

# State Purchasing Bureau Policy

## NOTICE

This guidance document is advisory in nature but is binding on the Nebraska Department of Administrative Services until amended. A guidance document does not include internal procedural documents that only affect the internal operations of the Department of Administrative Services and does not impose additional requirements or penalties on regulated parties or include confidential information or rules and regulations made in accordance with the Administrative Procedure Act. If you believe that this guidance document imposes additional requirements or penalties on regulated parties, you may request a review of the document. See Neb. Rev. Stat. § 84-901.03

**Policy No:** 23-07

**Application:** Goods & Services

**Subject:** Protest Policy

**Effective Date:** 11-20-2023

### I. DEFINITIONS

- A. **Awardee** – The Bidder who is identified in the Intent to Award as the prospective recipient of the contract.
- B. **Bid** – A Bidder's response to a published solicitation.
- C. **Bidder** – A Vendor who properly submitted a Bid by the Solicitation's deadline.
- D. **DAS** – An abbreviation for the State of Nebraska, Department of Administrative Services. For the purposes of this policy, DAS shall not include Budget Division, the Capitol Commission, or the Office of the Chief Information Officer.
- E. **Debrief** - Feedback on the Bidder's proposal that the Purchasing State Agency produces at that Bidder's request.
- F. **Intent to Award** – The document posted on DAS's website that designates the Bidder(s) to which the State intends to award the contract.
- G. **Notice of Appeal** – A formal pleading meeting the requirements of the policy that an Awardee or Protestor who was dissatisfied with the decision of the Materiel Administrator or Designee submits to the Director of the Department of Administrative Services.
- H. **Procurement Manual** – The manual formally adopted and promulgated by the State Purchasing Bureau (SPB) pursuant to Neb. Rev. Stat. § 73-504.
- I. **Protest** – A formal pleading by an eligible Vendor or Bidder that conforms to the requirements set forth within this policy and is submitted within the time limits contained herein.
- J. **Protestor** – A Vendor who submits a Protest under this policy.
- K. **Protest Period** – The time during which a Protest may be filed or during which a Protest is pending.
- L. **Purchasing State Agency** – The State Agency for whom a solicitation is published and on whose behalf goods will be delivered or services will be performed under the solicitation's terms.

- M. **State Agency** – All state agencies, board, and commissions, other than the University of Nebraska, the Nebraska state colleges, the courts, the Legislature, or any officer or state agency established by the Constitution of Nebraska.
- N. **Solicitation** – The documents a Purchasing State Agency posted on DAS's website to procure specific goods or services by soliciting Bids from Vendors.
- O. **Vendor** – A bona fide business that provides the goods or services requested by the Solicitation.

II. **APPLICABILITY**

All State Agencies shall be subject to this protest policy, regardless of which agency is responsible for the competitive Bidding process. This protest policy replaces and supersedes all previously published protest policies.

III. **PROTEST ELIGIBILITY**

- A. A Vendor may protest the specifications of a Solicitation.
- B. A Bidder may protest the Intent to Award to another Bidder.
- C. Any Bidder who executed a contract with the State of Nebraska as a result of an Intent to Award is not eligible to protest another Intent to Award stemming from the same solicitation.

IV. **PROTEST GROUNDS**

- A. A Protest of the specifications of the Solicitation may only be on the following grounds:
  - 1. The specifications are restrictive such that only one Vendor is eligible to submit a Bid; or
  - 2. The specifications are so vague that the State would not be able to fairly evaluate Bids.
- B. A Protest of the Intent to Award may only be on the following grounds:
  - 1. A violation of applicable Nebraska law or federal law;
  - 2. A failure to comply with the Procurement Manual;
  - 3. Mathematical or clerical error that resulted in an erroneous contract award;
  - 4. An actual conflict of interest;
  - 5. Collusion between two or more Bidders or between a Bidder and a Vendor; or
  - 6. Failure of the/an Awardee to meet mandatory minimum requirements.

V. **PROTEST PROCEDURE**

A. **Time to File**

- 1. A Protest of the specifications must be submitted within ten (10) business days after the Solicitation has been published on DAS's website.
- 2. A Protest of the Intent to Award must be submitted within ten (10) business days after the Intent to Award has been published on DAS's website.
- 3. A Protest of a withdrawn Intent to Award must be submitted within ten (10) business days after notice of withdrawal is published on DAS's website. A protest of a withdrawn Intent to Award is only available where

in the same solicitation at least one other Intent to Award was simultaneously issued but not withdrawn.

B. **Submission:** The Protest must be submitted electronically to [as.materielpurchasing@nebraska.gov](mailto:as.materielpurchasing@nebraska.gov) and must at a minimum contain:

1. The Solicitation number of the protested Solicitation;
2. The legal name of the Protestor;
3. The point of contact for the Protestor;
4. The ground(s) for the protest in accordance with Section IV; and
5. A request for a meeting before the Materiel Administrator, if so desired.

C. **Materiel Administrator's Review of Purchasing State Agency Award**

1. The Materiel Administrator or Designee shall issue a decision on each Protest within five (5) business days after his or her meeting with the Protestor or within ten (10) business days after the Protest's submission to the Materiel Administrator, whichever is later. If the Materiel Administrator or Designee determines that the issues involved in the Protest are too complex for a determination to be made within the above timeline, the Materiel Administrator or Designee may extend this deadline by a period not to exceed thirty (30) business days.
2. The Protestor, the Awardee, and the Purchasing State Agency may submit evidence in support of their various positions.
3. The record before the Materiel Administrator shall be closed five (5) business days after the submission of the Protest or at the conclusion of the meeting with the Materiel Administrator, whichever is later.
4. In evaluating the Protest, the Materiel Administrator may consider all information the Materiel Administrator deems relevant, and the Materiel Administrator's review shall be de novo.
5. Protestors have the burden to prove the allegations in their Protest by a preponderance of the evidence.
6. Meeting with Materiel Administrator:
  - i. If the Protest requests a meeting with the Materiel Administrator, the Materiel Administrator shall schedule the requested meeting within ten (10) business days of receiving the Protest.
  - ii. The meeting will allow the Awardee, the Protesting Bidder, and the Purchasing State Agency to present evidence and argument in support of their respective positions.
  - iii. Unless directed otherwise by the Materiel Administrator, the Awardee and Purchasing State Agency are not required to attend the meeting.
7. If the Materiel Administrator sustains the Protest, he or she may assign an appropriate remedy, including the following:
  - i. Rebidding the Solicitation;
  - ii. Awarding the contract to another Bidder;
  - iii. Settling the matter with the Protesting Bidder and the Awardee, which settlement shall not include any exchange of money; and
  - iv. Any other remedy the Materiel Administrator deems fair under the circumstances.

8. The Materiel Administrator may appoint a Designee to review any Protest on his or her behalf. However, when DAS is the Purchasing State Agency for a Protest or otherwise conducted the procurement, the Materiel Administrator must appoint a Designee to review the Protest in his or her stead. Any Designee must meet the following requirements:
  - i. The Designee must be licensed to practice law in the State of Nebraska.
  - ii. The Designee must not be under the direct supervision of the DAS Director or the Materiel Administrator.

**D. Appeal to Director of Administrative Services**

1. If the Awardee or the Protesting Bidder is dissatisfied with the Materiel Administrator's decision, the dissatisfied party may Appeal the decision to the Director of the Department of Administrative Services (the "DAS Director").
2. Notice of Appeal:
  - i. The dissatisfied party must electronically submit Notice of Appeal to the DAS Director at [as.materielpurchasing@nebraska.gov](mailto:as.materielpurchasing@nebraska.gov) within ten (10) business days after the issuance of the Materiel Administrator's decision.
  - ii. The Notice of Appeal must assign specific error to the Materiel Administrator's decision and argue all errors assigned.
  - iii. A dissatisfied party may only raise issues in their Notice of Appeal that were considered before the Materiel Administrator.
3. The DAS Director or Designee shall issue his or her decision on the Appeal within ten (10) business days after the submission of an Appeal or within five (5) business days after his or her meeting with the parties, whichever is later. If the DAS Director or Designee determines that the issues involved in the Appeal are too complex for a determination to be made within the above timeline, the DAS Director or Designee may extend this deadline by a period not to exceed thirty (30) business days.
4. The DAS Director or Designee shall review the Protest de novo on the record created before the Materiel Administrator.
5. The dissatisfied party has the burden to show the Materiel Administrator erred by a preponderance of the evidence submitted to the Materiel Administrator.
6. Meeting with the DAS Director:
  - i. If the dissatisfied party requests a meeting in their Notice of Appeal, the DAS Director shall hold a meeting with the dissatisfied party within ten (10) business days of receiving a valid written appeal.
  - ii. The meeting will allow the Awardee, the Protestor, and the Purchasing State Agency an opportunity to present and respond to arguments on Appeal.
  - iii. Unless directed otherwise by the DAS Director, no party aside from the dissatisfied party is required to attend the meeting on Appeal.
7. An Appeal is not available if the Solicitation has been withdrawn or will be rebid or, in the opinion of the Materiel Administrator, the defect(s) have been cured.

8. The DAS Director may affirm the decision of the Materiel Administrator, reverse the decision of the Materiel Administrator, or provide any alternative remedy that Materiel Administrator may provide under this policy.
9. The DAS Director may appoint a Designee to review any Appeal on his or her behalf. However, when DAS is the Purchasing State Agency for an Appeal, DAS Director must appoint a Designee to review that Appeal in his or her stead. Any Designee must meet the following requirements:
  - i. The Designee must be licensed to practice law in the State of Nebraska.
  - ii. The Designee must not be under the direct supervision of the DAS Director or the Materiel Administrator.
  - iii. The Designee must not be the same person who issued the initial decision on the Protest on behalf of the Materiel Administrator.

**VI. CONTRACT EXECUTION DURING PROTEST**

A contract that is subject to this policy may be negotiated but shall not be executed until the Protest Period has concluded, except with the approval of the DAS Director or designee.

**VII. NO CONTESTED CASE**

This Protest Policy does not create a contested case under Neb. Rev. Stat. § 84-901(3).

**VIII. DEBRIEFS**

- A. A Bidder may request a Debrief with the Purchasing State Agency.
- B. A Bidder must request a Debrief within sixty (60) calendar days after the Intent to Award has been posted to DAS's website.
- C. No Debrief shall occur until after the Protest Period has passed.
- D. If a Debrief is requested, the Purchasing State Agency shall either:
  1. Prepare a written explanation as to why the Bidder did not receive the award; or
  2. Meet with the Bidder to discuss the Solicitation.
- E. The Purchasing State Agency's explanation or meeting must occur within thirty (30) calendar days after the contract is executed or thirty (30) calendar days after the request for Debrief was submitted, whichever is later.
- F. No provision of the foregoing section requires a Purchasing State Agency to disclose any information that the State is not otherwise obligated to disclose, and this section does not waive any rights, privileges, or immunities of the Purchasing State Agency.

**[THIS SPACE IS INTENTIONALLY BLANK.]**

**[SIGNATURE PAGE TO FOLLOW.]**

**IX. Signature and Execution**

The foregoing policy is duly signed and executed on this 20<sup>th</sup> day of November, 2023.

  
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**Director,**  
State of Nebraska, *Department of Administrative Services*

20 Nov 23  
\_\_\_\_\_  
DATE

Amara Block  
\_\_\_\_\_  
**Material Administrator,**  
State of Nebraska, *Department of Administrative Services*

11/20/23  
\_\_\_\_\_  
DATE

