support their claim. The detailed statement should include citations to pertinent laws, rules, regulations, or procedures on which the protest is based.
7. The DGS/PD/DR, buyer and legal counsel ensure that the State’s response is drafted to represent the facts and legal standing of the State’s decision to defend its proposed award. The DGS/PD/DR ensures that all deadlines and milestones are met.
8. The DGS/PD/DR, buyer and legal counsel review the protestant’s rebuttal to prepare for potential hearing or next steps.

The VCGCB reviews all submitted documentation and will determine notification and hearing dates to be scheduled as necessary. Hearings are held by the VCGCB, which result in a final administrative decision regarding the protest.

1. The DGS/PD/DR responds to all inquiries from the VCGCB.

For additional information refer to VCGCB Regulations, CCR, Title 2, Division 2, Chapter 1 sections 870.1 – 874.1

## Topic 4 - Post Award Disputes

### 7.4.0 Definition

A post award dispute is a disagreement or conflict between a 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.

### 7.4.1 Occurrences

Disputes can occur 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, purchase document terms and conditions, Special Provisions, or when a Statement of Work is not clearly defined or contains conflicting provisions or ambiguities.

### 7.4.2 Buyer responsibility

Buyers are the eventual contract managers responsible for monitoring the contractor’s performance after award. However, in many departments, buyers do not conduct daily or regular oversight of every contract. That responsibility usually falls to an IT project manager, or some other person closely associated with the project. In this case, the buyers will advise the person to administer the contract in accordance with the terms and conditions by notifying the contractor of problems immediately. In the event of a dispute, documentation must be maintained of any performance problem, its resolution, or unresolved problems. The buyer is to use a cure notification process to start the resolution process.

### 7.4.3 Dispute provisions

The contract terms found in General Provisions Information Technology (GSPD-401IT) Article #44 Disputes provide suppliers with the process for disputing contract administration after an award has been executed.

Click here to access the [GSPD-401IT](https://www.dgs.ca.gov/PD/Resources/Page-Content/Procurement-Division-Resources-List-Folder/Model-Contract-Language).

### 7.4.4 Deal in good faith

Buyers should deal in good faith with suppliers/contractors when encountering a dispute and attempt to resolve potential disputes informally at the lowest level.

Whenever a dispute occurs, conflicts should be resolved as quickly and fairly as possible, as disputes are disruptive and can be expensive to all parties to the contract.

**Note**: As stated within the GSPD-401IT, the contractor 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.

### 7.4.5 Resolving disputes

Disputes shall be documented in the procurement file. When informal discussions and negotiations fail to render a satisfactory resolution for all parties:

1. All conflicts or disagreements that affect contract performance shall be documented
2. Discussions shall occur with all principals (contractor, buyer, contract administrator, project manager, etc.) involved in the conflict
3. Dispute language contained within the GSPD-401IT and any special or additional contract provisions that may impact the dispute shall be reviewed
4. Every effort shall be made to reach an agreement that is acceptable to all participants
5. Written summaries of the major points of the dispute shall be prepared
6. The State cannot gift public funds, and must ensure that any monies or settlement are reasonable, legal, and justifiable
7. Department management and/or department legal counsel shall be involved, as appropriate. For the DGS/PD buyer, the DGS/OLS attorney and the DGS/PD/DR staff shall be involved.
8. If the dispute resolution:
* Requires clarification or change to the purchase document, an amendment to document the action shall be prepared and processed expeditiously
* Is unsuccessful, then the contractor must submit a written demand for final decision to the department director or designee. The contractor’s written demand must present all facts of the dispute and be signed by a company officer.
1. The department director or designee shall render a final decision within a timely manner
2. If the supplier is not satisfied with the department’s final decision, then the supplier may appeal the decision to the DGS/PD/DR for resolution at any time in the process. Either party to the dispute may invoke the Disputes clause.