

SECTION IX - ADMINISTRATIVE REMEDIES

1. Protests (*City Code, 43-25*)

A. Solicitation Protests (*City Code, 43-25.A*)²³

- I. An aggrieved party may protest the contents of a solicitation before the solicitation deadline when the protest is based on an alleged mistake, impropriety or defect in the solicitation that is apparent.*
- II. Offerors or respondents may protest an adverse determination issued by the Procurement Officer, regarding whether the offeror or respondent is responsible or its offer or response is responsive, within seven days of the date the offeror or respondent was notified of the adverse determination.*
- III. Offerors or respondents may protest an award recommendation if the offeror or respondent can establish that it had a substantial chance of being awarded the contract and will be harmed by the recommended award.*
- IV. In accordance with regulations, in the event the aggrieved parties, offerors or respondents submitted a public records request after receiving the applicable notice but prior to the deadline to file a protest as set forth in this article, the Procurement Officer will extend the deadline one day for every day between the day the City receives the public records request and the day the public records are produced, the request is otherwise addressed by the City or a court of competent jurisdiction enjoins disclosure of the requested records.*

B. Right to Protest

- I. Right to protest does not apply to small dollar purchases, informal procurements and exceptions to the procurement process.*
- II. Protests filed under PCC 43-25(A)(1) may be addressed by an amendment to the solicitation, or denied by the City. If denied, the opening and award will proceed unless the City determines that it is in the City's best interests to set new deadlines, amend the solicitation, cancel or re-bid. Therefore, unless otherwise notified by a formal amendment, the Protester must adhere to all solicitation dates and deadlines, including timely filing of an Offer, regardless of filing a protest.*
- III. Solicitation Protests under PCC 43-25(A)(1) must be submitted to the Procurement Officer when the aggrieved party knew or should have known of the alleged mistake, impropriety or defect in the solicitation, but no later than seven days before the solicitation's due date and time. An aggrieved party, Offerors or Respondents who fail to protest timely an alleged mistake, impropriety or defect in the solicitation that was apparent may not later protest that alleged mistake, impropriety or defect.*
- IV. Protests of adverse responsiveness or responsibility determinations and protests of award recommendations differ from solicitation protests since the parties that may protest are known after the solicitation deadline.*
- V. Only Offerors or Respondents may protest any resulting award recommendations.*
- VI. Protests under PCC 43-25(A)(2) must be filed within seven days of the date the Offeror or respondent was notified of the adverse determination.*
- VII. Protests under 43-25(A)(3) must be submitted to the Procurement Officer within seven days after the award recommendation is posted to the City's website, with exceptions only for good cause shown, within the City's full and final discretion.*

²³ *Italics indicate Code provision*

C. Contents of Protests (City Code, 43-25.B)²⁴

To be considered, all protests under this section must be submitted in writing and must include the name, address, telephone number, e-mail address and signature of the protester or its authorized representative; the solicitation number and title; a detailed statement of the legal or factual basis of the protest including any copies of relevant documents; and the relief requested. An offeror or respondent protesting an award recommendation shall also establish in its protest that it had a substantial chance of being awarded the contract and will be harmed by the recommended award. Protests received after the protest due dates set forth in this article will not be considered, except for good cause.

- I. When inspecting submissions that appear to be a Protest, but are not clearly labeled as such, Procurement Officers will examine the elements of the document to determine if it contains all of the elements required to be included in a Protest, as set forth in PCC 43-25, and consult the Law Department if necessary.
- II. To be considered, all protests must be submitted in writing and must include the name, address, telephone number, e-mail address and signature of the protester or its authorized representative; the solicitation number and title; a detailed statement of the legal and factual basis of the protest; copies of relevant documents; and the relief requested.
- III. An Offeror or respondent protesting an award recommendation shall establish in its protest that it has a substantial chance of being awarded the contract if the protest is granted, and the Offeror or respondent will be harmed by the recommended award.
- IV. Solicitation due dates will not be postponed solely on the basis of receiving a solicitation protest. All solicitation protesters must submit a timely Offer or Response. Only upon official addendum from the City, will a solicitation deadline be postponed, at the City's sole discretion.
- V. Notification of Protest Receipt
All Protests will be retained in the procurement file and will be made available for public inspection upon request. If Offers or responses are received, Interested Parties will be notified of the Protest of the solicitation. Requests for Council Authority will be postponed as necessary.

²⁴ *Italics* indicate Code provisions.

D. Authority to Resolve Protests (City Code, 43-25.D)²⁵

The Procurement Officer for the solicitation has the authority to review, decide and settle protests under this section.

1. The Procurement Officer is authorized to deny, sustain, or sustain in part, any Protests submitted prior to the occurrence of any legal action resulting from the Protester's complaint.
2. Protest Decision
 - a. The Procurement Officer will issue a decision in writing within a reasonable period of time of the Protest's receipt. The Central Procurement Officer will maintain information and resources regarding the preparation of Protest decisions and, along with the Law Department, will advise and assist Procurement Officers with Protests.
 - b. A protest decision will be sent by fax or email and regular mail with return receipts requested for all methods of delivery.

2. Appeals (City Code, 43-26)²⁶

- A. Upon receipt of an adverse protest decision under (City Code) Section 43-25(D), the aggrieved party, offeror or respondent may appeal the protest decision to the City Manager. The scope of an appeal, the evidence presented and arguments made may not extend beyond the scope of the original protest by the aggrieved party, offeror or respondent.*
- B. Appeals must be submitted in writing to the City Manager, with a copy sent to the Procurement Officer, within seven days of the date of the protest decision. Appeals received after this date will not be considered except for good cause. The appeal must include a detailed analysis of the legal or factual errors resulting in the protest decision. Copies of all relevant documents should also be provided.*
- C. Within 14 days of the City Manager's receipt of the appeal, the Procurement Officer shall submit an appeal report to the City Manager. In accordance with the regulations, this period of time may be extended as authorized by the City Manager. The appeal report shall include a statement by the Procurement Officer defining the scope of the appeal, the appeal, the protest decision, the protest, and any other applicable documents or abstracts thereof.*
- D. The City Manager is authorized to settle and resolve appeals. The City Manager may make the determination that an appeal is frivolous or unwarranted as to facts and dismiss the appeal. The City Manager may appoint an independent hearing officer or select an appeal panel to review and consider the basis of the appeal and render a recommendation.*
- E. If assigned to a hearing officer for fact finding, the appeal may be supplemented in the discretion of the hearing officer, with oral argument and witness testimony by the party submitting the appeal, the Procurement Officer, relevant City staff, the recommended offerors and other relevant witnesses.*
- F. The City Manager will issue a final decision in writing within a reasonable period of time. The final decision shall identify and explain the basis of the City Manager's determination and the decision will be final.*

²⁵ *Italics* indicate Code provisions.

²⁴ *Italics* indicate Code provisions.

Appeals of Protest decisions in accordance with PCC 43-26 will be facilitated in accordance with the following policies and procedures:

A. Right to Appeal Protest Decisions.

Only Protesters that received an adverse Protest decision, including a denial or a denial in part, may Appeal a Protest decision to the City Manager, through the Procurement Officer.

B. Contents of Appeals.

When inspecting submissions that appear to be an Appeal, but are not clearly labeled as such, the Procurement Officer will examine the elements of the document to determine if it contains all of the elements required to be included in an Appeal as set forth in PCC 43-26.

The scope of an appeal, the evidence presented, and arguments made may not exceed the scope of the original protest by the aggrieved party, Offeror or respondent. The appeal must include a detailed analysis of the legal or factual errors resulting in the appealed protest decision.

Appeals not adhering to all appeal requirements will be rejected, and the Procurement Officer will notify the prospective Appellant as soon as practicable.

If the Appeal is filed on the day it is due, and it is insufficient, it is deemed denied.

C. Time for Filing an Appeal.

Appeals must be submitted to the City Manager through the Procurement Officer, within seven days of the date the Protest decision is sent to the Protester, as verified in a return or read receipt, fax confirmation or other indicia of receipt. Appeals received after this date must be rejected unless they show Good Cause. The City Manager will consult with the Law Department in such cases to determine whether or not the late Appeal demonstrates sufficient Good Cause. Within seven days of the receipt of a late Appeal, the City Manager will notify the Appellant whether the late Appeal will be accepted. The decision of the City Manager with regard to receipt of late Appeals is final.

D. Notification of Appeal Receipt.

Notices of an Appeal will be sent to all Interested Parties.

E. Authority to Resolve Appeals.

The City Manager may deny, sustain or sustain in part any appeals submitted prior to the occurrence of any legal action associated with the Appeal. Once legal action is taken by the Appellant, the City Manager may turn the dispute over to the Law Department. The City Manager may dismiss or deny the Appeal if there is not sufficient evidence to establish that the Appellant has a substantial chance of being awarded the contract, or for other findings that the Appeal is frivolous, unfounded or unwarranted as to facts or the law. Any issues not addressed in the Protest may not be raised in the appeal.

F. Appeal Report.

The Procurement Officer will assemble a report and submit it to the City Manager within 14 days of the date the Appeal is received by the City. If a longer period of time is necessary, the Procurement Officer will send an email to the City Manager requesting the extra time. The Central Procurement Officer will maintain information and resources regarding the preparation of reports, and along with the Law Department, will advise and assist Procurement Officers with reports regarding Appeals.

G. Appeal File.

The Procurement Officer will assemble the relevant portion of the file and send electronically (email, disc or thumb drive) to the Law Department. The Law Department will work with the Procurement Officer to review, number and prepare the file for submittal to the City Manager with the Report.

H. Appeal Decisions.

The City Manager will issue a decision in writing, within a reasonable period of time following the receipt of the report and file. The decision will set forth the basis of the decision and state that the decision is the final administrative step. Appeal decisions will be sent by fax or email and regular mail with return receipts requested for all methods of delivery. The City Manager has the discretion to appoint a Hearing Officer to review the Appeal. If a Hearing Officer is appointed, the Appeal File will be transmitted to the Hearing Officer. Any issues not addressed in the Protest may not be raised in the appeal. Evidence will be received in written form to expedite the review, but the Hearing Officer may hear testimony. The Hearing Officer will submit a recommendation to the City Manager in approximately three weeks (15 business days) from the deadline to submit additional documentation, but may request additional time from the City Manager, if necessary. The Hearing Officer must at all times proceed in a timely manner.

I. Hearing Officer, generally.

The City Manager has the discretion to appoint a Hearing Officer to review the Appeal. If a Hearing Officer is appointed, the Appeal File will be transmitted to the Hearing Officer. Any issues not addressed in the Protest may not be raised in the appeal. Evidence will be received in written form to expedite the review, but the Hearing Officer may hear testimony. The Hearing Officer will submit a recommendation to the City Manager in approximately three weeks (15 business days) from the deadline to submit additional documentation, but may request additional time from the City Manager, if necessary. The Hearing Officer must at all times proceed in a timely manner.

J. Hearing Officer process.

The Hearing Officer will review the Appeal File and may either present a recommendation to the City Manager or require the parties to submit briefs. This initial review will be done as quickly as possible. If a briefing is not required, the Hearing Officer will issue a deadline for the Parties to submit any further documentation required. No more than five calendar days for each of these steps is recommended, but actual time necessary will vary depending on the case. The Hearing Officer may require oral argument on the briefs where it is deemed necessary to clarify issues raised in the Appeal. The Hearing Officer may request a hearing where a recommendation cannot be made based on the Appeal file or briefing and the facts are in dispute.

K. Briefs.

Appellant and the City will file briefs at the Hearing Officer's request. Briefs must explain and summarize the issues presented in the original Protest, upon which the Appeal is based, and address any relevant and applicable legal principles. The Hearing Officer must decide whether supplementation of the record is necessary in order not to frustrate effective judicial review. If briefs are requested, the Hearing Officer will provide a schedule to the parties with approximately two weeks for each side, subject to the Hearing Officer's discretion based on the case. The Hearing Officer at all times shall proceed in a timely manner through the process.

L. Oral Argument and Hearing Date.

The Hearing Officer will set a date for oral argument or a hearing where necessitated by the case. The Hearing Officer will notify the parties of the date. The parties have five days for reconsideration of the date for any reason; after five days, or within five days of the hearing, whichever is shorter, postponements will only be approved by written motion to the Hearing Officer for good cause. Arguments should be scheduled as soon as practical after briefing, if required. The City will notify the parties of the date for arguments or a hearing.

M. Hearing.

The Hearing Officer will make a recommendation on the Appeal to the City Manager as soon as practical depending on the case.

- Elements of a Hearing:
- The Hearing Officer will call the case. The parties and their counsel are identified. The Hearing Officer will administer oaths and affirmations to witnesses, if necessary.
- If there are any motions, the Hearing Officer will address them.
- Any required testimony will be made under oath or affirmation.
- All testimony and evidence are limited to the relevant issues raised in the Appeal.
- The parties may make opening statements or they may be waived.
- The Appellant proceeds by presenting evidence first.
- The parties may present testimonial and documentary evidence relevant solely to the Appellant's appeal, subject to cross-examination by other parties or their counsel. The Hearing Officer may limit witnesses or evidence in his discretion.
- After all evidence has been presented, the parties may present closing statements summarizing their respective positions.
- After completion of closing statements, the hearing is then concluded.
- The Hearing Officer then prepares a written recommended decision to submit to the City Manager.

3. Suspensions (City Code, 43-27)²⁷

- A. *The City Manager may, in the public interest, suspend an actual or prospective contractor when it has been determined that immediate action is necessary to protect the City's interest. In assessing the adequacy of the evidence, the City Manager shall consider how much information is available, how credible the information is given the circumstances, and whether or not important allegations have been independently corroborated. This assessment should include an examination of basic documents such as contracts, inspection reports, and correspondence. A suspended contractor and any of its affiliates will be prohibited from entering into any contracts with the City, any subcontracts thereunder, or any other contract related to a City project while the suspension is in effect. Suspension constitutes suspension of all divisions or other organizational elements of the contractor and its affiliates.*
- B. *The City Manager may suspend a contractor and its affiliates from participating in a City procurement within the scope of this chapter:*
1. *Upon indictment or other adequate evidence of the commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract.*
 2. *Upon adequate evidence that the business practices of the contractor or its affiliates under or in connection with a City contract or a City project were unethical, fraudulent, discriminatory, or illegal.*
 3. *Upon adequate evidence of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, delinquent transaction privilege tax of at least \$1,000, other tax evasion or violation of Federal criminal tax laws, or receiving stolen property.*
 4. *Significant overpayment under a City contract, a related subcontract or a contract for a City project and a failure to repay the City after reasonable notice of the overpayment.*

²⁷ *Italics indicate Code provisions.*