

Title: **Protested Solicitations and Awards**

Effective Date: 03/01/2017 Supersedes Date: August 2014

Policy No: PRO-080

I. GENERALLY

- A. This Policy establishes the exclusive procedures and requirements for a protest of a City award under this Procurement Policy.
- B. This Policy shall not apply to the following:
 - 1. Any City bid involving a purchase price of less than \$50,000 (unless City utilizes an Invitation to Bid);
 - 2. A decision by City to procure a contract pursuant to the “Single/Sole Source” provisions of this Procurement Policy. (Such provisions contain a separate procedure concerning objections to such a City decision.);
 - 3. City bids exempt from competition under the “Purchases Exempt From Competition” provisions of this Procurement Policy.
 - 4. A decision by City to enter into a contract pursuant to the “piggy-back” provisions of Florida law; this shall not preclude an objection to such a contract at City Council. (Although piggy-back contracts are not subject to this Procurement Policy, this paragraph is included to clarify that they are also not subject to this Policy.)

II. POLICY

A. Definitions

As used in this Policy, the following terms shall have the following meanings (regardless of whether they are capitalized):

- 1. **Aggrieved bidder** – A bidder who is adversely affected by a City award including:
 - (a). A bidder to whom a contract under section II.A.3(a) is not recommended be awarded, but to whom, if the aggrieved bidder’s protest is granted, is likely to receive such award (e.g., the aggrieved bidder is the second lowest bidder, or the lowest responsible and responsive bidder).
 - (b). A bidder disqualified under section II.A.3(b).
 - (c). The bidder to whom a contract was awarded, or the lowest responsible and responsive bidder, as to a City award under section II.A.3(c).

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2. **Bidder** – A participant in a City bid seeking the award of a contract for such bid; a prospective bidder as to a City award under section II.A.1(b); and a prospective bidder as to a City award under section II.A.1(a) protesting the specifications for a City bid pursuant to section II.B.2.
3. **City award** – A decision by the City to:
 - (a). Recommend that City award a contract pursuant to a City bid;
 - (b). Disqualify a prospective bidder; or
 - (c). Reject all bids.
4. **City bid** – A request, offer or solicitation by City, under this Procurement Policy, to enter into a contract with a third party for the provision of goods or services to City including an invitation to bid, request for proposal, letter of interest, or invitation to negotiate.
5. **Contract** – A contract, including purchase order, for goods or services to be acquired by City pursuant to the Procurement Policy.
6. **Corrective action** – Action taken by City based upon a protest. Corrective action may include:
 - (a). Recommending that the City award the contract to the protestor.
 - (b). Removing the disqualification of a prospective bidder as to a City award under section II.A.3(b) of this policy.
 - (c). Rejecting all bids.
 - (d). Such other action as City deems appropriate.
7. **Day** – A calendar day; provided, however, if a time period set forth in this Policy is five days or less, the calculation of such time period shall exclude Saturdays, Sundays and legal holidays (i.e. days when most City offices are closed).
8. **Formal proceeding** – One or more proceedings under section II.G of this policy.
9. **Informal proceeding** - A proceeding under section II.F of this policy.
10. **Interested Party** – An actual or prospective bidder whose direct economic interest would be affected by a City award.

11. **Intervenor** – An interested party as to a City award that is the subject of a protest including:
 - (a). In the case of a City award under section II.A.3(a), the bidder to whom the City has recommended the contract be awarded; or
 - (b). As to other City awards, all bidders who appear to have a substantial prospect of receiving a City award if the protest is denied.
12. **Party** – City, the protestor and any intervenor.
13. **Protest** – A protest filed by a protestor.
14. **Protest committee** – A committee to hear a protest under section II.G.1. The protest committee shall consist of: (a) the City Manager or its designee; (b) the City Finance Director or its designee; and (c) the Director of the City department that will utilize the goods or services that are the subject of the bid, or the Director's designee; if there is no such City department, the third member of the protest committee shall be the Procurement and Contracting Officer.
15. **Protestor** – The bidder protesting a City award.
16. **Specifications** – The specifications, requirements, terms, conditions or processes contained in a City bid.

B. Right to Protest

1. An aggrieved bidder may protest a City award pursuant to this policy.
2. An aggrieved bidder seeking to protest a City award made pursuant to section II.A.3(a) of this Policy based upon an alleged defect in the specifications of the City bid, may protest the City award only if the aggrieved bidder objected to the specifications as follows:
 - (a) If City conducted any pre-bid meetings, the bidder must have attended, and objected to such specification, at the first meeting after the specifications were included in the City bid; or
 - (b). If no pre-bid meetings were held, the bidder must have objected in writing to the specification at least three days prior to the deadline for bids or submissions.
3. Failure to protest a City award under this Policy shall constitute a waiver of all rights to challenge a City award.

C. Notice of Protest

1. A protest shall be commenced by an aggrieved bidder filing a notice of protest with the Procurement and Contracting Officer.
2. The notice of protest must be in writing and shall: identify the City award (with reference to any numbers utilized by City in connection with such an award; identify the protestor; include a clear statement of the grounds upon which the protest is based (including a clear statement of the facts, a reference to statutes, laws, ordinances or other legal authorities that the protestor deems applicable to such grounds, and other information that the protestor deems relevant to a determination of the protest); and specifically request the relief to which the protestor deems itself entitled by application of such authorities to such grounds.
3. The notice must be submitted within five (5) days after the earlier of:
 - (a). The date that City posts, on the City Procurement web page, its intent to make a City award;
 - (b). The date that City posts, on the City web page, a City Council agenda for the City Council meeting at which the City award will be considered by City Council; or
 - (c). The date the City provides written notice to all bidders of its intent to make a City award.

D. Protest Bond

A notice of protest must be accompanied by a protest bond payable to City in the following amounts and in compliance with the following requirements.

1. The protest bond shall be an amount equal to one (1.0) percent of the value of the City bid, but in no case less than five hundred dollars (\$500.00) or in excess of five thousand dollars (\$5,000.00). This bond shall be in cash or by a U.S. postal service money order, or certified, cashier's or bank (official) check, payable to the City of Ocala.
2. The bond required by this section shall be conditioned upon the payment of all costs and charges which City may incur as a result of an unsuccessful protest.
 - (a). If the protest is granted, and protestor receives the corrective action it seeks in the notice of protest, the bond shall be returned to the protestor.

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- (b). If the protest is denied, or the protestor does not receive the corrective action in substantially the form it seeks in its notice of protest, the bond shall be forfeited unless the last decision-maker in the protest determines that, based upon the facts involved in the protest (including any failure of City to follow procedures applicable to the bid) the public interest was furthered by the protest.
3. Failure to provide the protest bond with the notice of protest shall result in the protest being dismissed.

E. Intervention

1. Upon timely receipt of a notice and protest bond, the Procurement and Contracting Officer shall provide notice of the protest to all other bidders (or, as to a City award under section A.1(b), all prospective bidders of whom City has knowledge are likely to bid).
2. An interested party shall have the right to intervene in the protest proceeding by filing a notice of intervention with the Procurement and Contracting Officer. A notice of intervention may be accompanied by a clear statement of the grounds upon which the intervention is based (including a statement of the facts upon which the intervenor relies, a reference to statutes, laws, ordinances or other legal authorities that the intervenor deems applicable to such facts, and other information that the intervenor deems relevant to a determination of the protest); and a specific discussion of any corrective action that intervenor believes is appropriate.
3. Although an interested party may intervene in the protest proceeding at any time, no intervenor shall be entitled to seek a delay in any portion of the protest proceeding based upon an intervenor's delay in intervening.

F. Informal Proceeding

1. The Procurement and Contracting Officer shall have the authority to review and attempt to resolve the protest informally.
2. The Procurement and Contracting Officer may resolve the protest based solely upon any written material by the parties or may, in its sole discretion, schedule an informal meeting. At any such informal meeting: parties may make oral presentations of the evidence and arguments; witnesses shall not be sworn or subjected to cross-examination; and no formal rules of evidence shall apply.

3. After reviewing the facts surrounding the issues raised in the notice of protest, the Procurement and Contracting Officer shall, within ten (10) days after the notice of protest is filed, make a determination to:
 - (a). Grant the protest and recommend corrective action to be the subject of a further City award; or
 - (b). Deny the protest.
4. The Procurement and Contracting Officer's determination shall be in writing, provide the reasons for that determination, and be provided to all parties.

G. Formal Proceedings

1. Hearing Before Protest Committee.
 - (a). If a protestor wishes to continue a protest after the protest has been denied in the informal proceeding, or after the protest has been granted but the protestor is not satisfied with the corrective action, the protestor may request a formal hearing before the protest committee.
 - (b). A request for such a hearing shall be made to the City's Procurement and Contracting Officer within three (3) days of issuance of the Procurement and Contracting Officer's decision under section II.F.4. Such request shall specify the basis for the protestor's request including any additional information that was not included in the notice of protest. Any grounds not stated shall be deemed to have been waived by the protestor unless they are set forth in the notice of protest.
 - (c). The protest committee shall hold a hearing within ten (10) days of the receipt of such request.
 - (d). All members of the protest committee shall be in attendance at any protest committee meeting. The City Manager or its designee shall serve as the chairperson of the protest committee.
 - (e). The protest committee shall make its decisions by majority vote.
 - (f). At, or prior to, the protest proceeding, any party may submit such additional written or physical materials, objects, statements, affidavits, and arguments which it deems relevant to the issues raised. In the proceeding, any party may make an oral presentation of such evidence and arguments, which may include direct and cross examination of witnesses.

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- (g). City shall arrange for a court reporter to attend the protest committee hearing to provide the record to be considered by City Council in the event that a further formal proceeding is held before City Council.
- (h). No more than fourteen (14) days after the hearing, the protest committee shall issue a written decision, which shall include the reasons for the decision, and shall provide copies of such decision to the parties. The length and scope of the decision may vary based upon the complexity of the issues raised but should specifically state any findings of fact made by the protest committee and the significance of such facts to the decision. The decision shall:
 - (1). Grant the protest and recommend corrective action to be the subject of a further City award; or
 - (2). Deny the protest.

2. Appeal to City Council.

- (a). If a protestor wishes to continue a protest after the protest has been denied in the informal proceeding, or after the protest has been granted but the protestor is not satisfied with the corrective action, the protestor may appeal the protest committee's decision to City Council.
- (b). A request for such an appeal shall be made to the Procurement and Contracting Officer within three (3) days of issuance of the protest committee's decision under section II.F.4. Such request shall specify the basis for the protestor's request including any additional information that was not included in the notice of protest. Any grounds not stated shall be deemed to have been waived by the protestor unless they are set forth in the notice of protest.

The City Council shall consider the protest at a regular or special City Council meeting, at least three (3) days' notice of which has been provided to the parties. City Council shall resolve the protest based on the record before the protest committee, and no evidence that was not presented to the protest committee shall be considered unless City Council requests that additional evidence be submitted. Presentations to City Council by the parties shall be limited to thirty (30) minutes for each party, unless City Council determines to provide additional time. City Council members may present questions to the parties. City Council shall base its decision on the protest upon any findings of fact contained in the protest committee's decision unless it determines, from a review of the record before the protest committee, that such findings were not based upon competent, substantial evidence.

(c). At the conclusion of the proceeding, City Council shall, by majority vote:

- (1). Grant the protest and make a recommendation concerning corrective action;
- (2). Deny the protest; or
- (3). Refer the protest back to the protest committee for additional proceedings.

(d). City Council may, but shall not be obligated, to direct the City Attorney to prepare a written decision of City Council for subsequent execution by the City Council President. If no such written decision is made, the transcript or minutes of the City Council hearing shall be deemed a written decision of the City Council.

3. Evidence and Procedural Matters.

(a). At any formal proceeding (including before City Council if additional evidence is permitted by City Council):

- (1). All witnesses shall be sworn and subjected to cross-examination.
- (2). Hearsay evidence shall be admissible but may be provided less weight by the decision maker.
- (3). The judicial rules of evidence and procedures shall not apply but meaningful due process and fundamental fairness shall be provided to the parties.

(b). The burden of proof throughout the protest proceeding shall rest with the protestor.

(c). In order to expedite formal proceedings, the parties are encouraged to reach agreement concerning undisputed facts or issues, and provide a writing containing such agreement to the decision maker.

H. Stay of Procurement during Protests

In the event of a timely protest, the Procurement and Contracting Officer shall stay the award of the contract unless the City Manager, with the advice of the City Attorney and after consultation with the department that will utilize the goods or services that are the subject of the bid, makes a determination that the award of the contract without delay is necessary to protect City's substantial interest. Further, as

an alternative to such immediate award, the City Manager may expedite the protest proceedings, with the advice of the City Attorney, by shortening the time frames for the Procurement and Contracting Officer to make its determination under section II.F.4, or for the protestor to request further proceedings under section II.G.1(a) or section II.G.2(a); if the City Manager shortens the time frames, it shall provide notice to all participants in the protest.

I. Reservation of Powers by the Council

Nothing in this section is intended to affect the powers of the City Council to settle or resolve any protest proceeding pending before the courts relating to any protest.

J. Subsequent Protests

1. Should a protest result in a recommendation of corrective action, the City shall thereafter announce a new City award based upon such recommendation.
2. This policy shall apply in connection with any such new City award but, in connection with any subsequent protest proceeding, any decision maker in a formal proceeding may give weight to any specific findings of fact made in a formal proceeding in the prior protest proceeding. In order to avoid any adverse impact as a result of this rule, all interested parties are advised to consider intervening in a prior protest to protect their rights.

K. Miscellaneous

1. Filing. All documents shall be filed with the Procurement and Contracting Officer. The Procurement and Contracting Officer shall provide copies of all papers filed to any decision-maker in a formal proceeding prior to the commencement of a hearing by such decision-maker. At the conclusion of a protest procedure, the Procurement and Contracting Officer shall provide all papers to the City Clerk.

Service. All documents filed by a party in the protest proceeding shall be served on all other parties. Each party shall file with the Procurement and Contracting Officer, and serve on all other parties, a notice of the address or addresses to use for such service, and may change such address or addresses by subsequent notice. In order to expedite proceedings and in light of the short time frames for parties to take action under this policy, City recommends that each party provide an email address as its service address. Service shall be complete upon faxing or emailing; or within two (2) days after mailing.

2. Legal Representation.

(a). Generally:

- (1). The City Attorney shall provide legal advice to the Procurement and Contracting Officer under section II.F, or the protest committee or City Council under section II.G, and shall not provide legal advice to advise other City staff, concerning the protest.
- (2). City staff shall participate in the protest proceeding in support of the initial City award, without the assistance of counsel. The Procurement and Contracting Officer or its designee shall serve as the City staff representative for this purpose unless the City Manager designates another City staff member to take such action.

(b). In the event that:

- (1). The City Attorney determines that the interests of City necessitate the City Attorney taking affirmative action on behalf of City to uphold the City award (based upon factors it deems relevant, including the size, scope of the City award, whether the protestor is represented by counsel, and the significance of the issues raised), the City Attorney may instead provide legal advice to City staff in connection with the proceeding, and shall immediately provide notice to all parties, and to the City Manager, that the City Attorney will be doing so. Upon receipt of such notice, the City Manager shall, without further approval of City Council, retain special counsel to provide legal advice to the Procurement and Contracting Officer, protest committee or City Council.
- (2). The Procurement and Contracting Officer or City Attorney determines that City staff needs legal advice that the City attorney may not provide (because of its obligations under section II.K.2(a)(1)), the Procurement and Contracting Officer or City Attorney shall provide notice of such determination to the parties and the City Manager. Upon receiving such notice, the City Manager shall, without further approval of City Council, retain separate counsel to advise City staff.

3. Time. Time is of the essence concerning all provisions of this Policy. When any time period specified herein falls or ends upon a Saturday, Sunday or legal holiday, the time period shall automatically extend to 5:00 p.m. on the next ensuing business day.

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4. No Solicitation. No bidder or other party may engage in any effort, either directly or indirectly, to influence a decision of the Procurement and Contracting Officer, protest committee or City Council under this policy except as expressly permitted by this policy. A violation of this prohibition may result in the disqualification of the bidder, the granting or denial of a protest, or corrective action by City; a decision as to such matters shall be made by the decision maker before whom the protest is pending at the time the prohibited communication is discovered.

5. Final Decisions.
 - (a). A decision by the Procurement and Contracting Officer under section II.F, or by the protest committee under section II.G.1, that is not the subject of further proceedings, is final and binding on the parties.

 - (b). A decision by City Council under section II.G.2, is final and binding on the parties but is subject to review by certiorari in proceedings filed with the Marion County Circuit Court.