Chapter 7

Protest and Post Award Disputes

Table of Contents

[Chapter 7 2](#_Toc407778821)

[Protest and Post Award Disputes 2](#_Toc407778822)

[Overview 2](#_Toc407778823)

[Introduction 2](#_Toc407778824)

[Contents 2](#_Toc407778825)

[Topic 1 – Protest Basics 2](#_Toc407778826)

[7.1.0 Definition 2](#_Toc407778827)

[7.1.1 Protest statutes 2](#_Toc407778828)

[7.1.2 Authority over protests 3](#_Toc407778829)

[7.1.3 Ability to Award During Protest 3](#_Toc407778830)

[7.1.4 Dispute Resolution Section 3](#_Toc407778831)

[7.1.5 Protest provisions in standard solicitation language 3](#_Toc407778832)

[7.1.6 Solicitation identifies key action dates 3](#_Toc407778833)

[Topic 2 - Protests of Proposed Award 4](#_Toc407778834)

[7.2.0 Defining protests of proposed award 4](#_Toc407778835)

[7.2.1 Who may file a protest of proposed award and when 4](#_Toc407778836)

[7.2.2 Handling a protest of proposed award (rev 12/14) 4](#_Toc407778837)

[Topic 3 - Alternative Protest Process 6](#_Toc407778838)

[7.3.0 Alternative Protest Process 6](#_Toc407778839)

[7.3.1 Procurements eligible for participation 6](#_Toc407778840)

[7.3.2 Contact the DR 6](#_Toc407778841)

[Topic 4 - Post Award Disputes 7](#_Toc407778842)

[7.4.0 Definition 7](#_Toc407778843)

[7.4.1 Occurrences 7](#_Toc407778844)

[7.4.2 Buyers’ responsibility 7](#_Toc407778845)

[7.4.3 Dispute provisions 7](#_Toc407778846)

[7.4.4 Deal in good faith 7](#_Toc407778847)

[7.4.5 Steps in resolving disputes 8](#_Toc407778848)

## Chapter 7

## Protest and Post Award Disputes

### Overview

#### Introduction

This chapter describes what buyers may be faced with if a bidder protests the contract award for non-IT goods solicitations. Refer to the SCM, Vol. 1, for protests and post-award disputes for non-IT services that are non-LPA, and SCM, Vol. 3 for protest and post award disputes of IT solicitations.

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

#### Topic 1 – Protest Basics

##### 7.1.0 Definition

A protest is a challenge brought by a bidder during the competitive solicitation process asserting that the protestant should have been selected for award.

##### 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).
* Victim Compensation and Government Claims Board (VCGCB)– Board Hearing Regulations, CCR, Title 2, Division 2, Chapter 1 sections 870.1 – 874.1

##### 7.1.2 Authority over protests

The VCGCB must review and render a final decision for protests of proposed awards that are not withdrawn.

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

**Note**: Refer to the SCM, Vol. 1, regarding protests of non-IT services solicitations that are not an LPA transaction, and SCM, Vol. 3 for IT goods and services. When conducting LPA’s Request for Offer’s (RFO), buyers must not include competitive solicitation language regarding small business preference, protest language, intents to award, evaluation criteria or advertising requirements.

**Warning:**
Master Agreements (MA) and California Multiple Award Schedules (CMAS), since MA and CMAS RFOs are not considered competitive solicitations, departments must not include protest language.

##### 7.1.3 Ability to Award During Protest

No further action (i.e. award) may occur until a protest is withdrawn or the VCGCB renders a decision regarding the protest.

##### 7.1.4 Dispute Resolution Section

DR facilitates and mediates resolution of protests against proposed awards of non-IT goods and contract disputes.

Click here to access the [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 language provides bidders with the method for clarifying requirements and protesting a competitive solicitation. This language is found in the Bidder instructions:

* Article # 12-Specification Concerns
* Article # 21--Protests

To view the Bidder Instructions, click the [Standard Contracts and Solicitation Documents](http://www.dgs.ca.gov/pd/Resources.aspx) ribbon on the Resources web page.

##### 7.1.6 Solicitation identifies key action dates

The competitive solicitation will provide key action dates that will notify bidders of the last day to file a protest of the proposed contract award for non-IT goods valued over $25,000.00.

#### Topic 2 - Protests of Proposed Award

##### 7.2.0 Defining protests of proposed award

A protest of proposed award is a challenge conducted under PCC 10306 by a participating bidder against the proposed contract award of a non-IT goods contract.

##### 7.2.1 Who may file a protest of proposed award and when

Per Public Contract Code Section 10306, prior to award, any bidder who has submitted a bid may file a protest 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 periods exclude Saturdays, Sundays and legal holidays.

7.2.2 Handling a protest of proposed award

The table below describes the process that shall be followed when a protest has been filed.

Step Description

1 The bidder notifies the buyer identified in the solicitation in writing of an objection to the selection of the intended award.

2 The buyer immediately upon having knowledge of or having received a written protest notifies DR by phone, fax or electronic mail:

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* PH: 916/375-4623
* FAX: 916/376-6226
* E-mail: 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 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 bidder recap, the recommendation for award, and any other documentation or information used to determine the proposed award. DR works with the buyer to validate documents to be submitted to the VCGCB.

**Step Description**

5 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 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 DR ensures that all deadlines and milestones are met.

8 The DR, buyer and legal counsel review the protestant’s rebuttal to prepare for a potential hearing or next steps.

9 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.

10 The DR responds to all inquiries from the VCGCB.

For additional information regarding VCGCB regulations see CCR Title 2, Division 2, Chapter 1, sections 870.1 – 874.1.

#### Topic 3 - Alternative Protest Process

##### 7.3.0 Alternative Protest Process

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

##### 7.3.1 Procurements eligible for participation

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

##### 7.3.2 Contact the DR

Departments interested in information regarding the APP shall contact the DGS/PD Dispute Resolution Manager, who acts as the APP Protest Coordinator.

For additional information see OAH arbitration regulations – CCR Title 1 section 1400 et seq.

#### Topic 4 - Post Award Disputes

##### 7.4.0 Definition

A post award dispute is a disagreement or conflict between a bidder/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 authority type 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.

##### 7.4.2 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

##### 7.4.3 Dispute provisions

The DGS/PD general provisions provide bidders with the process for disputing after an award has been executed. This language is found in the General Provisions – Non-IT Commodities (GSPD-401), Article #38-Disputes.

To view the General Provisions, click on the [Standard Contracts and Solicitation Documents](http://www.dgs.ca.gov/pd/Resources.aspx) ribbon on the Resources web page.

##### 7.4.4 Deal in good faith

Departments and bidders/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 non-IT commodities 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 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 (bidder, buyer, contract administrator, project manager, etc.) involved in the conflict.

3 Review dispute language contained within the General Provisions 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, see 7.4.3.

6 The State cannot gift public funds and must ensure that any monies or settlements are reasonable, legal, and justifiable.

7 Involve department management and/or department legal counsel as appropriate.

8 If the dispute resolution requires clarification or change to the purchase document, prepare an amendment to document the action and process expeditiously. If unsuccessful, the bidder 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.

9 The department director or designee renders a final decision in a timely manner not to exceed 90 days from receiving the bidder’s demand.

10 If the bidder is not satisfied with the department’s final decision, then the bidder may appeal the decision to the DGS/PD DR for resolution.