

How to Handle and Avoid Protests

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1

1

Why do I Need to be Concerned?

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2

2

What Laws Require

- Specific processes described in state law must be followed to ensure competition
- Selection and award is based on criteria included in specification documents
- Award is made to bidders or proposers that meet all the mandatory requirements and offer either the best price or the best value
- Bidders must be treated equally and fairly

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3

3

Examples of Abuses that have Resulted in Litigation

- Restrictive specifications that favor one vendor
- Waiving mandatory requirements for a favored vendor
- Providing incomplete or vague specifications in the solicitation packet
- Providing information to only some vendors

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4

4

Examples of Abuses that have Resulted in Litigation

- Awarding contracts to friends or relatives
- Splitting purchases to keep amounts under formal bid limits
- Release of information considered confidential by vendors
- Release of proposal information prematurely

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5

5

Examples of Abuses that have Resulted in Litigation

- More time is needed to respond
- There are many brand names or equal issues
- The specifications are overly complicated and detailed, making them difficult to understand
- Evaluation factors not clear

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6

6

When Vendors are Unhappy

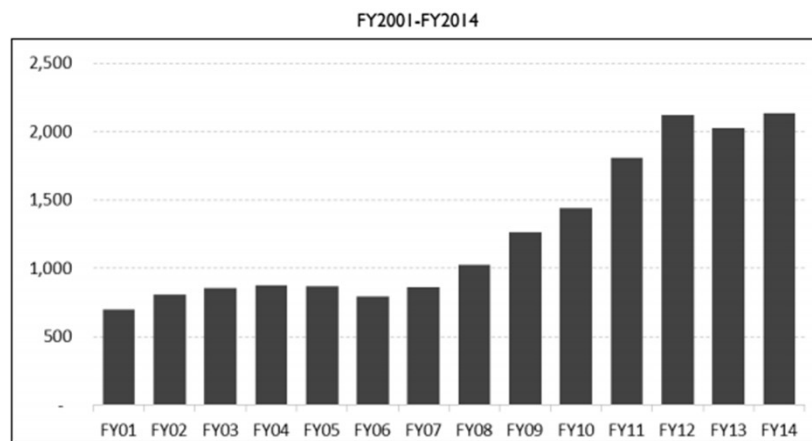
- Some complain to the purchasing department
- When they cannot get a satisfactory explanation, some will go public by complaining to elected officials or the press
- Some resort in filing official protests or lawsuits because they believe that the process is flawed

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7

7

Trend: Federal Procurements Protested 2000-2014



Source: GAO data provided to CRS.
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8

8

What Should We Do to Avoid Protests and Lawsuits?

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9

9

Determine Where You Are in the Bid/Proposal Process

- Before distribution of specifications
- After distribution of specifications
- After bids/proposals are opened but before award
- After bids/proposals are awarded

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10

10

Procedures to Be Considered Before Distribution

- Check specifications for restrictive wording.
- If specifications are prepared by the user department:
 - 1) Determine the source of their information.
 - 2) Get copies of the materials they used.



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11

11

Procedures to Be Considered Before Distribution

- Make suggestions to the department for any changes you feel necessary.
- Have potential bidders comment on the specifications.
 - 1) Ask whether they can bid on the specifications as written.
 - 2) Be sure to mark the request “draft”.



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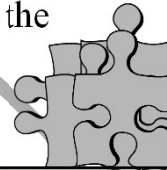
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Procedures to Be Considered Before Distribution

- Have calls regarding the specifications come to Purchasing rather than to the user department.
- Hold a pre-bid conference if you think that there could be protests.
 - 1) Try to resolve all disputes there.
 - 2) Have the department explain to vendors the reason for certain specifications.

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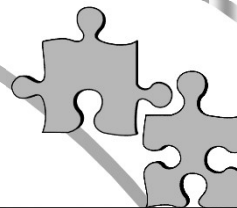


13

Procedures to Be Considered Before Distribution

- Be sure that your instructions are complete. Don't assume anything.
- If you feel that there could be a political problem with the specifications, have your governing body approve them BEFORE distribution.

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14

If Bid Specifications Have Been Distributed

- Watch for warning signs:
 - 1) A call from a vendor.
 - 2) Comments from the user department.
- Send an addendum to correct restrictions, if possible.
- Be certain that all vendors have the same information.

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15

15

If Bid Specifications Have Been Distributed

- Cancel the bid and rewrite the specifications if major changes need to be made.
- Make all potential bidders/proposers aware of the cancellation

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16

16

If a Problem Is Discovered After Opening, Before Award

- Admit that there is a problem.
- Consider canceling the bid.
- Rebid with new specifications.

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17

17

If the Bid Has Been Awarded

- Proceed with caution—there may be legal liability.
- Consult with legal council for advice.
- Carefully document all steps that have occurred.



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18

18

Other Considerations

- Make sure that your bosses are aware of the problem. Don't let them be blind-sided.
- Be aware that taking more time and thought in developing specifications can save days and weeks of dealing with a protest.
- You cannot avoid a protest by having vendors sign a waiver.

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19

19

Other Considerations

- When a vendor protests:
 - 1) Listen to his concerns carefully.
 - 2) Ask questions to show that you heard what he said.
 - 3) Make sure that you understand what and why he is protesting.
 - 4) Don't minimize a vendor's position. Make them feel that their concern is important.

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20

20

Other Considerations

- 4) Be sure that you act on **complete** information.
- 5) Listen with an open mind.
- 6) Be courteous and responsive.
- 7) Consider having a debriefing with vendors after complex or high dollar bids. This may help you avoid a protest and help them understand how they scored.
- 8) Never compromise your ethics.

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21

21

Other Considerations

- **DOCUMENT,
DOCUMENT,
DOCUMENT!!**

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22

22

There can be Positive Aspects of a Protest from a Vendor Perspective

In a report issued by NASPO, the following benefits for vendors were noted:

- Provides a fair process and real check on flawed or anticompetitive awards
- Opportunity to improve the procurement process
- Opportunity to change bid outcome

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23

23

There can be Positive Aspects of a Protest from a Vendor Perspective

- Opportunity to complain about losing competitive process
- Opportunity to express dissatisfaction with the bid award process
- Opportunity to learn how to better prepare a bid response

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24

24

Should We have a Protest Policy or Procedure?

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25

25

What are the Requirements?

- State Agencies are required to have Protest Procedures
- Local Governments are not mandated to have them, but it is a best practice

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26

26

Texas Government Code

- 2155.076. PROTEST PROCEDURES. (a) The commission and each state agency by rule shall develop and adopt protest procedures for resolving vendor protests relating to purchasing issues. An agency's rules must be consistent with the commission's rules. The rules must include standards for maintaining documentation about the purchasing process to be used in the event of a protest.

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27

27

Items to Consider Including in a Protest Procedure

- Steps for the protestor to follow
- Deadline for filing a protest
- Instructions whether the protest must be written and/or verbal
- Information that must be included in the protest documentation

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28

28

Items to Consider Including in a Protest Procedure

- Indication whether a stay will be issued on the procurement pending resolution of the protest
- Protest bond or fee
- Method of final determination
- Appeal process

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29

29

Required Protest Documentation Might Include

- Statute or procedure alleged to have been violated
- The relevant facts
- Issues that the protestor is requesting to be resolved
- Protestor's argument and supporting documentation

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30

30

FANNIN COUNTY PROTESTS PROCEDURES

1. RIGHT TO PROTEST

Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract shall seek resolution with the Purchasing Agent unless the solicitation provides other avenues of appeal. If the aggrieved person does not perceive there to be satisfactory resolution, then a written appeal may be submitted to the Fannin County Commissioners' Court, whose decision will be final. A protest with respect to an invitation for bids or request for proposals shall be submitted in writing prior to the opening of bids or the closing date of proposals, unless the aggrieved person did not know and should not have known of the facts giving rise to such protest prior to bid opening or the closing date for proposals. The protest shall be submitted within ten (10) calendar days after such aggrieved person knows or should have known of the facts giving rise thereto.

2. STAY OF PROCUREMENT DURING PROTESTS

In the event of a timely protest under **Right to Protest**, the County shall not proceed further with the solicitation or award of the contract until all administrative and judicial remedies have been exhausted or until the Commissioners' Court makes a determination, in writing, that the award of a contract without delay is necessary to protect the substantial interests of the County of Fannin.

3. A FORMAL PROTEST SHALL CONTAIN

- a) A specific identification of the statutory or regulatory provision that the action complained of is alleged to have violated;
- b) A precise statement of the relevant facts;
- c) An identification of the issue or issues to be resolved;
- d) Argument and authorities in support of the protest;
- e) An affidavit that the contents of the protest are true and accurate.

Failure to include all of Items (a) through (e) above will result in a protest being incomplete and it will be rejected.

31

31

City of San Marcos Protest Procedures

Protest Procedures

The purpose of the protest procedures is to protect the public interest in the purchasing process. This section is intended to give a bidder, proposer, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract the opportunity to protest. The City's objective is to resolve protests as soon as practical.

Any protest or complaint to the City's consideration must be submitted in writing and received by the Purchasing Manager no later than 5:00 PM on the fifth (5th) calendar day after the City notifies the bidder or proposer: 1) that it is deemed non-responsive; 2) that it is deemed not responsible; 3) the name of the apparent winning bidder; or 4) the City's intent to award a contract. If the protest or complaint does not contain the following information, it may be dismissed by the Purchasing Manager:

- Protestor's name, address, telephone number, and email address;
- The solicitation number;
- Identification of the statute or policy that is alleged to have been violated;
- A precise statement of the relevant facts;
- Identification of the issues to be resolved; and
- Supporting documentation.

The protest must be concise and presented logically and factually to help with the City's review and determination as to whether the grounds for the protest are sufficient. The Purchasing Manager will notify the protesting party that the protest has been received and make every effort to resolve the protest before contract award.

If it is determined that the grounds for the protest are insufficient and no violation of a statute or policy has occurred, the Purchasing Manager will provide a written decision to the protesting party setting forth the reasons for the determination.

If, after conferring with the City Attorney's Office, it is decided that the grounds for the protest are sufficient and it is determined that a violation of a statute or policy has occurred, the Purchasing Manager will inform the protesting party by letter setting forth the reasons for the determination and the remedial action that will be taken.

When a protest is filed, the City will not make an award until a decision on the protest is made except, as determined by the City Manager, when a delay would jeopardize urgently needed goods or services, or a delay in making an award will unduly delay the performance of urgently needed services.

32

32

More Examples of Protest Procedures

- DIR
<https://dir.texas.gov/View-Information-For-Vendors/Pages/Content.aspx?id=21>
- The University of Texas System
<https://utsystem.edu/offices/contracts-and-procurement/27-supplier-protests-disputes-resolutions>
- GAO
<https://www.gao.gov/legal/bid-protests>

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33

33

A Final Thought

Having a policy that allows fair handling of protests helps ensure a fair and level playing field for all vendors who wish to participate in your entity's bid process. An approved procedure, posted for vendors' use, will provide less stress when a protest is made.

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34

34

Thank You

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35

35