

## NCTD PROCEDURES FOR PROTESTS AND REQUESTS FOR RECONSIDERATION

These procedures are to be used to handle and resolve disputes relating to procurements and should be referenced in all solicitation documents. There are additional procedures for procurements funded with Federal Transit Administration (FTA) monies or subject to Public Contract Code section 20216 or 20217. In addition, procedures for requesting a review involving Disadvantaged Business Enterprise (DBE) requirements (DBE Reconsideration) are provided. All protests and requests for reconsideration must be made in writing. The use of email with delivery receipts or mail with overnight delivery and confirmation receipts is typically utilized to expedite the process whenever possible.

NCTD shall not be liable for any costs incurred by an entity filing a protest or reconsideration request or to any participant involved in the process, on any basis, express or implied.

Violations of federal law or regulation will be handled by the complaint process stated within that law or regulation rather than by these procedures. Violations of state or local law or regulations will be under the jurisdiction of state or local authorities.

NCTD will only consider protests from **interested parties**. Typically, only the prime offeror will qualify as an interested party. A subcontractor does not qualify as an interested party because it does not have a direct economic interest in the results of the procurement. An established consortium, joint venture, partnership, or team that is an actual prospective vendor and is acting in its entirety qualifies as an interested party because it has a direct economic interest in the results of the procurement. An individual member of a consortium, joint venture, partnership, or team, acting solely in its individual capacity, does not qualify as an interested party because it does not have a direct economic interest in the results of the procurement. An association or organization that will not perform under the potential contract award does not qualify as an interested party because it does not have a direct economic interest in the results of the procurement.

### I. **Standard Protest Procedures for Formal Procurements in Excess of \$150,000**

#### Protests Before Bid/Proposal Due Date Related to the Content of the Solicitation

Protests relating to the content of the solicitation, including any protest based on the contents of the Scope of Work, must be filed in writing within ten (10) business days after the date the solicitation or addendum with the revised content is issued by NCTD. Failure to file a protest concerning the content of the solicitation or addendum with the revised content prior to this deadline constitutes a waiver of any protest on these grounds. In the event a protester's protest based on the content of the solicitation is rejected, the protester can renew its protest on the same grounds within fifteen (15) days after the notice of intent to award is issued.

Exceptions to NCTD's proposed contract language do not require use of the protest process. Instead, exceptions must be requested via the process provided in the solicitation.

#### Review Requests Related to Determinations of Responsiveness or Responsibility Following Bid/Proposal Due Date

If, after opening and evaluating all proposals/bids, an offeror is determined to be nonresponsive or a proposal/bid is determined to be nonresponsive, and such determination is **not** based on DBE requirements, the offeror may submit a review request based on such a determination. The request

must be filed in writing within five (5) business days of receipt of notice of nonresponsiveness or nonresponsibility from NCTD. Failure to file a review request concerning a determination of nonresponsiveness or nonresponsibility prior to this deadline constitutes a waiver of any protest on these grounds. In the case of a review request relating to a finding of an offeror's nonresponsibility, such offeror shall be entitled to present its protest evidence rebutting the adverse evidence presented in the notice as well as present evidence demonstrating its qualifications to perform the contract. Also, in the case of a review request relating to a NCTD determination that an offeror is nonresponsible, the protester's evidence shall be presented solely in writing unless the protester affirmatively requests an administrative hearing on the issue of responsibility in its timely submitted review request materials. In the event a protester so requests an administrative hearing, all requirements of the initially submitted materials as set forth below must be met including the timely submission of all relevant evidence, but the protester will thereafter be afforded an administrative hearing prior to the review request decision as reflected in the paragraph entitled "Protest Decision."

#### Protests Related to the Notice of Intent to Award/Negotiate

After opening and evaluating all proposals/bids, a notice will be provided to all responsive and responsible offerors. Protests relating to the intent to award/negotiate must be filed in writing within fifteen (15) calendar days of the notice issue date. Untimely protests will be rejected as such. If the protester makes allegations regarding the responsiveness or responsibility of another offeror, the protester shall concurrently email, or mail with overnight delivery, a copy of the protest to any offeror(s) who are the subject of the protest. A protester may obtain the contact information for other offerors from the PlanetBids website used by NCTD.

An affected offeror may deliver statements in support of or in opposition to the protest within five (5) calendar days of receipt of the protest. Any such statements must be emailed to the Chief of PCA or physically delivered to NCTD during its normal business hours. NCTD will promptly forward copies of any such statements to the protester. NCTD reserves the right to reject a protest that covers an issue on which NCTD has already issued a final decision or which is untimely.

#### Protest, Review Request, and Appeal Content and Communication Requirements

A protest must set forth detailed grounds for the protest and be fully supported with technical data, documentary evidence, names of witnesses, and other pertinent information related to the subject being protested. The protest also must state the law, rule, regulation, or policy upon which the protest is based. The protester must allege or establish a clear violation of a specific law, rule, regulation, or policy that applies to NCTD. All materials submitted in a protest shall be considered a public record unless disclosure is prohibited by law or regulation.

All protests and related statements must be emailed to the Manager of PCA at [gwellong@NCTD.org](mailto:gwellong@NCTD.org) with a read receipt requested, or be physically delivered to NCTD during its normal business hours to:

Manager of PCA

NCTD Solicitation No. [Solicitation Number]

North County Transit District

810 Mission Ave.

Oceanside, CA 92054

Additionally, when another offeror is the subject of the protest, documentation supporting the protest must be delivered to the affected offeror(s) by email or overnight delivery with proof of delivery provided to NCTD no later than two (2) calendar days after submission of the protest to NCTD.

Notification by the protester to the affected offeror is necessary to give that offeror the opportunity to provide a defense and/or evidence that contradicts the protester's allegations. A protester may obtain the contact information for other offerors on PlanetBids. Failure to notify another offeror when its proposal/bid is the subject of the protest shall result in the immediate rejection of the protest without further consideration by NCTD.

An offeror whose proposal/bid is the subject of the protest may submit to NCTD materials in response to the protest within five (5) calendar days of its receipt of the protest. Such materials shall be emailed with a read receipt requested, or physically delivered by overnight delivery to the Manager of PCA. A copy of the materials also must be emailed or physically delivered by overnight delivery to the protester.

Communications to NCTD concerning the protest by the protester or an adversely affected offeror must only be directed through the Chief or Manager of PCA or his/her designee. Violation of this prohibition on all other communications may result in an automatic finding of the protest to be invalid. Any protests determined to be incomplete will be rejected.

#### Initial Protest Review

The Chief or Manager of PCA shall review each protest to determine if it is in compliance with the deadline, format, content, and notice requirements set forth in these procedures. If a protest does not meet such requirements, it may be rejected without further consideration. A notice of such rejection shall be sent to the protester.

#### Resolution Of Protests Requiring Factual Determinations

If resolution of the protest requires determinations on questions of fact, the Chief or Manager of PCA will designate one or more persons to gather factual information from persons with a known and direct connection to the solicitation that is the subject of the protest. This designee will prepare a memo containing background and factual information regarding the protest. The designee may interview the protester or adversely affected offeror(s) if deemed necessary in order to complete the investigation. The designee will prepare a recommendation regarding the protest and the Chief or Manager of PCA will prepare a written response to the protester within fourteen (14) calendar days of the date of receipt of the protest. All materials included with the original protest at time of submittal will be considered. Supplemental materials filed by a protester after the protest deadline will not be considered unless there are extenuating circumstances in the opinion of the Chief or Manager of PCA. Documents submitted by a protester or other interested party will be considered a public record unless disclosure is prohibited by law or regulation.

#### Resolution of Protests Requiring Legal Determinations

To the extent resolution of a protest requires determination of a question of law, the NCTD General Counsel or other attorney designee will provide attorney-client privileged advice regarding the protest within fourteen (14) calendar days of the date of receipt of the protest and provide it to the Chief or

Manager of PCA, who shall use it to prepare a response to the protester. The NCTD Chief or Manager of PCA will submit a statement regarding the protest to the NCTD General Counsel for consideration prior to General Counsel review.

### Protest Decision

Decisions related to protests and other requests in this policy will be rendered on the basis of the best interest of NCTD. For protests regarding nonresponsibility, where the protester has properly requested an administrative hearing as set forth above, a designee approved by the Executive Director shall act as the hearing officer and shall consider the evidence submitted and testimony presented at the hearing in rendering the decision. The protest decision will be communicated in writing by the Chief or Manager of PCA to the protester and/or the offeror whose proposal/bid is the subject of the protest.

### Appeals

Upon receipt of a decision from the Chief of PCA, the protester or any offeror whose proposal/bid is the subject of the protest may file an appeal. The scope of the appeal shall be whether the protest determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The protester's appeal must identify with specificity how the protest decision was arbitrary, capricious, an abuse of discretion, or contrary to law. Any appeal that fails to state a valid basis for appeal, is untimely, is based on repetition of arguments previously raised, or simply expresses disagreement with the protest decision will be rejected. When another offeror's offer is the subject of the appeal, the appeal must be delivered to the affected offeror by email or overnight delivery with proof of delivery provided to NCTD no later than two (2) calendar days after submission of the appeal to NCTD. A protester may obtain the contact information for other offerors on PlanetBids. Failure to notify another offeror when its proposal/bid is the subject of the appeal shall result in the immediate rejection of the appeal without further consideration by NCTD.

Appeals must be directed to the Chief or Manager of PCA in writing, fulfill the format, content, and notice requirements set forth in these procedures and be received within seven (7) calendar days from the date the protester or adversely affected offeror receives the protest decision from NCTD. The appeal and supporting materials must be either emailed to the Chief of PCA with a read receipt requested, or physically delivered to NCTD by overnight delivery.

An offeror whose proposal/bid is the subject of an appeal shall have the right to respond to the request by submitting a written response to the Chief of PCA within three (3) calendar days of receiving the appeal. The offeror shall provide a copy of its response to the protester by email or overnight delivery at the time of submitting its response to NCTD.

The Executive Director or appointed designee will review the appeal materials and either affirm or deny the protest decision within fourteen (14) calendar days from the date NCTD receives the request. The designee shall be from a department that was not the source of the procurement within NCTD. Although it is not typical, a protester may request an administrative hearing with the Executive Director/designee or an opportunity to present information to the NCTD Board of Directors regarding its appeal. Any such requests shall be included in the appeal. It should be noted that the Board has delegated most contract actions to staff and does not vote on most contract awards.

The decision of the Executive Director or designee will be communicated in writing by the Chief of PCA, to the protester and any party whose proposal/bid is the subject of the appeal. The decision of the Executive Director or designee will be final.

### Results of the Protest

If a protest relating to the content of a solicitation is sustained, the solicitation will be modified by addendum or cancelled. If the protest is rejected, the original solicitation will stand.

If a protest relating to the responsiveness or responsibility of an offeror is sustained, the original notice to the offeror may be withdrawn and the offeror may be required to submit additional information. If the protest is rejected, the original notice will stand.

If a protest relating to a proposed contract award is sustained, the original notice to offerors of the intent to award or negotiate may be withdrawn after the deadline for appeal has passed. NCTD then may issue a new notice. A new protest period will then commence and the requirements of these procedures will be followed. If the protest is rejected, the original notice will stand.

## **II. Alternate Timelines When Public Contract Code Sections 20216 or 20217 Apply**

Different timelines are applicable to procurements triggering Public Contract Code sections 20216 or 20217, which may apply if the solicitation concerns a negotiated procurement involving products and materials undergoing rapid technological change:

- (1) Protests based on the content of the solicitation shall be filed with NCTD within ten (10) calendar days after the request for proposals is first advertised. NCTD shall issue a written decision on the protest prior to opening of proposals.
- (2) A protester may renew its protest based on the content of the solicitation by refileing the protest with NCTD within fifteen (15) calendar days after the staff recommendation for award has been made available to the public as required by Public Contract Code Section 20216(e).
- (3) A protest based on any ground other than the content of the request for proposals shall be filed with NCTD within fifteen (15) calendar days after the staff recommendation for award has been made available to the public as required by Public Contract Code Section 20216(e).

Protesters shall have an opportunity to appear and be heard by NCTD prior to the opening of proposals in the case of protests based on the content of the solicitation, or prior to final award in the case of protests based on other grounds or the renewal of protests based on the content of the solicitation.

## **III. Protests Involving FTA or other Federally Funded Procurements**

When a protest involves a federally-funded procurement, the Chief of PCA or designee will notify the FTA after receiving a protest on a notice of intent to award in order to keep the FTA informed as protest decisions are made. NCTD Finance staff also will be notified and include information on the protest in its next quarterly milestone progress report and at its next project management oversight review. Pursuant to federal agency and Caltrans guidance, NCTD is responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of its procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. In the case of contract awards that will use federal funds, protests may be reviewed by the federal agency providing funds only when the issue is a compelling federal concern.

If review is granted by the federal awarding agency, the federal awarding agency will not substitute its judgment for that of NCTD unless the matter is primarily a federal concern. Violations of law should be referred to the local, state, or federal authority having proper jurisdiction. Alleged violations of a specific federal requirement that provides an applicable complaint procedure should be submitted and processed in accordance with that federal regulation. For example, Buy America Requirements and requirements for Participation by Minority Business Enterprise in DOT Programs. NCTD's role and responsibilities with regard to the FTA when there is a protest on FTA funded procurements are as follows:

- NCTD will provide copies of all protests and any or all related supporting documents for protests on procurements that have a value exceeding \$100,000; or involve a controversial matter, irrespective of amount; or involve a highly publicized matter, irrespective of amount.
- NCTD will provide a brief description of the protest; the basis of disagreement, and if open, how far the protest has proceeded, or if resolved, the agreement or decision reached, and whether an appeal has been taken or is likely to be taken.
- When NCTD denies a bid protest, and especially if litigation is likely to occur, NCTD will inform the FTA Region Administrator for the region administering a regional project or the FTA Associate Administrator for the program office administering a headquarters project directly.

NCTD will follow the same procedures as those used for FTA funded procurements; including notifying the appropriate authority at Caltrans when NCTD is a subrecipient of federal or state funds through Caltrans and notifying the appropriate authority(ies) when NCTD is a direct recipient of such funds.

#### **IV. Requests for DBE Reconsideration**

The following procedures shall be used by NCTD to fairly and promptly respond to any requests for DBE Reconsideration (DBER) received regarding the procurement or contracting processes relating to requirements imposed by 49 CFR Part 29. NCTD will only review DBER requests submitted by an interested party. NCTD will consider all DBER requests received by NCTD at 4 PM on the deadlines discussed below. The effective date of the DBER request filing shall be the date NCTD electronically or physically receives the written DBER request. A DBER request that does not strictly comply with these procedures will be rejected. NCTD shall not be liable for any costs incurred by an entity filing a DBER request or to any participant in the DBER request process, on any basis, express or implied.

If, after opening and evaluating all proposals/bids, an offeror is determined to be nonresponsive or nonresponsive for failure to meet a DBE goal or provide Good Faith Efforts, a DBER request relating to any such determination must be filed with the NCTD in writing within five (5) calendar days of receipt of notice of nonresponsiveness or nonresponsibility from NCTD. Failure to file a DBER request concerning a determination of nonresponsiveness or nonresponsibility relating to a DBE matter prior to this deadline constitutes a waiver of any DBER request on these grounds by the Offeror. In the event an Offeror requests DBER, all requirements of the DBER request materials as set forth below must be met, including the timely submission of all relevant evidence. The Offeror will thereafter be afforded an administrative hearing upon request. Offeror shall notify NCTD of any such hearing request prior to NCTD issuing the DBER request decision.

The NCTD Disadvantaged Business Enterprise Liaison Officer (DBELO) shall serve as the DBER official overseeing the DBER process. The DBELO or designee will not have played any role in the original

determination that the Offeror is nonresponsive or nonresponsible. The DBELO will review the administrative record concerning the request for DBER, and any other materials submitted with the DBER request. Any request for reconsideration that fails to state a valid basis for reconsideration, is untimely, is based on repetition of arguments previously raised, or simply expresses disagreement with the DBER request decision, will be rejected by the DBELO for failure to state a claim that is eligible for DBER.

As part of its DBER request, the Offeror must provide written documentation concerning the issue of whether it met the DBE goal, made adequate Good Faith Efforts to do so, and/or failed to provide required documentation. No new DBE evidence, including a revised DBE commitment form or Good Faith Effort documentation shall be considered in the reconsideration process. The Offeror also may request a meeting with the DBELO or designee to discuss whether it met the goal or made adequate GFE to do so. The DBER request also must state the law, rule, regulation, or policy upon which the DBER request is based. The scope of reconsideration shall be whether the DBE-related determination of nonresponsibility or nonresponsiveness was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

All materials submitted in a DBER request shall be considered a public record unless disclosure is prohibited by law or regulation. All DBER requests and related statements must be emailed to the DBELO or physically delivered to NCTD during its normal business hours with proof of delivery to NCTD. DBER requests shall be addressed to [bsaran@NCTD.org](mailto:bsaran@NCTD.org) or:

DBELO

NCTD Solicitation No. [Solicitation Number]

North County Transit District

810 Mission Ave.

Oceanside, CA 92054

Communications to NCTD concerning the DBER request must only be directed through the DBELO or his/her designee. Violation of this prohibition on all other communications may result in a determination by NCTD that the DBER request process cannot proceed. Any DBER requests determined to be incomplete will be rejected.

The DBELO or designee shall review the DBER request to determine if it is in compliance with the deadline, format, content, and notice requirements set forth in these procedures. If a DBER request does not meet such requirements, it may be rejected without further consideration. A notice of such rejection shall be sent to the DBER requestor. The DBELO or designee will review the DBER request in a timely manner and may hold an informal meeting with other NCTD staff if deemed necessary in order to complete the investigation. The DBELO or designee will prepare a recommendation regarding the Offeror's DBER request, in writing, to the NCTD Executive Director or designee within ten (10) business days of the date the DBER request was filed. Only materials included with the DBER request at time of submittal will be considered. The Executive Director or designee will either sustain or reject the DBER request in writing based upon the recommendation of the DBELO and in the best interests of NCTD. This

decision will be communicated in writing to the DBER requestor. The result of the reconsideration process is not administratively appealable to any other person within NCTD or the FTA.