



COUNTY OF SAN LUIS OBISPO

Board Approved Policy

Bid Protests and other Challenges to Construction Contracts

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Prepared by: General Services Agency, Public Works, Administrative Office, and
County Counsel
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1. PURPOSE

To establish a procedure for the resolution of any protests, objections, or challenges to the award of Construction Contracts.

2. AUTHORITY

By this Policy, Department Heads are delegated the authority to make the County's final determination on (1) whether any Bidder's bid on a Construction Contract is responsive; and (2) whether any Bidder is not a responsible Bidder. Each Department Head is further delegated the authority to process any and all bid Protests in the manner authorized by this Policy. Each Department Head shall interpret this Policy in a manner consistent with the Board's general and specific intent set forth herein. Each Department Head shall exercise all of its delegated authority in a manner consistent with all applicable laws, and in consultation with the Office of County Counsel.

3. POLICY

The requirements set forth in this Policy are mandatory and are a Bidder's sole and exclusive remedy in the event a Bidder desires to challenge, protest or contest the award of any Construction Contract. A Bidder's failure to comply with these requirements shall constitute a waiver of any right to challenge, protest or contest the award of a Construction Contract in any subsequent proceeding, including but not limited to, the filing of a Government Code Claim or a court action.

A Bidder may not rely upon another Bidder's compliance with the requirements of this Policy. Any Bidder that does not independently comply with the requirements set forth herein shall be deemed to have waived any right to challenge, protest or contest the award of a Construction Contract.

The only exception to the mandatory requirements of this Policy arises when the specific bid documents that constitute the County's solicitation of bids for a particular Construction Contract expressly amend this Policy or state that this Policy shall not be applicable to that particular bid solicitation. In such event, the bid protest requirements shall be governed by the requirements set forth in those specific bid documents.

Nothing in this Policy affects the right of the County to reject all bids at any time prior to the award of a Construction Contract.

3.1 Definitions.

- 3.1.1 Bidder - The contractor submitting a bid in response to a County solicitation for bids on a Construction Contract.
- 3.1.2 Protestor - A Bidder who files a Protest in accordance with the provisions of this Policy.
- 3.1.3 Board – Board of Supervisors of the County of San Luis Obispo (hereinafter, also “County”).
- 3.1.4 Construction Contract - Any Construction Contract which is formally or informally advertised for bids in which the County of San Luis Obispo is, or will be, a party.
- 3.1.5 Protest – Any challenge, objection, or protest to the award of a Construction Contract to any Bidder.
- 3.1.6 Response – Any response to a Protest that is filed by an Interested Party in accordance with the provisions of this Policy.
- 3.1.7 Responsible Department - The County department, agency, or office responsible for the preparation of the bid documents for the Construction Contract and the administration of the Construction Contract.
- 3.1.8 Department Head - The person appointed to be the head of the Responsible Department, or that person designated by the Department Head to assume the powers, duties, and responsibilities conferred upon the Department Head under the terms of this Policy.
- 3.1.9 Initial Determination – A written notice by the Department Head that notifies a Bidder of the reasons why the Department Head believes that a bid is nonresponsive, or that a Bidder is not a responsible Bidder.
- 3.1.10 Interested Parties - For the purpose of this policy, Interested Parties are defined as:
 - 3.1.10.1 The Responsible Department and/or its Department Head.
 - 3.1.10.2 Any Bidder that filed a Protest or whose bid is the subject of an Initial Determination.
 - 3.1.10.3 Any Bidder whose eligibility for having the Construction Contract awarded to it as a responsible Bidder with the lowest responsive bid would be affected by the outcome of a Protest or Initial Determination.

3.2 Department Head's Independent Authority to Determine Bid Responsiveness and Bidder Responsibility.

- 3.2.1 Regardless of whether a Protest is submitted under this Policy, the Department Head is authorized to determine whether any bid is a responsive bid and whether any Bidder is a responsible Bidder. In the event the Department Head issues an Initial Determination, the Department Head shall provide the Interested Parties with written notice of the Initial Determination at least five (5) business days before the Department Head renders a final decision addressing the grounds stated in the Initial Determination. A final decision of the Department Head under this section 3.2 shall be the final decision of the County with no provision for reconsideration or appeal to the Board.
- 3.2.2 The Department Head need not issue an Initial Determination in order to make a final decision on whether a bid is a responsive bid or a Bidder is a responsible Bidder. A final decision can also be issued by the Department Head through the processing of a Protest pursuant to the procedures set forth in this Policy.
- 3.2.3 The Department Head reserves the right to amend or withdraw an Initial Determination at any time before the Department Head renders a final decision addressing the grounds stated in the Initial Determination. When an Initial Determination is withdrawn, it shall have the same effect as if the Initial Determination had never been made.

3.3 Basis for Protest.

- 3.3.1 Grounds for Protest – The grounds for a Protest may include any grounds a Protestor may have for contesting or challenging the award of a Construction Contract to any Bidder, including but not limited to the following grounds:
 - 3.3.1.1 A Protestor objects to a Construction Contract being awarded to another Bidder on the grounds that the other Bidder's bid is nonresponsive.
 - 3.3.1.2 A Protestor objects to a Construction Contract being awarded to another Bidder on the grounds that the other Bidder is not a responsible Bidder.
 - 3.3.1.3 A Protestor objects to a Construction Contract being awarded to the Protestor on the grounds that the Protestor made a mistake in its bid that entitles the Protestor to be relieved of its bid under Public Contract Code Sections 5100 et seq.
 - 3.3.1.4 A Protestor objects to a Department Head's Initial Determination issued under section 3.2.1 above.
- 3.3.2 Required Form of Protest - All Protests shall be made in writing, containing the information listed below, and shall be filed with the Responsible Department identified in the solicitation package. Protests shall contain the following information:
 - 3.3.2.1 The name, address, telephone, facsimile numbers, and email address of the Protestor.

- 3.3.2.2 The signature of the Protestor or its representative.
- 3.3.2.3 The bid, solicitation and/or contract number.
- 3.3.2.4 The Protest must contain a complete statement of all grounds for the Protest, and must refer to the specific portion of the bid documents that are the basis of the Protest. The Protest must set forth all supporting facts and documentation. If Protester believes there are some facts relevant to its Protest that Protester cannot adequately present in writing, Protester must describe such facts in its Protest under the heading “Facts Requiring Oral Presentation”, and state therein the reasons why the Bid Protester believes it cannot adequately present those facts through documentation.
- 3.3.2.5 All information establishing that the Protestor is a Bidder for the purpose of filing a Protest.
- 3.3.2.6 The form of relief requested.

3.4 Protest Requirements and Procedure.

- 3.4.1 Standing to Protest - Protests shall be filed only by a Bidder.
- 3.4.2 Time for Filing a Protest:
 - 3.4.2.1 Except as provided in sections 3.4.2.2 and 3.4.2.3 below, all Protests must be submitted in writing to the Department Head before 5 p.m. PST of the sixth (6) business day following the date upon which the bids on the Construction Contract were opened.
 - 3.4.2.2 When a Protestor objects to a Construction Contract being awarded to the Protestor on the grounds that the Protestor made a mistake in its bid that entitles the Protestor to be relieved of its bid under Public Contract Code Sections 5100 et seq., the Protest must be submitted in writing to the Department Head before 5 p.m. PST of the fifth (5) business day following the date upon which the bids on the Construction Contract were opened pursuant to Public Contract Code Section 5103.
 - 3.4.2.3 When the Protestor objects to an Initial Determination made by the Department Head under section 3.2.1 above, the Protest must be submitted in writing to the Department Head before 5 p.m. PST of the fifth (5) business day following the date upon which the Initial Determination was first delivered to Protestor (either electronically or otherwise).
- 3.4.3 Written Responses of Interested Parties - If any Interested Party desires to respond to the Protest, the Response must be submitted in writing to the Department Head within five (5) business days of the date the Protest was first delivered to the Interested Party (either electronically or otherwise). If an Interested Party believes there are some facts relevant to its Response that the Interested Party cannot adequately present in writing, the Interested Party must describe such facts in its Response under the heading “Facts Requiring Oral Presentation”, and state therein the reasons why the Interested Party believes it cannot adequately present those facts through documentation.

- 3.4.4 Proof of Transmittal - All Protests, Responses, and Replies shall include documentation evidencing that all Interested Parties were concurrently sent a complete copy of the respective Protest, Response or Reply in a manner that would provide all Interested Parties with a complete copy of the respective Protest, Response or Reply no later than one (1) business day after it was submitted to the Department Head. The means of transmission chosen must also provide the sending party a means of verifying the date and time the copy was received by each Interested Party. Transmission by email may be an acceptable means of transmittal.
- 3.4.5 No Ex Parte or Unilateral Communications on the Merits of a Protest - No Bidder shall have any written communications regarding the merits of a Protest with the Responsible Department or its Department Head that are not concurrently sent to all of the other Interested Parties. No Bidder shall have any oral communications regarding the merits of a Protest with the Responsible Department or its Department Head other than during an oral presentation properly noticed by the Department Head under this Policy.
- 3.4.6 Suspension of Process for Proposed Rejection of all Bids - At any time during the processing of a Protest, the Department Head may elect to indefinitely suspend any further processing of the Protest by providing written notice to all Interested Parties that the Department Head intends to recommend to the Board that all bids be rejected. All time deadlines provided in this Policy shall be tolled during any such suspension period. If the Board decides to not reject all bids, or if the Department Head otherwise decides to lift the suspension, the requirements of this Policy shall be reactivated upon the Department Head providing all Interested Parties with written notice thereof.

3.5 Summary Dismissal of Protest.

The Department Head may summarily dismiss a protest, or specific protest allegations, at any time that the Department Head determines that the Protest is untimely, frivolous, or without merit; is not submitted in the required form of Protest, as set forth above in section 3.3.2., "Required Form of Protest;" or is submitted by a non-Bidder. In such cases, a notice of summary dismissal will be furnished to the Interested Parties.

3.6 Decision by the Department Head Based on Written Submissions Only.

In reaching a decision on the merits of a Protest, the Department Head may consider relevant documentation submitted by the Protestor and any other Interested Party. If the Department Head wishes to have additional information submitted by the Protestor that was not included in the Protest or in any documentation from other Interested Parties, the Department Head will make a request specifying the information sought and time for submittal. Submissions of additional information that have not been specifically requested by the Department Head may not be considered at the Department Head's sole discretion. The Department Head need not conduct a "hearing" or consider oral testimony. The

Department Head will issue a written decision containing the basis of the decision. The decision shall be the final decision of the County with no provision for reconsideration or appeal to the Board except as provided in section 3.9 below.

3.7 Decision by the Department Head Following Oral Presentation.

3.7.1 The Department Head may, at his or her discretion, elect to provide an opportunity for the Protestor to make an oral presentation to the Department Head regarding the Protest. In such event, oral presentations shall be conducted in accordance with the following procedure:

- 3.7.1.1 Notice of Oral Presentation - The Department Head will set a date, time, and place for an oral presentation. Written notice will be sent to Interested Parties not less than five (5) business days in advance of the oral presentation unless it is agreeable to all parties that an earlier date be established. Continuances may be granted by the Department Head for good cause.
- 3.7.1.2 Guidelines for Oral Presentation - Oral presentations are informal in nature and shall be made by the Protestor or its authorized representative. The Department Head will determine how the oral presentations will be conducted and may set time limits for the presentation. The Department Head may request additional documentation or information prior to, during or after the oral presentation. Unless requested by the Department Head, additional documentation or information may not be accepted. Technical rules of evidence shall not apply. The Department Head may question Interested Parties or provide an opportunity for Interested Parties to make an oral presentation.
- 3.7.1.3 Record of Oral Presentation - Any Interested Party may request, and in the Department Head's sole discretion, the Department Head may allow recording of the presentation. If the Department Head allows the presentation to be recorded, the Interested Party requesting that the presentation be recorded must pay the cost of recording, including the costs to make and distribute copies of the recording to the Department Head and other Interested Parties. There shall be no cost to the County.
- 3.7.1.4 Decisions - The Department Head will issue a written decision within 30 calendar days of the oral presentation; however, the time for issuing the written decision may be extended by the Department Head. A copy of the decision will be furnished to the Interested Parties. The decision shall be the final decision of the County with no provision for reconsideration or appeal to the Board except as provided in section 3.9 below.

3.8 Effect on Contracts.

The failure of a County employee or department to comply with the provisions stated in this Board Policy shall in no way affect the validity of any Construction Contract entered into by the County.

3.9 Department Head Decisions on Protests Seeking Relief from a Bidder's Mistake under Public Contract Code Section 5103.

When a Protestor objects to a Construction Contract being awarded to the Bid Protester on the grounds that the Protestor made a mistake in its bid that entitles the Protestor to be relieved of its bid under Public Contract Code Sections 5100 et seq., a final decision of the Department Head that relieves the Protestor of its bid on the grounds of mistake must be approved by the Board before it can become a final decision of the County. Any other final decision of the Department Head regarding a Protestor's request to be relieved of its bid on the grounds of mistake under Public Contract Code Sections 5100 et seq., shall be the final decision of the County with no provision for reconsideration or appeal to the Board.