

# Chapter 25. Protests

## Summary

This section establishes the procedure for addressing protests by vendors.

<b>Essential Information in this Chapter</b>	
<ul style="list-style-type: none"><li>• The protest procedure provides a possible remedy in any procurement when a prospective vendor desires to challenge the award of a contract to another vendor.</li><li>• A protest must be received in the purchasing office within ten calendar days of the public posting of the notice of intent to award or the notice of award.</li><li>• The purchasing agent may award a contract during the period allowed to protest under certain circumstances.</li><li>• A protest must be in writing and shall include the basis for the protest and the relief sought.</li><li>• The purchasing agent must issue a written response to the protest within ten calendar days of the receipt of the protest. The response must state the reasons for either denying or upholding the protest.</li><li>• No protest lies for a claim that the selected vendor is not responsible or that challenges the terms and conditions of the invitation for bids or request for proposals.</li><li>• If the protest is upheld, the purchasing agent shall grant appropriate relief.</li></ul>	
<b>Key References to the Code of Virginia Applicable to this Chapter</b>	
Section 2.2-4360: Protest of award or decision to award	
Section 2.2-4362: Stay of award during protest	
Section 2.2-4364: Legal actions challenging decision to award contract	

### **25-1 General**

The protest procedure set forth herein provides a possible remedy in any procurement when a prospective vendor desires to challenge the award of a contract to another vendor.

### **25-2 Competitive Sealed Bidding: Typical Grounds for Protest and Strategies to Prevent Protests**

A protest in the competitive sealed bidding procedure typically will be based on one of the following grounds: (1) the vendor claims its low bid was erroneously determined to be nonresponsive; (2) the vendor claims that it was erroneously determined to be not responsible; or (3) the vendor who submitted higher bid claims low bidder's bid was not responsive.

No protest shall lie for a claim that the selected vendor is not responsible. Thus, vendor qualifications including, but not limited to, minimum prior experience,

expertise, or minimum bonding capacity, are not the proper subject of a protest because those issues pertain to vendor responsibility. No protest shall lie to challenge the terms and conditions of the invitation for bids.

Following are some strategies to prevent protests when the competitive sealed bidding procedure is used:

- Confirm the correctness of determination that low bidder was nonresponsive.
- Confirm the correctness of determination that low bidder was not responsible.
- Confirm that the apparent low bidder is responsive.
- Confirm that any deviation from the terms of the invitation for bids were minor informalities, not material deviations.

### **25-3 Competitive Negotiation: Typical Grounds for Protest and Strategies to Prevent Protests**

A protest in the competitive negotiation procedure typically will be based on one of the following grounds: (1) arbitrariness in the process or in a substantive decision, such as the finding required in order to use the competitive negotiation process for the procurement of goods or nonprofessional services; (2) failure to follow the request for proposals or its evaluation criteria; (3) misleading discussions; (4) failure to avoid the appearance of impropriety; (5) failure to obtain high quality goods and services at reasonable costs; (6) failure to include qualified vendors; or (7) failure to conduct the process in a fair and impartial manner.

Following are some grounds for protesting a competitive negotiation award that are questionable and should be considered with skepticism: (1) the County's decision was erroneous; (2) the County arbitrarily appointed people without technical knowledge to the selection committee; (3) the County failed to retain certain documents; (4) the County failed to timely reply to a Freedom of Information Act request; (5) the selected vendor's proposal infringes on some other vendor's copyrighted work; (6) the requirements of the request for proposals were such that the vendor selected had a major advantage; and (7) the County did not negotiate enough with a particular vendor.

No protest shall lie for a claim that the selected vendor is not responsible. Thus, vendor qualifications including, but not limited to, minimum prior experience, expertise, or minimum bonding capacity, are not the proper subject of a protest because these issues pertain to vendor responsibility. No protest shall lie which challenges the terms and conditions of the request for proposals.

Following are some strategies to prevent protests when a competitive negotiation procedure is used:

- Confirm that the selection was based only upon the factors in the request for proposals.
- Confirm that neither the process nor the decision was arbitrary.
- Ensure that no verbal statements were made during the process that may have misled vendors.
- Confirm that the successful vendor satisfies all requirements of the request for proposals.
- Ensure that the requirements do not change without fair notice to all vendors.
- Ensure that complex methods for evaluating proposals are accurately and objectively performed.

#### **25-4 Effect of Protest on Contract Award**

The purchasing agent may award a contract during the period allowed to protest. However, if a timely protest is received or timely legal action is commenced, the purchasing agent shall take no further action to award the contract unless he makes a written determination that proceeding without delay is necessary to protect the public interest or unless the bid or offer would expire.

#### **25-5 Procedure for Making a Protest**

A protest shall be in writing and shall include the basis for the protest and the relief sought. A protest must be received in the purchasing office within the periods identified below:

- Competitive sealed bidding procurement: Within ten calendar days after the notice of intent to award or the notice of award is posted, whichever occurs first.
- Competitive negotiation procurement: Within ten calendar days after the notice of intent to award or the notice of award is posted, whichever occurs first.
- Sole source procurement: Within ten calendar days after the notice of award is posted.
- Emergency procurement: Within ten calendar days after the the notice of award is posted.

- Any type of procurement, where the protest depends on public records pertaining to the procurement: Within ten calendar days after the records are available for inspection.

Except as otherwise provided herein, the purchasing agent shall reject any protest that is either untimely received or fails to state the basis for the protest and the relief sought. However, the purchasing agent may, in his discretion, consider any protest that is untimely and may grant any remedy authorized by Section 25-7, if the protest is determined to be meritorious and the remedy granted is determined to be in the best interests of the County.

#### **25-6 Response to Protest; Denial**

The purchasing agent shall issue a response to the protest within ten calendar days after receipt of the protest. The response shall be in writing and shall state the reasons for either denying or upholding the protest. In making his decision, the purchasing agent shall consider the following factors:

- Whether, based on the evidence presented in the protest or discovered by the purchasing agent as part of his investigation, it is more likely than not that the grounds stated in the protest are true.
- If the grounds stated in the protest are true, whether those grounds are a violation of a criminal law, the Virginia Public Procurement Act or this manual; or, whether those grounds render the decision to award arbitrary or capricious.

The purchasing agent shall either hand deliver or mail the response to the vendor. If the response is hand delivered, the purchasing agent shall prepare a certificate stating the date of delivery to retain in the contract file. If the response is mailed, it shall be mailed by certified mail, return receipt requested. The decision of the purchasing agent shall be final unless the protesting vendor then invokes the judicial appeals process as provided by law within ten calendar days after receipt of the response.

#### **25-7 Remedies if Protest Upheld**

If the protest is upheld and the decision to award the contract was, therefore, arbitrary or capricious, the purchasing agent shall grant the following relief:

- Prior to contract award: The award shall be canceled or revised to comply with the law.
- After contract award, prior to contract performance: The performance of the contract by the vendor may be enjoined.

- Contract performance begun: The contract may be declared void upon finding that the action is in the best interest of the public.

If, after a hearing held by the purchasing agent following reasonable notice to all vendors who submitted bids or proposals, there is probable cause to believe that a decision to award the contract was based on fraud, corruption, or an act in violation of the ethics provisions of the Virginia Public Procurement Act, the purchasing agent shall enjoin the award of the contract to the particular vendor.