



SAN LUIS OBISPO COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT

Board Approved Policy

Bid Protests and other Challenges to Construction Contracts of the San Luis Obispo County Flood Control and Water Conservation District

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Prepared by: Public Works, General Services Agency, Administrative Office, and
County Counsel
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Water Conservation District on October 22, 2013

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, the Director is delegated the authority to make the District'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. The Director is further delegated the authority to process any and all bid Protests in the manner authorized by this Policy. The Director shall interpret this Policy in a manner consistent with the Board's general and specific intent set forth herein. The Director 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 District'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 District 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 District 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 San Luis Obispo County Flood Control and Water Conservation District (hereinafter, also “District”).
- 3.1.4 Construction Contract - Any Construction Contract which is formally or informally advertised for bids in which the District 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 Public Works Department - The District department responsible for the preparation of the bid documents for the Construction Contract and the administration of the Construction Contract.
- 3.1.8 Director - The person appointed to be the head of the Department of Public Works and Transportation, or that person designated by the Director to assume the powers, duties, and responsibilities conferred upon the Director under the terms of this Policy.
- 3.1.9 Initial Determination – A written notice by the Director that notifies a Bidder of the reasons why the Director 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 Public Works Department and/or its Director.
 - 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 Director's Independent Authority to Determine Bid Responsiveness and Bidder Responsibility.

- 3.2.1 Regardless of whether a Protest is submitted under this Policy, the Director is authorized to determine whether any bid is a responsive bid and whether any Bidder is a responsible Bidder. In the event the Director issues an Initial Determination, the Director shall provide the Interested Parties with written notice of the Initial Determination at least five (5) business days before the Director renders a final decision addressing the grounds stated in the Initial Determination. A final decision of the Director under this section 3.2 shall be the final decision of the District with no provision for reconsideration or appeal to the Board.
- 3.2.2 The Director 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 Director through the processing of a Protest pursuant to the procedures set forth in this Policy.
- 3.2.3 The Director reserves the right to amend or withdraw an Initial Determination at any time before the Director 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 the Director'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 Public Works Department as 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 Protestor believes there are some facts relevant to its Protest that Protestor cannot adequately present in writing, Protestor must describe such facts in its Protest under the heading “Facts Requiring Oral Presentation”, and state therein the reasons why the Bid Protestor 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 Director 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 Director 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 Director under section 3.2.1 above, the Protest must be submitted in writing to the Director 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 Director 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 Director. 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 Public Works Department or its Director 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 Public Works Department or its Director other than during an oral presentation properly noticed by the Director 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 Director may elect to indefinitely suspend any further processing of the Protest by providing written notice to all Interested Parties that the Director 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 Director otherwise decides to lift the suspension, the requirements of this Policy shall be reactivated upon the Director providing all Interested Parties with written notice thereof.

3.5 Summary Dismissal of Protest.

The Director may summarily dismiss a protest, or specific protest allegations, at any time that the Director 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 Director Based on Written Submissions Only.

In reaching a decision on the merits of a Protest, the Director may consider relevant documentation submitted by the Protestor and any other Interested Party. If the Director 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 Director will make a request specifying the information sought and time for submittal. Submissions of additional information that have not been specifically requested by the Director may not be considered at the Director's sole discretion. The Director need not conduct a "hearing" or consider oral testimony. The Director will issue a written decision containing the basis of the decision. The decision shall be the final decision of the District with no provision for reconsideration or appeal to the Board except as provided in section 3.9 below.

3.7 Decision by the Director Following Oral Presentation.

3.7.1 The Director may, at his or her discretion, elect to provide an opportunity for the Protestor to make an oral presentation to the Director 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 Director 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 Director 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 Director will determine how the oral presentations will be conducted and may set time limits for the presentation. The Director may request additional documentation or information prior to, during or after the oral presentation. Unless requested by the Director, additional documentation or information may not be accepted. Technical rules of evidence shall not apply. The Director 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 Director's sole discretion, the Director may allow recording of the presentation. If the Director 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 Director and other Interested Parties. There shall be no cost to the District.

3.7.1.4 Decisions - The Director 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 Director. A copy of the decision will be furnished to the Interested Parties. The decision shall be the final decision of the District 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 District employee 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 District.

3.9 Director 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 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., a final decision of the Director 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 District. Any other final decision of the Director 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 District with no provision for reconsideration or appeal to the Board.