Judicial Council of California

PROTESTS

CHAPTER 7

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Table of Contents

Introduction 3
Defined Terms 3
7.1 Designation of JBE Protest Personnel 3
7.2 Protest Thresholds 3
7.3 Solicitation Specifications Protests 4
A. Who May Submit a Solicitation Specifications Protest 4
B. Deadline for Receipt of Protest 4
C. Required Information 5
D. Submission of the Protest 5
E. Evaluation 6
F. Written Determination 6
G. Appeal 7
7.4 Award Protests 7
A. Who May Submit an Award Protest 7
B. Deadline for Receipt of Protest 8
C. Required Information 8
D. Submission of the Protest 9
E. Evaluation 9
F. Written Determination 10
G. Appeal 11
7.5 Appeals 11
7.6 SB/DVBE Option 113

INTRODUCTION

There are two types of protests in Judicial Branch Entity (JBE) procurement: solicitation specifications protests and award protests. This chapter provides information on these types of protest and how they are handled by JBEs.

DEFINED TERMS

If not defined in the text of this chapter, the definitions of capitalized terms are set forth in the glossary.

7.1 DESIGNATION OF JBE PROTEST PERSONNEL

Each JBE should designate a protest hearing officer to evaluate and issue written determinations regarding protests. To ensure proper segregation of duties, the protest hearing officer should be someone other than the Buyer. Each JBE should also designate a protest appeals officer to evaluate and issue written determinations regarding appeals of the protest hearing officer's written determinations. These designations should be documented in the JBE's Local Contracting Manual.

If a JBE does not designate a protest hearing officer, the Buyer's manager will act as the protest hearing officer. If a JBE does not designate a protest appeals officer, the protest hearing officer's manager will act as the protest appeals officer.

7.2 PROTEST THRESHOLDS

A JBE may adopt in its Local Contracting Manual thresholds for the acceptance of protests. The thresholds adopted by the JBE may not be higher than the dollar amounts in the following chart for the applicable type of procurement.

Type of Procurement	Threshold
Non-IT goods	$50,000
Non-IT services	$5,000
IT goods and services	$100,000

If a JBE adopts protest thresholds, the JBE must (i) state in any Solicitation Document associated with a procurement estimated to be below the applicable threshold that protests will not be accepted, and (ii) reject any protest received for a procurement if the procurement is below the applicable threshold.

The remainder of this chapter is applicable only to procurements above the applicable protest thresholds.

7.3 SOLICITATION SPECIFICATIONS PROTESTS

A solicitation specifications protest is a protest alleging that a Solicitation Document contains a technical, administrative, or cost specification or requirement that is defective. The specification or requirement may be defective because it is:

- Onerous, unfair, or illegal; or
- Imposes unnecessary constraints in proposing less costly or alternate solutions.

Example: A JBE inappropriately requires that goods be of a specific brand, when goods of another brand meet the JBE's requirements equally well at a lower cost. The requirement could result in a solicitation specifications protest.

Failure to comply with the protest processes set forth in this chapter may result in the JBE's rejection of a solicitation specifications protest.

A. Who May Submit a Solicitation Specifications Protest

Any Prospective Bidder may submit a solicitation specifications protest.

B. Deadline for Receipt of Protest

The deadline for the JBE to receive a solicitation specifications protest is the applicable date specified in the Solicitation Document. If no date is specified in the Solicitation Document, the deadline for the JBE to receive a solicitation specifications protest is the deadline specified in the JBE's Local Contracting Manual. If no deadline is specified in the JBE's Local Contracting Manual, the deadline for the JBE to receive a solicitation specifications protest is the Bid Closing Time.

The Prospective Bidder is solely responsible for ensuring that a solicitation specifications protest is received by the JBE by the deadline. The failure of a Prospective Bidder to submit a timely solicitation specifications protest constitutes a

waiver of the Prospective Bidder's right to protest the solicitation's specifications or requirements.

C. Required Information

A solicitation specifications protest must include the following information:

- Contact information of the Protester or its representative (this must include name, address, and telephone number, and should include e-mail address and fax number);
- The title of the Solicitation Document to which the protest is related;
- The specific alleged deficiency in the solicitation's technical, administrative, or cost specifications or requirements;
- A detailed description of the specific legal and factual grounds of protest and any supporting documentation; and
- The specific ruling or relief requested.

A solicitation specifications protest lacking any of this information may be rejected by the protest hearing officer.

The protest hearing officer may issue a written determination regarding the solicitation specifications protest without requesting further information from the Protester. Therefore, the solicitation specifications protest must include all grounds for the protest and all evidence available at the time the protest is submitted. If the Protester later raises new grounds or evidence that was not included in the initial protest submittal but which could have been raised at that time, the JBE shall not consider the new grounds or new evidence.

D. Submission of the Protest

The Protester must send the solicitation specifications protest to the protest hearing officer or other individual identified in the Solicitation Document to receive protests. Unless personal delivery is permitted as noted below, the Protester must send the solicitation specifications protest by certified mail, registered mail, or overnight courier.

If allowed by the Solicitation Document, the Protester may also deliver the solicitation specifications protest personally as specified in the Solicitation Document. If the solicitation specifications protest is personally delivered, a receipt must be provided to the Protester if requested.

E. Evaluation

When evaluating the solicitation specifications protest, the protest hearing officer should consider:

- The validity and defensibility of the allegedly defective technical, administrative, or cost specification or requirement;
- Whether the Protester has raised a valid issue; and
- Whether competition would be advanced by revising the allegedly defective technical, administrative, or cost specification or requirement.

The protest hearing officer should seek legal advice as needed.

Note: The Protester bears the burden of proof to show that the Solicitation Document contains a defective technical, administrative, or cost specification or requirement.

F. Written Determination

The protest hearing officer must issue a written determination before the JBE opens the Bids (or evaluates the Bids, if the Bids are not sealed). If required, the JBE may extend the Bid Closing Time to allow for time to review the solicitation specifications protest.

If the protest hearing officer determines that the solicitation specifications protest has merit, the protest hearing officer should take appropriate remedial action. Such action may include:

- Changing or clarifying the defective technical, administrative, or cost specification or requirement through an addendum to the Solicitation Document; or
- Canceling the solicitation.

If an addendum to the Solicitation Document is issued and the addendum may require additional time for Prospective Bidders to respond, the addendum should extend the Bid Closing Time by an appropriate amount of time (as determined by the protest hearing officer).

G. Appeal

The protest hearing officer's written determination is the final action by the JBE unless the Protester submits an appeal to the protest appeals officer within two Court Days of the issuance of the protest hearing officer's written determination.

Note: The JBE may adopt in its Local Contracting Manual a different deadline for the filing of an appeal, provided it is not fewer than two Court Days.

See section 7.5 for the handling of appeals.

7.4 AWARD PROTESTS

An award protest is a protest alleging that:

- The JBE has committed an error in the award process sufficiently material to justify invalidation of the proposed award; or
- The JBE's decisions are lacking a rational basis and are, therefore, arbitrary and capricious.

Example: The Solicitation Document stated that 50 percent of a Bid's total score would be cost points, but the JBE instead made cost points only 30 percent of the Bid's total score. This error could result in an award protest.

Failure to comply with the protest processes set forth in this chapter may result in the JBE's rejection of an award protest.

A. Who May Submit an Award Protest

A Bidder may submit an award protest if the Bidder meets the following requirements:

- The Bidder submitted a Bid that the Bidder believes to be responsive to the Solicitation Document; and
- The Bidder believes that the JBE has incorrectly selected another Bidder for an award.

A person or entity who did not submit a Bid may not submit an award protest.

In no event will a JBE consider a protest if the JBE rejected all Bids or the solicitation was canceled for any reason.

B. Deadline for Receipt of Protest

For solicitations using an RFQ, the deadline for the JBE to receive an award protest should be specified in the RFQ. If no deadline is specified in the RFQ, the award protest must be received by the JBE before the contract is executed. In no event will a JBE consider a protest for a solicitation using an RFQ after the contract has been executed.

For solicitations using an IFB or RFP, the deadline for the JBE to receive an award protest is specified in the table below.[1]

The Bidder is solely responsible for ensuring that an award protest is received by the JBE by the applicable due date. The failure of a Bidder to submit a timely award protest constitutes a waiver of the Bidder's right to protest the award.

Non-IT goods	Non-IT services	IT goods and services
The JBE must receive the award protest within **24 hours** after the JBE posts the intent to award. The Protester will have **10 calendar days** after the JBE receives the protest to submit all information in section C below to the JBE.	The JBE must receive the award protest within **5 Court Days** after the JBE posts the intent to award. The Protester will have **5 calendar days** after the JBE receives the protest to submit all information in section C below to the JBE.[2]	The JBE must receive the award protest within **5 Court Days** after the JBE posts the intent to award. The Protester will have **10 calendar days** after the JBE receives the protest to submit all information in section C below to the JBE.

C. Required Information

An award protest must include the following information:

- Contact information of the Protester or its representative (this must include name, address, and telephone number, and should include e-mail address and fax number);

[1] On a case-by-case basis, a JBE may in its sole discretion extend any deadline in the table below for the receipt of the required information in section C.
[2] A JBE may extend this deadline to 10 calendar days in its Local Contracting Manual if the JBE prefers to have a uniform deadline for all three types of procurements.

- The title of the Solicitation Document to which the protest is related;
- The specific alleged error or irrational decision made by the JBE;
- A detailed description of the specific legal and factual grounds of protest and any supporting documentation; and
- The specific ruling or relief requested.

If an award protest is missing any of this information (by the date the Protester is required to have all such information to the JBE), the award protest may be rejected by the protest hearing officer.

The protest hearing officer may issue a written determination regarding the award protest without requesting further information from the Protester. Therefore, the award protest must include all grounds and all evidence available at the time the award protest is submitted. If the Protester later raises new grounds or evidence that was not included in the initial protest submittal but which could have been raised at that time, the JBE shall not consider such new grounds or new evidence.

Note: For protests of non-IT goods solicitations, the Protester must assert that it is the lowest responsible bidder meeting specifications unless the JBE waives this requirement. A JBE may include a general waiver of this requirement in its Local Contracting Manual.

D. Submission of the Protest

The Protester must send the award protest (and any supporting documentation) to the protest hearing officer or other individual identified in the Solicitation Document to receive protests. Unless personal delivery is permitted as noted below, the Protester must send these materials by certified mail, registered mail, or overnight courier.

If allowed by the Solicitation Document, the Protester may also deliver these materials personally to the JBE as specified in the Solicitation Document. If the materials are personally delivered, a receipt must be provided to the Protester if requested.

E. Evaluation

When evaluating the award protest, the protest hearing officer should consider:

- Whether the JBE committed an error in the award process;
- Whether an allegedly defective decision lacks a rational basis; and

- If the JBE committed an error in the award process or made a decision that lacks a rational basis, the materiality of the error or decision.

The protest hearing officer should seek legal advice as needed.

The Protester bears the burden of proof to show that (i) the JBE has committed an error in the award process sufficiently material to justify invalidation of the proposed award, or (ii) the JBE's decisions are lacking a rational basis and are, therefore, arbitrary and capricious.

Note: The following do **not** constitute the absence of a rational basis:

- The Protester disagrees with the scores assigned by the Evaluation Team; or
- The Evaluation Team could have assigned different scores based on the same information.

F. Written Determination

The protest hearing officer must respond to an award protest with a written determination before the contract is awarded. The protest hearing officer should issue the written determination within 10 Court Days of the complete submission of the award protest, or notify the Protester that additional time will be required. The JBE may extend the award date to allow for time to review the award protest.

If the protest hearing officer determines that the award protest has merit, the protest hearing officer should take appropriate remedial action. In determining the appropriate remedial action, the protest hearing officer should consider all circumstances surrounding the procurement, including:

- The seriousness of the procurement deficiency;
- The degree of prejudice to other Bidders;
- The impact on the integrity of the competitive procurement system;
- The good faith of the parties;
- The cost to the JBE;
- The urgency of the procurement; and
- The impact on the JBE.

Remedial actions may include:

- Issuing a new solicitation; and
- Awarding the contract consistent with law.

G. Appeal

The protest hearing officer's written determination is considered the final action by the JBE unless the Protester submits an appeal to the protest appeals officer within five calendar days of the issuance of the protest hearing officer's written determination.

The JBE may, at its sole discretion, delay the contract award until the appeal is resolved or proceed with the award and execution of the contract. See section 7.5 for the handling of appeals.

7.5 APPEALS

Unless personal delivery is permitted as noted below, the Protester must send the appeal to the protest appeals officer by certified mail, registered mail, or overnight courier. If allowed by the Solicitation Document, the Protester may also deliver the appeal personally to the JBE as specified in the Solicitation Document. If the appeal is personally delivered, a receipt must be provided to the Protester if requested.

Any appeal not received by the protest appeals officer by the applicable deadline for submission will be rejected by the protest appeals officer. The Protester is solely responsible for ensuring that an appeal is received by the protest appeals officer by the applicable due date.

The appeal must include:

- Contact information of the Protester or its representative (this must include name, address, and telephone number, and should include e-mail address and fax number);
- The title of the Solicitation Document to which the protest is related;
- A copy of the protest hearing officer's written determination;
- A detailed description of the specific legal and factual grounds for the appeal and any supporting documentation; and
- The specific ruling or relief requested.

An appeal lacking any of this information may be rejected by the protest appeals officer. The appeal must include all information that the Protester wants the protest appeals officer to consider.

The Protester bears the burden of proof to show that the protest hearing officer's written determination is incorrect:

- In light of new information related to the protest that was not available at the time the protest was originally submitted; or
- Because it is in error of law or regulation.

The protest appeals officer reviews the appeal and issues a written determination. Issues that could have been raised earlier are not to be considered on appeal. The written determination of the protest appeals officer constitutes the final determination of the JBE regarding the protest.

If the protest appeals officer determines that the appeal has merit, the protest appeal officer will direct the protest hearing officer to take appropriate remedial action. In determining the appropriate remedial action, the protest appeals officer should consider all circumstances surrounding the procurement, including:

- The seriousness of the procurement deficiency;
- The degree of prejudice to other Bidders;
- The impact on the integrity of the competitive procurement system;
- The good faith of the parties;
- The cost to the JBE;
- The urgency of the procurement; and
- The impact on the JBE.

Remedial actions may include:

- Issuing a new solicitation;
- Recompeting the contract;
- Terminating the contract (e.g., if a contract was executed despite a pending appeal);
- Refraining from the exercise of options under the awarded contract; and
- Awarding the contract consistent with law.

7.6 SB/DVBE OPTION

Protests are not allowed in solicitations using the SB/DVBE option.[3]

[3] See Government Code section 14838.5(a).