Chapter 7

Protests

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## Chapter 7

## Protests

### Overview

### Introduction

This chapter describes the processes and possible outcomes when a supplier/bidder protests:

* requirements during a competitive solicitation or challenges the contract award for Information Technology (IT) goods and services solicitations; or
* the contract award for non-IT goods solicitations

Refer to the SCM, Vol. 1, for protests of non-IT services that are not procured through an LPA.

## Topic 1 – Protest Basics

### 7.1.0 Definition

A protest is a challenge brought by a supplier/bidder 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 participating bidder against the proposed contract award for non-IT goods or 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 12102.2 (g).
* Protest of proposed award for non-IT procurements (PCC section 10306). Victims Compensation and Government Claims Board (VCGCB) – Board Hearing Regulations, California Code of Regulations (CCR), Title 2, Division 2, Chapter 1, Article 17, Bid Protest, Subarticle 1, General Provisions; sections 870.1 – 877
* Alternative Protest Process (APP) - PCC section 12125 et seq.
* Office of Administrative Hearings (OAH) – Arbitration Regulations - CCR, Title 1 Division 2, Chapter 5, Article 1, General Provisions

### 7.1.2 Authority and role over protests

The director of the California Department of Technology (CDT), or a person designated by the director, may consider and decide on initial protests of bids for information technology projects conducted by the (CDT) and telecommunications procurement made pursuant to Section 12120. The Director of the Department of General Services, or a person designated by the director, may consider and decide on initial protests of all other information technology acquisitions and non-it goods.

VCGCB must review and render a final decision for protests of solicitations conducted under PCC section 10306 and 12102.2(g), also known as a traditional protest of proposed award, when they are not withdrawn.

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

DGS/PD and (CDT) cannot delegate its authority to manage protests. Therefore, whenever a department is notified of a protest of non- IT goods or IT goods and services, regardless of the PCC or CCR under which the solicitation is conducted, the department shall contact DGS/PD/Dispute Resolution (DRU) or the (CDT), whichever agency has oversight for the procurement immediately (the same day or within 24 hours). Refer to Topic 4, [Resources](#Resources7), at the end of this chapter for contact information for DGS/PD/Dispute Resolution Unit (DRU) and the (CDT).

See SCM, Vol. 1 for information regarding protests of non-IT services solicitations that are not an LPA transaction. When conducting LPA Request for Offers (RFO), buyers must **not** include competitive solicitation language regarding small business preference, protest language, intents to award, evaluation criteria or advertising requirements.

\*As of the date of publication of this manual, current policy restricts the use of the APP process to DGS/PD and the (CDT) only.

### 7.1.3 Ability to award during protest

Unless the purchase is conducted under 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 VCGCB.

If the purchase is conducted under APP, the (CDT) or DGS Director may authorize an award(s) while the proposed award is under protest and pending resolution at OAH

### 7.1.4 Dispute resolution unit (DRU)

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

### 7.1.5 Protest provisions in standard solicitation language

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

* Bidder Instructions, Article # 12 – Specification Concerns
* Bidder Instructions, Article # 21 – Protests (PCC section 12102.2(g))
* 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

To view the Bidder Instructions, refer to Topic 4, [Resources](#Resources7), at the end of this chapter.

### 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 either IT goods and services or non-IT goods valued over $25,000.00.

## Topic 2 – Protests: Non-IT Goods and IT Goods and Services

### 7.2.0 Terminology for Initial Protest and protest of proposed award

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.

A protest of proposed award is a challenge by a participating bidder against the proposed contract award of a non-IT goods contract under PCC 10306 or an award of a IT goods and services contract. under PCC 12102.2(g).

### 7.2.1 Who may file and when to file a protest

Any supplier who submitted a bid may file an initial protest of IT requirements for solicitations conducted under PCC section 12102.2(g) 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.

For non-IT goods, a bidder may file a protest of proposed award conducted under PCC Section 10306 for non-IT goods, prior to award, with the department against the awarding of the contract or purchase order on the grounds that he or she is the lowest responsible bidder meeting specifications.

When a contract or purchase order is not to be awarded to the lowest bidder, the bidder must be notified 24 hours prior to awarding the contract or purchase order. If protested, the award shall not be made until either the protest has been withdrawn or the VCGCB has made a final decision as to the action to be taken relative to the protest. The 24 hour period excludes Saturdays, Sundays and legal holidays.

For IT goods and services, 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 12102.2(g) 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.

### 7.2.2 Handling a protest

When a buyer receives an initial protest or a supplier/bidder has notified the buyer of their intent to submit an initial protest or protest of proposed award:

1. A supplier/bidder shall submit a 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/bidder notifies the buyer verbally via telephone or in person of intent to protest, the buyer must notify the supplier/bidder that a written protest is required to start the resolution process. The buyer will check the “protest flag” in the FI$Cal system. When the protest flag is checked, the system will put the event (e.g. the solicitation or the award) on hold and will not allow the buyer to move forward. The protest flag also triggers a protest notification to the buyer and DGS/PD/DRU. If prior to receiving the written version of a verbal protest, a buyer has reason to believe the protest has merit or should be investigated prior to opening the bids, the buyer shall advise management.
2. A new protest information hyperlink will be added in FI$Cal which will open a new protest information page. DRU will add the protest information, including:
	* Reason code for protest
	* Protest Date
	* Check received check box to track if a check is received for the protest
	* Check Number
	* Check Amount
	* Check Deposited
	* Comments
	* Protest resolved check box to track that protest is resolved
	* Protest Resolved Date
3. Any further action on the procurement will stop until the initial protest/protest of proposed award has been resolved either through a withdrawal of the protest, a written final determination by DGS, or resolution by VCGCB.
4. DGS/PD/DRU staff shall acknowledge the protest, conduct an independent review of the initial protest in relationship to the solicitation document, maintain communication with the buyer, assist with coordinating a response to the supplier, and respond to all inquiries from the VCGCB.

| **INITIAL PROTEST OF SPECIFICATIONS** | **PROTEST OF PROPOSED AWARD** |
| --- | --- |
| 1. The buyer and DGS/PD/DRU staff shall work together to resolve an initial protest of requirements 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.
 | 1. The buyer provides DRU 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 bidder recap, the recommendation for award, and any other documentation or information used to determine the proposed award. DRU works with the buyer to validate documents to be submitted to the VCGCB.
 |
| 1. The buyer will draft a written response to the supplier, and DGS/PD/DRU 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 DGS/PD/DRU.
 | 1. DRU staff prepares and transmits all required formal documentation to meet regulatory notification and submission of the protest to the VCGCB.
 |
| 1. Dependent upon the resolution, the buyer:
	* Continues with the competitive bid process through contract award without amendment when the initial protest is resolved by DGS/PD Deputy Director, or
	* Cancels the solicitation, or
	* Amends the solicitation to change the solicitation to reflect the initial protest in part or in whole.
 | 1. Within ten calendar days after filing the intent to protest of the proposed award, 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.
 |
|  | 1. The DRU, 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 DRU ensures that all deadlines and milestones are met.
 |
|  | 1. The DRU, buyer and legal counsel review the protestant’s rebuttal to prepare for a potential hearing or next steps.
 |
|  | 1. The VCGCB reviews all submitted documentation and will determine notification and hearing dates to be scheduled as necessary. The hearing officer prepares his/her proposed decision which is decided by the three-member board, resulting in a final administrative decision regarding the protest.
 |

Lastly, DGS/PD/DRU will uncheck the Protest Flag checkbox when all the protests have been resolved. When the checkbox is unchecked, the system releases the hold and the buyer may continue with the procurement. The system also sends a Protest Resolved Notification to the buyer and DGS/PD/DRU.

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

If a resolution of the initial protest 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 – Alternative Protest Process

### 7.3.0 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 procurements.

Pursuant to PCC section 12125 et seq., any non-IT goods or IT goods and services competitive solicitation may include the APP\*

An APP Application must be completed and submitted for approval in order to be conducted under the APP.

\*As of the date of publication of this manual, current policy restricts the use of the APP process to DGS/OTA only

For additional information, refer toOAH Arbitration Regulations refer to Topic 4, [Resources](#Resources7), at the end of this chapter

## Topic 4 – Resources

## Chapter 7 Resources

**B**

[Bidder Instructions](http://www.documents.dgs.ca.gov/pd/modellang/GSPD451-110911.pdf) [Link to Webpage](https://www.dgs.ca.gov/PD/Resources/Page-Content/Procurement-Division-Resources-List-Folder/Model-Contract-Language)

**C**

Contact Us

 DGS/PD/Dispute Resolution Unit [Link to Website](https://www.dgs.ca.gov/PD/About/Page-Content/PD-Branch-Intro-Accordion-List/Policy-Training-and-Customer-Service/Dispute-Resolution-Unit)

 California Department of Technology [Link to Website](http://www.cio.ca.gov/)

**G**

General Provisions (GSPD-401 (non-IT)/GSPD-401IT (IT))

[Link to Webpage](https://www.dgs.ca.gov/PD/Resources/Page-Content/Procurement-Division-Resources-List-Folder/Model-Contract-Language)

**O**

OAH Arbitration Regulations (CCR Title 2, Division 2, Chapter 1,

 sections 870.1 – 874.1 [Link to Webpage](https://govt.westlaw.com/calregs/Browse/Home/California/CaliforniaCodeofRegulations?guid=I2297F750D48F11DEBC02831C6D6C108E&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default))