

Effective 3/28/2016

**Part 16
Protests**

63G-6a-1601 Title.

This part is known as " Protests."

Amended by Chapter 355, 2016 General Session

63G-6a-1601.5 Definitions.

As used in this part:

- (1) "Constructive knowledge":
 - (a) means knowledge or information that a protestor would have if the protestor had exercised reasonable care or diligence, regardless of whether the protestor actually has the knowledge or information; and
 - (b) includes knowledge of:
 - (i) applicable provisions of this chapter and other law and administrative rule;
 - (ii) instructions, criteria, deadlines, and requirements contained in the solicitation or in other documents made available to persons interested in the solicitation or provided in a mandatory pre-solicitation meeting;
 - (iii) relevant facts and evidence supporting the protest or leading the protestor to contend that the protestor has been aggrieved in connection with a procurement;
 - (iv) communications or actions, pertaining to the procurement, of all persons within the protestor's organization or under the supervision of the protestor; and
 - (v) any other applicable information discoverable by the exercise of reasonable care or diligence.
- (2) "Protestor" means a person who files a protest under this part.
- (3) "Standing" means to have suffered an injury or harm or to be about to suffer imminent injury or harm, if:
 - (a) the cause of the injury or harm is:
 - (i) an infringement of the protestor's own right and not the right of another person who is not a party to the procurement;
 - (ii) reasonably connected to the procurement unit's conduct; and
 - (iii) the sole reason the protestor is not considered, or is no longer considered, for an award of a contract under the procurement that is the subject of the protest;
 - (b) a decision on the protest in favor of the protestor:
 - (i) is likely to redress the injury or harm; and
 - (ii) would give the protestor a reasonable likelihood of being awarded a contract; and
 - (c) the protestor has the legal authority to file the protest on behalf of the actual or prospective bidder or offeror or prospective contractor involved in the procurement that is the subject of the protest.

Enacted by Chapter 355, 2016 General Session

63G-6a-1602 Protest -- Time for filing -- Basis of protest -- Authority to resolve protest.

- (1) A protest may be filed with the protest officer by a person who:
 - (a) has standing; and

- (b) is aggrieved in connection with a procurement or an award of a contract.
- (2) A protest may not be filed after:
 - (a)
 - (i)
 - (A) the opening of bids, for a protest relating to a procurement under a bidding process; or
 - (B) the deadline for submitting responses to the solicitation, for a protest relating to another standard procurement process; or
 - (ii) the closing of the procurement stage that is the subject of the protest:
 - (A) if the protest relates to a multiple-stage procurement; and
 - (B) notwithstanding Subsections (2)(a)(i)(A) and (B); or
 - (b) the day that is seven days after the day on which the person knows or first has constructive knowledge of the facts giving rise to the protest, if:
 - (i) the protestor did not know and did not have constructive knowledge of the facts giving rise to the protest before:
 - (A) the opening of bids, for a protest relating to a procurement under a bidding process;
 - (B) the deadline for submitting responses to the solicitation, for a protest relating to another standard procurement process; or
 - (C) the closing of the procurement stage that is the subject of the protest, if the protest relates to a multiple-stage procurement; or
 - (ii) the protest relates to a procurement process not described in Subsection (2)(a).
- (3)
 - (a) A protestor shall include in a protest:
 - (i) the protestor's mailing address and email address; and
 - (ii) a concise statement of the facts and evidence:
 - (A) leading the protestor to claim that the protestor has been aggrieved in connection with a procurement and providing the grounds for the protestor's protest; and
 - (B) supporting the protestor's claim of standing.
 - (b) A protest may not be considered unless it contains facts and evidence that, if true, would establish:
 - (i) a violation of this chapter or other applicable law or rule;
 - (ii) the procurement unit's failure to follow a provision of a solicitation;
 - (iii) an error made by an evaluation committee or conducting procurement unit;
 - (iv) a bias exercised by an evaluation committee or an individual committee member, excluding a bias that is a preference arising during the evaluation process because of how well a solicitation response meets criteria in the solicitation;
 - (v) a failure to correctly apply or calculate a scoring criterion; or
 - (vi) that specifications in a solicitation are unduly restrictive or unduly anticompetitive.
- (4) A protest may not be based on:
 - (a) the rejection of a solicitation response due to a protestor's failure to attend or participate in a mandatory conference, meeting, or site visit held before the deadline for submitting a solicitation response; or
 - (b) a vague or unsubstantiated allegation.
- (5) A protest may not include a request for:
 - (a) an explanation of the rationale or scoring of evaluation committee members;
 - (b) the disclosure of a protected record or protected information in addition to the information provided under the disclosure provisions of this chapter; or
 - (c) other information, documents, or explanations not explicitly provided for in this chapter.
- (6) A person who fails to file a protest within the time prescribed in Subsection (2) may not:

- (a) protest to the protest officer a solicitation or award of a contract; or
 - (b) file an action or appeal challenging a solicitation or award of a contract before an appeals panel, a court, or any other forum.
- (7) Subject to the applicable requirements of Section 63G-10-403, a protest officer or the head of a procurement unit may enter into a settlement agreement to resolve a protest.

Amended by Chapter 355, 2016 General Session

63G-6a-1603 Protest officer responsibilities and authority -- Proceedings on protest -- Effect of decision.

- (1) After a protest is filed, the protest officer shall determine whether the protest is timely filed and complies fully with the requirements of Section 63G-6a-1602.
- (2) If the protest officer determines that the protest is not timely filed or that the protest does not fully comply with Section 63G-6a-1602, the protest officer shall dismiss the protest.
- (3) If the protest officer determines that the protest is timely filed and complies fully with Section 63G-6a-1602, the protest officer shall:
 - (a) dismiss the protest if the protest officer determines that the protest alleges facts that, if true, do not provide an adequate basis for the protest;
 - (b) uphold the protest without holding a hearing if the protest officer determines that the undisputed facts of the protest indicate that the protest should be upheld; or
 - (c) hold a hearing on the protest if there is a genuine issue of material fact that needs to be resolved in order to determine whether the protest should be upheld.
- (4)
 - (a) If a hearing is held on a protest, the protest officer may:
 - (i) subpoena witnesses and compel their attendance at the protest hearing;
 - (ii) subpoena documents for production at the protest hearing;
 - (iii) obtain additional factual information; and
 - (iv) obtain testimony from experts, the person filing the protest, representatives of the procurement unit, or others to assist the protest officer to make a decision on the protest.
 - (b) The Rules of Evidence do not apply to a protest hearing.
 - (c) The applicable rulemaking authority shall make rules relating to intervention in a protest, including designating:
 - (i) who may intervene; and
 - (ii) the time and manner of intervention.
 - (d) A protest officer shall:
 - (i) record each hearing held on a protest under this section;
 - (ii) regardless of whether a hearing on a protest is held under this section, preserve all records and other evidence relied upon in reaching the protest officer's written decision until the decision, and any appeal of the decision, becomes final; and
 - (iii) submit to the procurement policy board chair a copy of the protest officer's written decision and all records and other evidence relied upon in reaching the decision, within seven days after receiving:
 - (A) notice that an appeal of the protest officer's decision has been filed under Section 63G-6a-1702; or
 - (B) a request from the chair of the procurement policy board.
 - (e) A protest officer's holding a hearing, considering a protest, or issuing a written decision under this section does not affect a person's right to later question or challenge the protest officer's jurisdiction to hold the hearing, consider the protest, or issue the decision.

- (5)
 - (a) The deliberations of a protest officer may be held in private.
 - (b) If the protest officer is a public body, as defined in Section 52-4-103, the protest officer shall comply with Section 52-4-205 in closing a meeting for its deliberations.
- (6)
 - (a) A protest officer, or the protest officer's designee, shall promptly issue a written decision regarding any protest, unless the protest is settled by mutual agreement.
 - (b) The decision shall:
 - (i) state the reasons for the action taken;
 - (ii) inform the protestor of the right to judicial or administrative review as provided in this chapter; and
 - (iii) indicate the amount of the security deposit or bond required under Section 63G-6a-1703.
 - (c) A person who issues a decision under Subsection (6)(a) shall mail, email, or otherwise immediately furnish a copy of the decision to the protestor.
- (7) A decision described in this section is effective until stayed or reversed on appeal, except to the extent provided in Section 63G-6a-1903.
- (8)
 - (a) A decision described in Subsection (6)(a) that is issued in relation to a procurement unit other than a legislative procurement unit, a judicial procurement unit, a nonadopting local government procurement unit, or a public transit district is final and conclusive unless the protestor files an appeal under Section 63G-6a-1702.
 - (b) A decision described in Subsection (6)(a) that is issued in relation to a legislative procurement unit, a judicial procurement unit, a nonadopting local government procurement unit, or a public transit district is final and conclusive unless the protestor files an appeal under Section 63G-6a-1802.
- (9) If the protest officer does not issue the written decision regarding a protest within 30 calendar days after the day on which the protest was filed with the protest officer, or within a longer period as may be agreed upon by the parties, the protestor may proceed as if an adverse decision had been received.
- (10) A determination under this section by the protest officer regarding an issue of fact may not be overturned on appeal unless the decision is arbitrary and capricious or clearly erroneous.

Amended by Chapter 355, 2016 General Session

63G-6a-1604 Dismissal of protest not filed in accordance with requirements.

The protest officer may dismiss a protest described in Section 63G-6a-1602 that is not filed in accordance with the requirements of this part.

Enacted by Chapter 347, 2012 General Session

Amended by Chapter 347, 2012 General Session, (Coordination Clause)