

3.10 Protests

3.10.1 Policy

SORTA policy requires that all prospective contractors be accorded fair and equal consideration in the solicitation and award of contracts. To that end, any interested party shall have the right to protest alleged inequities in the procurement process and to have its issues heard, evaluated and resolved administratively. "Interested party" is defined as an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by failure to award a contract.

Each solicitation above the small purchase threshold as defined herein shall contain, as part of the instructions to bidders/offerors, the following notice:

Board policy and procedure for the administrative resolution of protests is set forth in §3.10 of SORTA's Procurement Procedures Manual (PPM). The PPM contains rules for the filing and administration of protests. The Contracting Officer shall furnish a copy of §3.10 upon request. Chapter VII, Sec. 1.b. of Federal Transit Administration (FTA) Circular 4220.1 F addresses protests where federal funds are involved. FTA will only review protests regarding the alleged failure of the grantee to have a written protest procedure; an alleged failure to follow such procedure; or violations of Federal law or regulation. A protestor must exhaust all administrative remedies with SORTA before pursuing a protest with FTA.

3.10.2 Submittal Procedures

An interested party wishing to protest a matter involving a proposed procurement or contract award shall file a written submission with the Director of Procurement by certified mail or other delivery method by which receipt can be verified. Electronic submission of protests is not acceptable unless an original signed copy of the protest is received by the Director within 24 hours (not including weekends and holidays) after receipt of the electronic copy. The Director may, however, permit the electronic provision of supplemental information after the initial protest submittal. The protest shall include, at a minimum:

- (a)** The name and address of the protesting party and its relationship to the procurement sufficient to establish that the protest is being filed by an interested party;
- (b)** Identity of the contact person for the protestor, including name, title, address, telephone, fax and e-mail addresses. If the contact point is a third party representing the protestor, the same information must be provided, plus a statement defining the relationship between the protestor and the third party;
- (c)** Identification of the procurement;
- (d)** A description of the nature of the protest, referencing the portion(s) of the solicitation involved;
- (e)** Identification of the provision(s) of any law, regulation, or other governance upon which the protest is based;
- (f)** A complete discussion of the basis for the protest, including all supporting facts, documents or data;
- (g)** A statement of the specific relief requested and
- (h)** A notarized affirmation by the protestor (if an individual) or by an owner or officer of the protestor (if not an individual) as to the truth and accuracy of the statements made in the protest submittal.

The protestor is solely responsible for the completeness and validity of the information provided. Any documents relevant to the protest should be attached to the written submission. Documents which are readily available on the Internet may be referenced to an appropriate link.

Protests shall be submitted in accordance with the requirements of this chapter and any directions included in the solicitation, and shall be addressed to the Director of Procurement. Unless otherwise specified in the solicitation, the written protest shall be accompanied by an electronic copy (CD) in PDF format. In case of a variance in the content of the written and CD submittals, the written version shall prevail.

The Contracting Officer, or an assigned Contracting Officer in cases where the conduct of the Contracting Officer for the procurement is called into question, shall conduct the administrative processing of protests filed with SORTA or with FTA, and shall be responsible for the processing, documenting a protest, and recommending a decision to the Director of Procurement. The Director of Procurement shall request legal counsel to review and advise concerning any legal issues involved in a protest.

The Director of Procurement shall be responsible for overseeing the decision process and for the content of the decision. The Director shall ensure that all relevant parties within SORTA have been involved in the decision-making

process and shall, as circumstances require, obtain the concurrence of the CEO or other personnel in a decision prior to its issuance.

SORTA may decide a protest solely upon the written submission. The protest submission should, therefore, include all materials necessary to support the protester's position. Additional or supplemental materials may only be submitted at the request of, or with the permission of, the Director of Procurement.

If the procurement uses federal funds, an informal notice of receipt of a protest must be given to the appropriate regional office of the Federal Transit Administration (FTA). The form of notice may be specified by the regional office.

3.10.3 Protests of the Solicitation Process

A protest related to the technical scope or specification, terms, conditions, or form of a solicitation must be received no later than ten (10) working days prior to the date established for opening of bids or receipt of proposals; if the protest addresses an amendment to the solicitation, it must be received no later than ten (10) working days prior to the date established for opening bids or receipt of proposals or five (5) working days after the date of issuance of the amendment, whichever is later; in no event, however, may a protest of this nature be submitted after bids or proposals are received. The protest must conform in all respects to the requirements set forth above.

Upon receipt of such a protest, the Director of Procurement shall notify all prospective offerors and other known interested parties of the receipt and nature of the protest, and shall post a notice of the protest on SORTA's procurement web page. Unless the Director of Procurement determines that delay will be prejudicial to the interest of SORTA or that the protest patently lacks substantial merit, the solicitation process will be extended pending resolution of the protest.

Protests will be considered and either denied or sustained, in part or in whole, by the Director of Procurement in writing. A written decision specifying the grounds for sustaining all or part of or denying the protest will be transmitted to the protestor prior to the receipt of bids or proposals in a manner that provides verification of receipt.

A notice of the decision shall be provided to all parties given notice of the protest, and posted to SORTA's procurement web page.

Should the protest be upheld in whole or in substantial part, the Contracting Officer may either (1) amend the solicitation to correct the document or process accordingly; or (2) cancel the solicitation in its entirety. If the solicitation is amended, the time for receipt of bids or proposals shall be equitably extended to permit all participants to revise their bids or proposals to reflect the decision. If the protest is denied, the solicitation shall proceed as if the protest had not been filed, unless the protester pursues its protest with the Federal Transit Administration (FTA) as defined below, or otherwise appeals the decision of the Director of Procurement, as defined below.

Protests received by SORTA after the time periods specified above shall be considered untimely and may be denied on that basis unless the Director of Procurement concludes that the issue(s) raised by the protest involves substantial prejudice to the integrity of the procurement process.

3.10.4 Protests of the Evaluation Process

All bidders/proposers will be notified of the recommended award, upon a determination by Board staff of a recommendation to be made to the CEO, or the Board of Trustees, as appropriate. This notice will be transmitted to each proposer at the address contained in its proposal form, and shall be posted on the procurement page of the SORTA website. Transmittal may be by electronic means or by hard copy. Any proposer whose proposal is valid at the time of the staff determination may protest the recommended award on one or more of the following grounds:

- (a)** That the recommended awardee does not meet the requirements of the solicitation;
- (b)** That the bid or proposal recommended for acceptance does not meet the criteria of the solicitation or award;
 - a. That the evaluation process conducted by SORTA is improper, illegal, or the decision to recommend award is arbitrary and capricious.

The protest must conform in all respects to the requirements set forth above.

The protest must be received by SORTA at the address specified in the solicitation, no later than five (5) calendar days after the date such notification is publicly posted or sent to the bidder or proposer, whichever is earlier. A written decision stating the grounds for allowing or denying the protest will be transmitted to the protestor and the proposer recommended for award in a manner that provides verification of receipt. Such decision shall be final, except as provided below or by applicable law or regulation.

Upon receipt of a protest of this type, the Contracting Officer shall notify all offerors and any other known interested parties of the receipt and nature of the protest and request an extension of the validity period of their offers, if appropriate. Unless the Director of Procurement determines that delay will be prejudicial to the interest of SORTA or that the protest lacks substantial merit, award will be withheld pending disposition of the protest. Should one or more offerors refuse a requested extension of the validity of an offer, the Contracting Officer may reject such proposal unless it is determined that the protest can reasonably be resolved and the award process continued without need for such extension. Delay in an award shall be considered prejudicial to SORTA if:

- (a) The equipment, supplies or services are urgently required or;
- (b) Failure to make a prompt award will economically or operationally damage SORTA.

Should the protest be upheld in whole or in substantial part, the Contracting Officer may either (1) revise the evaluation process to correct the matter protested; or (2) cancel the solicitation in its entirety.

In the event that SORTA proceeds with an award for one of the reasons stated above, and the protest is subsequently upheld, the Director of Procurement shall determine whether the performance of the contract will reasonably permit its termination in order to correct the protested matter. Such termination shall be for the convenience of SORTA.

3.10.5 Evaluation of Protests

A protest decision should ordinarily be written and published within ten (10) working days of receipt of the protest. The Director of Procurement may extend the response period if additional time is required to gather and evaluate information necessary for the decision or for other good cause.

Upon receipt of a protest, the Contracting Officer shall notify parties involved in the procurement as identified above, and such Board personnel or others as may be appropriate or necessary to determine the validity of the protest. A notice of the receipt of a protest should be sent to the FTA regional office, per FTA Circular 4220.1F, Chapter VII, Sec. 1.a(2). Copies of the protest submittal, or portions thereof, may be provided to the notified parties as appropriate.

The Director of Procurement may request additional written information from the protestor or other parties, as necessary to determine the validity of the protest. A formal or informal hearing may be held. If a formal hearing is held, testimony shall be given under oath and a transcript or electronic recording of

the proceeding shall be made; the transcript or recording shall be provided to the protestor and made part of the protest record.

The Director of Procurement shall redact from any submission under the protest process information which has been identified as proprietary, and which, in his/her judgment, is protected from disclosure under the Ohio Public Records Act (§149.43, Ohio Revised Code) prior to furnishing such submission to any other party, unless the person furnishing the information consents, in writing, to distribution of the information to other interested parties.

3.10.6 Decision

Upon receipt and evaluation of all relevant information, including any pertinent law or regulations, the Director of Procurement shall prepare a decision. The decision will contain four parts:

- I. SUMMARY – Describes briefly the protesting party, the solicitation involved, the issues(s) raised, and the decision.
- II. BACKGROUND – Describes in more detail the history of the solicitation and the procurement events leading to the protest, the date the protest was received, and the process by which it was evaluated.
- III. DISCUSSION - Identifies the issue or issues raised by the protestor, and the factors considered in reaching a decision, and the rationale for the decision.
- IV. DETERMINATION - States the decision and any remedy or subsequent action, e.g. cancellation of the procurement, resulting from it.

Ordinarily, each issue raised in the protest will be discussed separately in Parts III and IV.

Decisions shall be signed and issued by the Director of Procurement. The decision shall be issued to the protestor; other interested parties shall receive either a copy of the decision or a notice of decision, as appropriate. Where appropriate, transmittal may be electronic, followed by hard copy. The protest document, the decision, and all other documentation related to the decision shall be public record except as otherwise provided by the Ohio Revised Code or SORTA's regulations and policies.

3.10.7 Appeals

Decisions of the Director of Procurement may be appealed to the General Manager and Chief Executive Officer (CEO) by the protestor within five (5) working days after the decision is issued to the protestor. The appeal shall be in writing, addressed to the CEO with a copy to the Director of Procurement, and

shall state with specificity the basis for the appeal. The CEO or designee shall review the written record of the protest and may conduct such further investigation as is deemed necessary or appropriate to reach a decision. The decision of the CEO will ordinarily be issued within fifteen (15) working days of receipt of the appeal; this time period may be extended if necessary to complete an investigation. The decision of the CEO shall be final and conclusive, except for such remedies as state or federal law or regulation may provide.

3.10.8 Record of Protest

Upon receipt of a protest, the Contracting Officer shall establish a separate file in which a complete record of the protest shall be maintained. The file shall constitute a separate portion of the overall procurement file.

The procurement protest file shall include reasonable and adequate documentation of the protest and outcome of the protest. Protest file documentation should be proportional to the size and complexity of the protest.

The protest file should, at a minimum, include the following:

- I. The protest, including supporting documentation
- II. Record of determination of protest timeliness
- III. Record of internal distribution of protest
- IV. Record of notice to FTA, if federal funds are involved
- V. Record of internal responses to protest
- VI. Record of legal review
- VII. Determination and findings, including supporting documentation
- VIII. Protester response/appeal
- IX. Result of appeal
- X. Notice of cancellation of solicitation, if applicable

3.10.9 Protests Filed with FTA

A protestor may file a protest with FTA only after exhausting all administrative remedies provided by SORTA, on the basis described in FTA Circular 4220.1F, Chapter VII, Sec. 1.b.

FTA's review of protests will generally be limited to allegations that (1) SORTA does not have or fails to follow its protest procedures; (2) SORTA failed to review a complaint or protest; or (3) the issue involves violations of Federal law or regulation. The FTA is not obligated to review any protest.