

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

### **Protest Officer—**

The “Protest Officer” for the District is \_\_\_\_\_, or another person 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(36) (2013)*

### **Parties Who May Protest—**

A person who is an actual or prospective bidder, offeror, or contractor who is aggrieved in connection with a procurement or award of a contract may protest to the Protest Officer. A person who is debarred or suspended may protest the debarment or suspension to the Protest Officer that ordered the debarment.

*Utah Code § 63G-6a-1602(1), (2) (2012)*

### **Filing Protest—**

#### *Timing*

A protest with respect to an invitation for bids or a request for proposals must be filed either before the opening of bids or the closing date for proposals, or, if the person did not know and should not have known of the facts giving rise to the protest before the bid opening or the closing date for proposals, within seven days after the day on which the person knows or should have known of the facts giving rise to the protest.

A protest with respect to a debarment or suspension must be filed within seven days after the day on which the debarment or suspension is ordered.

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

*Utah Code § 63G-6a-1602(1), (2), (4) (2012)*

#### *Contents*

A person who files a protest under this section shall include in the filing document the person's address of record and email address of record and a concise statement of the grounds upon which the protest is made.

*Utah Code § 63G-6a-1602(3) (2012)*

*Dismissal for non-conforming protest.*

The Protest Officer may dismiss a protest that is not filed in accordance with the requirements of this policy.

*Utah Code § 63G-6a-1604 (2012)*

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

In the event of a timely protest under this policy, the District may not proceed further with the solicitation or with the award of the contract until all administrative and judicial remedies are exhausted. However, the District may proceed with solicitation or award during the protest period if the District, after consulting with the District's attorney, determines in writing that award of the contract without delay is necessary to protect substantial interests of the District. During an appeal from the protest determination, the District may proceed with solicitation or award 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 (2013)*

**Determination on Protest—**

*Authority to resolve*

A Protest Officer, or the Protest Officer's designee, may enter into a settlement agreement to resolve a protest.

*Utah Code § 63G-6a-1602(5) (2012)*

*Process for determining the protest*

After a timely protest is filed, the protest officer shall consider the protest and may hold a hearing on the protest. If a hearing is held, the procedures set forth below shall be followed. Whether other parties may intervene in the protest shall be determined by rules issued by the Procurement Policy Board. Regardless of whether a hearing on a protest 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. A Protest Officer who holds a hearing, considers a protest, or issues a written decision does not waive the 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. Apart

from settlement decisions, 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), (6) (2013)*

### Hearing process

For purposes of a protest hearing, the Protest Officer may subpoena witnesses and compel their attendance and may subpoena documents for production at the hearing. The Rules of Evidence do not apply to a protest hearing. The Protest Officer shall record the hearing, preserve all evidence presented at the hearing, and preserve all records and other evidence relied upon in reaching the written decision described below. Those records may not be destroyed until the decision, and any appeal of the decision, becomes final.

*Utah Code § 63G-6a-1603(2) (2013)*

### Written determination

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

*Utah Code § 63G-6a-1603(3) - (5) (2013)*

### 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, prospective contractor, or contractor:

1. files an appeal with the Procurement Policy Board, for a controversy related to a solicitation or the award of a contract or for a debarment or suspension, files an appeal under Section 63G-6a-1702; or,
2. commences an action in district court, for a controversy that arises between the District and a contractor in relation to an existing contract

with the District, including controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

*Utah Code § 63G-6a-1603(4) (2013)*

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 (2012)*

*Costs to or against protestor*

When 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 shall be 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.

When a protest is not sustained by the appeals panel, the protestor shall reimburse the District for the expenses incurred in defending the appeal, including personnel costs, attorney fees, other legal costs, expenses incurred by the attorney general's office, 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 (2013)*