

OSE Tip of the Day

Protests

January 20, 2020

I don't want to jinx the rest of the year; so, let's get this subject out of the way. **Protests.** It's a word that strikes fear into the heart of an agency. Why? Because when a protest is received by the State Engineer, the solicitation process or award of a contract stops. Let's briefly address the two types of protest, who can protest, what is to be included in a protest, and trying to avoid a protest.

Two items to begin: 1) protest rights are not available when an Agency solicits a bid or proposal, or awards a contract, for less than \$50,000 (§ 11-35-4210(d)), 2) when counting business days or calendar days from a solicitation or posting, the first day is the day after the advertisement or posting. For example, a project is advertised in SCBO on Monday, we count the first day as Tuesday, the second is Wednesday, etc. (§ 11-35-310(13))

Two types of protest. The first type of protest is a Protest of a Solicitation. Here, the protestant recognizes something within the actual Invitation for Bids, Request for Proposal, Solicitation, or amendment that would cause them to be an aggrieved party. The aggrieved party must submit its' protest to the State Engineer within 15 calendar days of the date of the solicitation or posting of the amendment.

The second type of protest is a Protest of an Award. Here, an actual bidder or offeror is protesting that the state was incorrect in its decision to award to another party. The aggrieved party must provide a written notice of intent to protest to the State Engineer within 7 business days of the date of the posting of the Notice of Award/Intent to Award. The party then must perfect its protest in writing by providing the State Engineer with the grounds of the protest and the relief requested within 15 calendar days of the date of the posting of the Notice of Award/Intent to Award.

Who can protest? From SC Procurement Law §11-35-4210, "a prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with a solicitation..." may protest the solicitation. "Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract..." may protest the intended award or award. An actual contractor or subcontractor is someone who already has a contract with the state agency – presumably for some or all of the same work. §11-35-310(10) and (32).

What information is to be included in the protest? The protestant should realize that the State Engineer may have very little knowledge of the solicitation, or the project. Therefore, the protestant must explain in writing the specific nature of the controversy and the specific relief requested. Sufficient details must be provided such that the State Engineer, and any other interested party, will know every issue the protestant wants the State Engineer to decide.

Trying to avoid a protest. Unfortunately, we cannot stop anyone from protesting. However, we can make sure we are being fair and reasonable in the expectations of our solicitations. First, we should make sure that we are inviting competition and not trying to exclude firms that can perform the work. Second, we should not ask for extraneous information to be submitted with a bid because "we want to know". Third, decisions by State Engineers on past protests can give us information so as not to

repeat history. Fourth, your OSE project manager is like Farmers Insurance, “we know a thing or two because we’ve seen a thing or two” and we can help guide away from pitfalls.

Now the good news! You do not have to commit this to memory. All of OSE’s forms that could be associated with the possibility of a protest contain language that alerts the bidder, offeror, etc of their protest rights. Finally, Chapter 1 of the Manual is your first resource and reminder for Legal Remedies for Solicitations and Awards, and the OSE project manager is your second resource.