



Procurement Protest Procedures

As of February 28, 2020

Procurement Objective

This procedure is for the submittal and evaluation of protests relating to any Authority procurement actions. This procedure applies to all Authority procurement actions except purchases \$25,000 or less (Micro-Purchases and Small Dollar Purchases).

Any protests submitted for procurements in excess of \$25,000, with the exception of those protests submitted in response to procurement for Specialized Rail Equipment conducted under Public Utilities Code §130238, shall be evaluated in accordance with the procedures described below. Procedures for protests submitted in response to a procurement for specialized rail equipment conducted under Public Utilities Code § 130238 are described in these procedures. Protests submitted against procurements of \$25,000 or less will not be considered by the Authority and will be returned.

Notice of Availability of Protest Procedures

Notice of the availability of these protest procedures and information on the applicable protest deadlines shall be provided to Bidders/Proposers in all solicitations in excess of \$25,000. The protest procedures shall be available on the Authority's website. A copy of the Protest Procedures may also be requested from the CA identified in the solicitation package.

Protest Grounds-General

Prior to receipt of bids/proposals, a protest may be submitted on the basis of one or more of the following grounds:

- The solicitation package contains unduly restrictive specifications or scope of work.
- The solicitation package violates local, state, or federal law or regulation.
- After receipt of bids/proposals and after an Authority action relating to selection of a Consultant/Contractor, a protest may be submitted on the basis of one or more of the following grounds:
 - The Authority made a clerical or mathematical error during evaluation of the bid/proposal.
 - Evidence of violations of the Black-Out Period
 - The Authority did not follow the posted award basis in solicitation document (e.g. lowest bid, best value)

Protest Submittal Criteria-General

In order for a protest to be considered, the submittal must meet each one of the following criteria:

- Must be for a procurement action in excess of \$25,000.

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- Must be submitted on a timely basis.
- Must be submitted by an Interested Party.
- Must identify the solicitation or contract number being protested.
- Must be submitted in writing.
- Must include all supporting documentation for each material issue raised in the protest.
- Must include a detailed statement of the legal and/or factual grounds for each material issue identified in the protest.
- Must describe the resolution to the protest desired by the Interested Party.
- Must be signed by a properly authorized representative of the Interested Party.

The Authority reserves the right to waive minor, non-substantive, frivolous, or trivial deficiencies in a protest in its sole discretion.

Protests Filed Prior to Submittal of Bids/Proposals

To be timely submitted, a protest filed prior to submittal of bids /protests that addresses the content of the solicitation package, must be received by the Protest Officer, who is usually the Director of CPMM, in conformance with the deadlines as defined in Timely Filed Protests.

A protest not received within the applicable time period may be found to be untimely, may not be considered, and may be returned without response other than the determination that it is untimely filed.

Additional material associated with the protest may be submitted within seven calendar days of submitting the initial protest. Any additional material may not be submitted after the seven calendar days have passed unless specifically requested in writing by the Protest Officer.

Authority Actions for Protests Filed Prior to Submittal of Bids/Proposals

If the protest is determined to be timely and meets the required criteria, the following actions will be initiated:

- All planholders will be notified within two working days that a protest has been filed and will be provided with a copy of the protest.
- The date for receipt of bids/proposals may be delayed, in the Protest Officer's sole discretion, to provide adequate opportunity to resolve the protest.
- The Protest Officer, at his/her discretion, may meet, either in person or over the telephone, with the Protestor to discuss the protest and/or perform additional fact finding.
- Should the Protestor determine, at this point or any other point in the evaluation of the protest, that he/she wishes to withdraw the protest, a written request to withdraw the protest will be provided to the Protest Officer and the Protest Officer will promptly notify all planholders that the protest has been withdrawn.
- The Protest Officer will research the protest and may call upon any resources

he/she feels are necessary and appropriate to assist in the evaluation of the protest.

- The CEO will render a determination to uphold or deny the protest, which determination shall be final and there shall be no further administrative recourse, with the exception of 1) protests filed in conjunction with procurements funded in whole or in part by the FTA; or 2) protests filed in conjunction with a procurement for specialized rail equipment subject to Public Utilities Code §120238.
- If the protest is upheld, an addendum to the solicitation may be issued to all planholders and the date for receipt of bids/proposals may be extended, at the CEO's sole discretion, to provide adequate time for all potential bidders/proposers to respond to the addendum.
- If the protest is denied, the solicitation may be continued without further delay.

Acceptance of bids/proposals will be subject to the administrative resolution of any protests timely filed.

Protests Submitted After Receipt of Bids/Proposals and Relating to Selection of Consultant/Contractor

To be timely submitted, protests after the receipt of Bids/Proposals and relating to selection of a consultant/Contractor, must be received by the Protest Officer in conformance with the deadlines as defined in Timely Filed Protests of these procedures. A protest not received within this time period, may be found to be untimely, may not be considered, and may be returned without response other than the determination that it is untimely filed.

Additional material associated with the protest may be submitted within seven calendar days of submitting the initial protest. Any additional material may not be submitted after the seven calendar days have passed unless specifically requested in writing by the Protest Officer.

Award of any Contract is subject to administrative resolution of any protest timely filed.

Authority Actions for Protests Submitted After Receipt of Bids/Proposals and Relating to Selection of Consultant/Contractor

If the protest is determined to be timely and meets the required criteria, the following actions will be initiated:

- The potential successful bidder/proposer will be notified within two working days of receipt of the protest that a protest has been filed and a copy of the protest will be provided to the potential successful offeror.
- The Protest Officer may convene a Protest Evaluation Team to review the merits of the protest. Such a team shall not include any members of the original proposal evaluation or bid review teams.
 - The expert(s) and/ or Protest Evaluation Team will consider the issues raised in the protest and may interview or request additional information

from Authority staff, the potential successful bidder/proposer or protestor as may be necessary. Issues raised in the protest may be considered by one or more experts or members of the Protest Evaluation Team depending on their expertise and at the sole discretion of the Protest Officer.

- After completing their review, the expert(s) and/ or Protest Evaluation Team will review the protest with the Protest Officer and provide its recommendation for resolution of the protest. Such recommendation may be in writing.
- The Protest Officer shall review the recommendation and documentation with Legal Counsel and shall prepare a recommended resolution of the protest for consideration by the CEO.
- If the CEO upholds the protest, in whole or in part, he/she may direct such actions, as he/she deems appropriate.

The CEO's decision will be provided to the protestor and to the potential successful bidder/proposer. The CEO's decision shall be final and there shall be no further administrative recourse, with the exception of 1) protests filed in conjunction with procurements funded in whole or in part by the FTA; or 2) protests filed in conjunction with a procurement for specialized rail equipment subject to Public Utilities Code §120238.

Protests Relating to a Solicitation Issued under Public Utilities Code § 130238 for Specialized Rail Equipment

This section of the procedures applies only to procurements of specialized rail transit equipment including rail cars, and computers, telecommunications equipment, fare collection equipment, microwave equipment and other related equipment and apparatus that have been found by a two-thirds majority of the Board to qualify under Public Utilities Code § 130238 (b).

A protest related to either the scope of work/specifications of a solicitation or an award of a Contract under Public Utilities Code § 130238 shall comply with the communication requirements set forth in Public Contract Code ("Public Contract Code Section") § 20216, which states in part:

Ex Parte Communication: Authority Board members or any other person responsible for awarding a Contract subject to Public Utilities Code § 130238 shall not have any ex parte communication with a Bidder/Proposer or any representative of the Bidder/Proposer except in writing and provided that the communication be made public. Public Contract Code § 20216 (d).

Staff Communication: Other than proprietary information, the content of any RFP, any proposal received, and any other communications between a transportation agency and a potential Bidder/ Proposer of a Contract that is subject to Public Utilities Code § 130238 shall be made available to the public no later than the same time that a recommendation for awarding a Contract is made to the governing board or persons responsible for

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approving the award of a Contract to a Bidder/Proposer, except that the price proposed in any Bidder's/Proposer's initial proposal shall be made available upon the opening of the bid by the agency requesting the proposal. Public Contract Code § 20216 (b).

A firm that submits or plans to submit a proposal may protest any acquisition conducted in accordance with Public Utilities Code § 130238 as follows:

- Protests based on the content of the request for proposals shall be filed with the Protest Officer within ten calendar days after the request for proposal is first advertised.
- The protest shall contain a full and complete written statement specifying in detail the grounds of the protest and the facts supporting the protest.
- The Protest Officer shall review the protest with the CEO and prepare a report for the Board, which shall include a copy of the original protest filed and a recommendation for resolution. The Protest Officer and/or CEO may choose to confer with Authority staff or individuals outside the Authority with specific expertise in the area(s) identified in the protest.
- Authority staff shall notify the Protestor of the date and time that the Board shall consider the matter and the Protestor shall have the opportunity to appear and be heard before the Board. Such hearing shall occur prior to the opening of proposals.
- The Board shall review the protest, hear the Protestor, if he/she wishes to speak, review the recommendation for resolution and issue a written decision on the protest prior to the opening of the proposals.

Protests Relating to a Solicitation Issued under Public Utilities Code § 130238 for Grounds Not Based upon Content of RFP

Any firm submitting a proposal in response to an acquisition conducted in accordance with Public Utilities Code § 130238¹ may protest the recommended award on any ground not based upon the content of the request for proposal.

The protest must be filed with the Protest Officer not more than 15 calendar days from the date the notice of recommended award is mailed by Authority to Bidder/ Proposer(s). Day 1 is defined as the day after the mailing date.

The protest shall contain a full and complete written statement specifying in detail the grounds of the protest and the facts supporting the protest.

The Protest Officer shall review the protest with the CEO and prepare a report for the

¹ § 130238(a): "The Legislature finds and declares that (1) because of the highly specialized and unique nature of all rail transit equipment, (2) because of products and materials which are undergoing rapid technological changes, and (3) for the introduction of new technological changes into the operations of the commission, it may be in the public interest to consider, in addition to price, factors such as vendor financing, performance reliability, standardization, life-cycle costs, delivery timetables, support logistics, and the broadest possible range of competing products and materials available, fitness of purchase, manufacturer's warranty, and similar factors in the award of contracts for these vehicles and equipment."

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Board, which shall include a copy of the original protest filed and a recommendation for resolution.

The Protest Officer and/or CEO may choose to confer with Authority staff or individuals outside the Authority with specific expertise in the area(s) identified in the protest.

Authority staff shall notify the Protestor of the date and time that the Board shall consider the matter and the Protestor shall have the opportunity to appear and be heard before the Board.

The Protestor shall have the opportunity to be heard before the Board prior to final award in the case of protests based on grounds other than content or on the renewal of protests based on content of the request for proposal.

Protests Relating to Federally Funded Procurements

Protests of procurement actions may be appealed to the Federal Transit Administration (FTA) only if the procurement is funded in whole or in part by the FTA. Any such protest must be filed in accordance with FTA Circular 4220.1F or most current version.

- Reviews of Protests by FTA may be limited to:
 - The Authority's failure to have or follow its protest procedures
 - The Authority's failure to review a complaint or protest
 - Violations of Federal law or regulation.
- An appeal to FTA must be received by the cognizant FTA regional or Headquarters office within five working days of the date the Protestor learned or should have learned of an adverse decision by the Authority or other basis of appeal to FTA.
- The Protestor shall provide a copy of all correspondence provided to the FTA to the Authority's Protest Officer.
- Award of any proposed Contract may be delayed by the Authority pending resolution of the protest by FTA unless one or more of the following conditions is present:
 - The items or services being procured are urgently required.
 - Delivery or performance will be unduly delayed by failure to make award promptly.
 - Failure to make prompt award will otherwise cause undue harm to the Authority.

Timely Filed Protest

A protest that addresses the content of the solicitation package must be received by the Protest Officer within seven calendar days after all requests for clarifications and requests for approved equals have been answered by the Authority. Day 1 is the day after the date of the Authority answer.

If no requests for clarification or approved equals are received, a protest regarding the content of the solicitation must be received by the Protest Officer within seven calendar

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days after the period for requests for clarification or approved equals has closed. This period shall be defined in each solicitation package in the Section entitled Requests for Clarification or Approved Equals.

For protests submitted after receipt of bids/proposals, the protest must be received by the Protest Officer within seven calendar days after the Authority's Board action, if applicable; or within seven calendar days after the successful award of the Contract; or such other time period as may be specified in the solicitation document. Day 1 is defined as the day after the Board meets and takes action.

For protests associated with the content of procurements conducted under Public Utilities Code § 130238: a written document filed by the Protestor must be received by the Protest Officer within ten calendar days after the request for proposal is first advertised. If the last calendar day falls on a weekend or legal holiday, the protest period ends at 5:00 p.m. (local time) the following business day.

For protests of the recommended award not based on the contents of procurements conducted under Public Utilities Code § 130238: a written document filed by the Protestor must be received by the Protest Officer not more than seven calendar days from the date the notice of recommended award is mailed by Authority to Bidder/Proposer(s). If the 7th calendar day falls on a weekend or legal holiday, the protest period ends at 5:00 p.m. (local time) the following business day.

Any solicitation for which contract award is not made by the Board will include a date certain by which a protest must be filed in order to be considered timely. A protest received after the date certain identified in the solicitation may be considered untimely, may not be considered, and may be returned without response.