

## **Procurement Appeals and Oversight: *Procurement Protests and Debarment Proceedings***

### **Definitions—**

A “protestor” is a person who files a protest.

A “hearing” is a proceeding in which evidence (which may include oral testimony) or argument relevant to a protest is presented to a protest officer in connection with the protest officer’s determination of an issue of fact or law or both.

“Standing” means to have suffered an injury or harm or to be about to suffer imminent injury or harm, if the following are also satisfied:

1. the cause of the injury or harm is:
  - a. an infringement of the protestor’s own right and not the right of another person who is not a party to the procurement, and
  - b. reasonably connected to the District’s conduct, and
  - c. the sole reason the protestor is not considered, or is no longer considered, for an award of a contract under the procurement that is the subject of the protest, and
2. a decision on the protest in favor of the protestor
  - a. is likely to redress the injury or harm and
  - b. would give the protestor a reasonable likelihood of being awarded a contract, and
3. the protestor has the legal authority to file the protest on behalf of the actual or prospective bidder or offeror or prospective contractor involved in the procurement that is the subject of the protest

“Constructive knowledge” means knowledge or information that a protestor would have if the protestor had exercised reasonable care or diligence, regardless of whether the protestor actually has the knowledge or information. Such knowledge includes knowledge of:

1. applicable provisions of the Procurement Code, Procurement Policy Board rules, and the District’s procurement policies,
2. instructions, criteria, deadlines, and requirements contained in the solicitation or in other documents made available to persons interested in the solicitation or provided in a mandatory pre-solicitation meeting,
3. relevant facts and evidence supporting the protest or leading the protestor to contend that the protestor has been aggrieved in connection with a procurement,

4. communications or actions, pertaining to the procurement, of all persons within the protestor's organization or under the supervision of the protestor, and
5. any other applicable information discoverable by the exercise of reasonable care or diligence.

[Utah Code § 63G-6a-1601.5\(1\), \(2\), \(4\), \(5\) \(2017\)](#)

The “Protest Officer” for the District is \_\_\_the Superintendent\_\_\_\_\_, or another employee of the District designated by the Board of Education, or such other person as is designated by rule of the Procurement Policy Board.

[Utah Code § 63G-6a-103\(62\) \(2018\)](#)

The “protest appeal record” includes (1) a copy of the protest officer’s written decision; (2) all documentation and evidence the protest officer relied on in reaching the decision; (3) the recording of the hearing (if a hearing was held); (4) a copy of the written protest; and (5) all documentation and other evidence submitted by the protestor.

[Utah Code § 63G-6a-1601.5\(3\) \(2017\)](#)

### **Parties Who May Protest—**

A protest may be filed with the Protest Officer by a person who has standing and who is aggrieved in connection with a procurement or an award of a contract.

[Utah Code § 63G-6a-1602\(1\) \(2017\)](#)

A person filing a protest may be asked to verify that the person has legal authority to file a protest when doing so on behalf of a corporation (public or private), governmental entity, sole proprietorship, partnership, or unincorporated association.

[Utah Admin. Rules R33-16-201 \(June 21, 2017\)](#)

### **Filing Protest—**

#### *Timing*

In general, a protest must be filed before the opening of bids (if it relates to bidding) or the solicitation deadline (if it relates to another standard procurement process). If the protest relates to a multiple-stage procurement process, then it must be filed before the closing of the stage which is the subject of the protest.

However, these deadlines do not apply if the protestor did not know or have constructive knowledge of the facts giving rise to the protest before the deadline expired. In those cases, the protest must be filed within seven days after the date the person first knew or had constructive knowledge of the facts giving rise to the protest.

If the protest does not relate to a standard procurement process, then the protest must be filed within seven days after the date the person first knew or had constructive knowledge of the facts giving rise to the protest.

The deadlines for filing a protest may not be modified.

A person who fails to timely file a protest under this section may not protest to the Protest Officer a solicitation or award of a contract, or file an action or appeal challenging a solicitation or award of a contract before an appeals panel, a court, or any other forum.

[Utah Code § 63G-6a-1602\(2\), \(3\), \(7\) \(2017\)](#)

### *Contents*

A person who files a protest under this section shall include in the filing document the protestor's mailing address and email address and a concise statement of the grounds upon which the protest is made. The statement of grounds for the protest must include the relevant facts and evidence leading the protestor to contend that a grievance has occurred, including but not limited to specifically referencing:

1. An alleged violation of the Utah Procurement Code;
2. An alleged violation of Utah Administrative Rules Title 33 or other applicable rule;
3. A provision of the solicitation allegedly not being followed;
4. A provision of the solicitation which is alleged to be ambiguous, confusing, contradictory, unduly restrictive, erroneous, anticompetitive, or unlawful;
5. An alleged error made by the evaluation committee or the District;
6. An allegation of bias by the evaluation committee or an individual committee member; or
7. A scoring criterion allegedly not being correctly applied or calculated.

[Utah Admin. Rules R33-16-101a\(2\)\(a\) \(June 21, 2017\)](#)

[Utah Code § 63G-6a-1602\(4\)\(a\) \(2017\)](#)

The "facts" alleged must be specific enough to enable the protest officer to determine, if such facts are proven to be true, whether a legitimate basis for the protest exists.

[Utah Admin. Rules R33-16-101a\(2\)\(b\) \(June 21, 2017\)](#)

None of the following qualify as a concise statement of the grounds for a protest:

1. claims made after the opening of bids or closing date of proposals that the specifications, terms and conditions, or other elements of a solicitation are ambiguous, confusing, contradictory, unduly restrictive, erroneous, or anticompetitive;
2. vague or unsubstantiated allegations that do not reference specific facts including, but not limited to, vague or unsubstantiated allegations such as that:
  - a. the protestor should have received a higher score or another vendor should have received a lower score;

- b. a service or product provided by a protestor is better than another vendor's service or product;
  - c. another vendor cannot provide the procurement item for the price bid or perform the services described in the solicitation;
  - d. the electronic procurement system used by the District was slow, not operating properly, was difficult to understand, could not be accessed or did not allow documents to be downloaded, or did not allow a response to be submitted after the submittal deadline expired;
  - e. the protestor did not receive individual notice of a solicitation or was unaware of the solicitation (where the District has complied with the public notice requirements); or
  - f. District officials, or the evaluation committee, or any committee member acted in a biased or discriminatory manner against the protestor; or
3. a request for:
- a. a detailed explanation of the thinking and scoring of evaluation committee members, beyond the official justification statement;
  - b. protected information beyond what is provided under the disclosure provisions of the Utah Procurement Code; or
  - c. other information, documents, or explanations reasonably deemed to be not in compliance with the Utah Code or this Policy by the protest officer.

[Utah Admin. Rules R33-16-101a\(2\)\(c\) \(June 21, 2017\)](#)

*Dismissal for non-conforming protest*

The protest officer may dismiss a protest if the concise statement of the grounds for the protest does not comply with the requirements set forth above.

[Utah Code § 63G-6a-1603\(1\) \(2017\)](#)

[Utah Admin. Rules R33-16-101a\(4\) \(June 21, 2017\)](#)

*Effect of timely protest and continuation despite protest or appeal*

The District may not proceed further with the solicitation or with the award of the contract while there is a pending protest and until all administrative and judicial remedies relating to the protest are exhausted (such as appeals to the Procurement Policy Board or further appeal to a court). However, the District may proceed with solicitation or award despite a pending protest or further proceeding if the District, after consulting with the District's attorney, determines in writing that award of the contract without delay is in the best interest of the District.

[Utah Code § 63G-6a-1903 \(2016\)](#)

**Intervention in a Protest—***Time to file motion to intervene*

After a timely protest is filed, the Protest Officer shall notify awardees of the subject procurement and may notify others of the protest. A motion to intervene must be filed with the Protest Officer no later than ten days from the date such notice is sent by the Protest Officer. Only those motions to intervene made within this prescribed time will be considered timely, and late motions shall be denied. The District and those who are the intended beneficiaries of the procurement are automatically considered a party of record and need not file any motion to intervene. A copy of the motion to intervene shall also be mailed or emailed to the person protesting the procurement.

*Form of motion to intervene*

Any motion to intervene must state, to the extent known, the position taken by the person seeking intervention and the basis in fact and law for that position. A motion to intervene must also state the person's interest in sufficient factual detail to demonstrate that:

- (1) the person seeking to intervene has a right to participate which is expressly conferred by statute or by rule, order, or other administrative action;
- (2) the person seeking to intervene has or represents an interest which may be directly affected by the outcome of the proceeding, including any interest as a:
  - a. consumer;
  - b. customer;
  - c. competitor;
  - d. security holder of a party; or
  - e. person whose participation is in the public interest.

*Ruling on motion to intervene*

If no written objection to the timely motion to intervene is filed with the Protest Officer within seven calendar days after the motion to intervene is received by the protesting person, the person seeking intervention becomes a party at the end of this seven-day period. If an objection is timely filed, the person seeking intervention becomes a party only when the motion is expressly granted by the Protest Officer based on a determination that a reason for intervention exists as stated in this policy. Notwithstanding any provision of this policy, an awardee of the procurement that is the subject of a protest will not be denied their motion to intervene, regardless of its content, unless it is untimely filed.

[Utah Admin. Rules R33-16-301 \(June 21, 2017\)](#)

**Determination on Protest—***Authority to resolve*

A Protest Officer, or the Board of Education or its designee, may enter into a settlement agreement to resolve a protest.

[Utah Code § 63G-6a-1602\(8\) \(2017\)](#)

At any time during the protest process, if it is discovered that a procurement is out of compliance with any part of the Utah Procurement Code or governing regulations, including errors or discrepancies, the Protest Officer or Board of Education or its designee may take administrative action to correct or amend the procurement to bring it into compliance, correct errors or discrepancies or cancel the procurement.

[Utah Code § 63G-6a-106\(4\)\(e\) \(2016\)](#)

[Utah Admin. Rules R33-16-401 \(June 21, 2017\)](#)

*Process for determining the protest*

After a protest is filed, the protest officer shall first determine whether the protest is timely and fully complies with the content requirements set forth above. The protest officer shall, without holding a hearing, dismiss any protests which are not timely or which do not fully comply with the content requirements.

If the protest is timely and compliant, then the protest officer shall:

- dismiss the protest without holding a hearing if the protest officer determines that it alleges facts that, if true, do not provide an adequate basis for the protest; or
- uphold the protest without holding a hearing if the protest officer determines that the undisputed facts of the protest indicate that it should be upheld; or
- hold a hearing on the protest, following the procedures below, if there is a genuine issue of material fact or law that needs to be resolved in order to determine whether it should be upheld.

The fact that a Protest Officer holds a hearing, considers a protest, or issues a written decision does not affect a person's right to, at a later date, question or challenge the Protest Officer's jurisdiction to hold the hearing, consider the protest, or render the decision. A Protest Officer's determination of facts relating to a protest is final and conclusive on appeal unless shown to be arbitrary and capricious or clearly erroneous.

[Utah Code § 63G-6a-1603\(1\), \(2\), \(3\), \(4\)\(e\), \(10\) \(2017\)](#)

*Protest records*

The Protest Officer shall record each protest hearing. Regardless of whether a hearing is held, the Protest Officer shall preserve all records and other evidence

relied upon in reaching the written decision. Such records may not be destroyed until the decision, and any appeal of the decision, becomes final. The Protest Officer shall submit the protest appeal record to the Procurement Policy Board within seven days after (a) notice of an appeal of the decision or (b) a request from the chair of the Procurement Policy Board.

[Utah Code § 63G-6a-1603\(4\)\(d\) \(2017\)](#)

#### *Hearing process*

For purposes of a protest hearing, the Protest Officer may subpoena witnesses and compel their attendance, may subpoena documents for production at the hearing, may obtain additional factual information, and may obtain testimony from experts, the person filing the protest, representatives of the District, or others. The Rules of Evidence do not apply to a protest hearing. The deliberations of the Protest Officer may be held in private.

[Utah Code § 63G-6a-1603\(4\), \(5\)\(a\) \(2017\)](#)

#### *Written determination*

A Protest Officer shall promptly issue a written decision regarding any protest that is not settled by mutual agreement. The decision shall state the reasons for the action taken, inform the protestor of the right to judicial or administrative review as provided in the District's procurement policies and the Procurement Code, and state the amount of the security deposit or bond required for a further appeal. The person issuing the decision shall mail, email, or otherwise immediately furnish a copy of the decision to the protestor. If the Protest Officer does not issue the written decision regarding a protest within 30 calendar days after the day on which the protest was filed with the Protest Officer, or within a longer period as may be agreed upon by the parties, the protestor may proceed as if an adverse decision had been received.

[Utah Code § 63G-6a-1603\(6\), \(9\) \(2017\)](#)

#### *Effect of determination*

A determination is effective until stayed or reversed on appeal, except as provided above. The determination is final and conclusive unless the protestor files an appeal with the Procurement Policy Board.

[Utah Code § 63G-6a-1603\(7\), \(8\)\(a\) \(2017\)](#)

#### *Finding of a violation before the contract is awarded*

If, before award of a contract, it is determined at any level of review that a procurement or proposed award of a contract is in violation of law, the procurement or proposed award shall be cancelled or revised to comply with the law.

[Utah Code § 63G-6a-1909 \(2012\)](#)

#### *Finding of a violation after the contract is awarded*

If after award of a contract it is determined at any level of review that a procurement or award of a contract is in violation of law, the following actions shall be taken:

1. if the person awarded the contract did not act fraudulently or in bad faith, then
  - a. the contract either may be ratified and affirmed, if it is in the best interests of the District, or may be terminated, and
  - b. the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract before the termination, plus a reasonable profit.
2. if the person awarded the contract acted fraudulently or in bad faith, then the contract either may be declared null and void or may be ratified and affirmed if it is in the best interests of the District, without prejudice to the District's rights to any appropriate damages.

Under no circumstances is a person entitled to consequential damages in relation to a solicitation or award of a contract under the procurement process, including consequential damages for lost profits, loss of business opportunities, or damage to reputation.

[Utah Code § 63G-6a-1907 \(2014\)](#)

#### *Costs to or against protestor*

If a protest is sustained at any level of review and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, the protestor is entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation and appeal costs and any equitable relief determined to be appropriate by the Procurement Policy Board appeals panel or court.

If the final determination of a procurement appeals panel or other appellate body does not sustain the protest, the protestor shall reimburse the District for all expenses incurred in defending the appeal, including personnel costs, attorney fees, other legal costs, the per diem and expenses paid by the District to witnesses or appeals panel members, and any additional expenses incurred by the staff of the District who have provided materials and administrative services to the appeals panel for that case.

The notice of claims provisions of the Utah Governmental Immunity Act ([Title 63G, Chapter 7, Part 4, Utah Code](#)) and the undertaking provision of [Utah Code § 63G-7-601](#) do not apply to actions brought under this chapter by an aggrieved party for equitable relief or reasonable costs incurred in preparing or appealing an unsuccessful bid or offer

[Utah Code § 63G-6a-1904 \(2015\)](#)

**Debarment or Suspension Proceedings—**

A person may be debarred or suspended for the causes set forth in Policy CBA. Before a person may be debarred or suspended, the Board of Education or its designee must consult with the procurement unit involved in the matter for which debarment or suspension is sought (if that unit is not the District), consult with the District's attorney, give notice as set forth below, and hold a hearing as set forth below.

[Utah Code § 63G-6a-904\(1\)\(a\), \(b\) \(2017\)](#)

**Notice of Debarment or Suspension—**

An individual to be debarred or suspended must be given written notice of the reasons for which debarment or suspension is being considered and of the hearing at which debarment or suspension will be considered. This notice must be given at least 10 days before the date of the hearing.

[Utah Code § 63G-6a-904\(1\)\(b\)\(ii\) \(2017\)](#)

**Hearing on Debarment or Suspension—***Hearing process*

The informal hearing shall be conducted by the Board of Education or its designee. For purposes of the hearing, the Board or its designee may subpoena witnesses and compel their attendance, subpoena documents for production, obtain additional factual information, and obtain testimony from experts, the person who is the subject of the proposed debarment or suspension, representatives of the District, or others who may be of assistance in making the determination. The Rules of Evidence do not apply in this informal hearing. The fact that an informal hearing is held on debarment or suspension or that a decision is issued does not prevent a person from later questioning or challenging the authority of the Board of Education or its designee to hold the hearing or issue the decision.

[Utah Code § 63G-6a-904\(1\)\(c\)\(i\), \(ii\), \(iv\) \(2017\)](#)

*Written decision*

The Board of Education or its designee shall promptly issue a written decision regarding any proposed debarment or suspension that is not settled by mutual agreement. If debarment or suspension is ordered, the decision shall state the reasons for that action and inform the person of the right to judicial review as provided in the Procurement Code. The person issuing the decision shall mail, email, or otherwise immediately furnish a copy of the decision to the person subject to the decision.

[Utah Code § 63G-6a-904\(1\)\(c\)\(v\), \(vi\) \(2017\)](#)

*Hearing record*

The Board of Education or its designee shall preserve all records and other evidence relied upon in reaching the decision. Such records may not be destroyed until the decision, and any appeal of the decision, becomes final.

[Utah Code § 63G-6a-904\(1\)\(c\)\(iii\) \(2017\)](#)

### **Effect of Order of Suspension or Debarment—**

A decision of debarment or suspension is final unless it is overturned by a court. (See Policy CDB.)

[Utah Code § 63G-6a-904\(1\)\(c\)\(vii\) \(2017\)](#)