



Note: This is an unedited chapter from William Sims Curry, [\*Contracting for Services in State and Local Government Agencies: Best Practices for Public Procurement\*](#) (Routledge 3d ed., forthcoming Sept. 2022) (also available for pre-order from [Amazon](#) and [Barnes & Noble](#))

## Chapter 6

### Protests

#### Chapter Objectives

As likely discerned by the chapter title, procurement professionals do not welcome protests. Legitimate measures for preventing protests, therefore, are explored here. Despite the implementation of well-conceived measures to prevent protests, however, state and local public entities almost invariably receive at least an occasional protest from companies that believe the contractor selection process or that the solicitation provisions are flawed.

Topics addressed in this chapter include the need to develop policies and procedures that establish the role of the public entity's legal counsel with respect to protests, the impact from

requests for public records in conjunction with a protest, and how protest policies are communicated to prospective contractors.

Variations in alternative approaches to filing protests are addressed. Conventional protests are those protests that are filed according to the public entity's protest policies and procedures. There is, however, the potential for protests to be filed contrary to established procedures. Measures to discourage such unconventional protests are explored in this chapter.

Because all state and local public entities are subject to receipt of a protest from aggrieved contractors, recommendations are offered for implementing measures for investigating and deciding on the merits of protests. The approach to investigating the proceedings of the proposal evaluation team (PET) and rendering a decision on the merits of a contractor selection protest includes the following activities:

- Read the protest and begin drafting questions for PET members
- Read the solicitation
- Read the PET instructions
- Review the source selection policy and procedures
- Review the proposal evaluation record
- Finalize the questions for PET members
- Interview PET members
- Synthesize the Information gathered to form a determination

Readers are provided with recommended actions to take upon formulation of the determination. Recommendations include documenting activities undertaken to determine the merits of the protest as well as suggestions for advising interested parties of the public entity's conclusions.

## 7.1 Introduction to Protests

Contractors that believe a competitor was improperly selected for award of a contract are referred to as aggrieved contractors. Aggrieved contractors have the right to protest the award of a contract upon announcement of the apparent successful contractor or actual contract award. The term "protest" is used to describe a challenge to the solicitation provisions, procedure for selecting a contractor, selection of the apparent successful contractor, or actual contract award. If the contract was awarded prior to the protest, the intent of the protest is normally to have the procurement office terminate the contract and award a new contract to the company that filed the protest. If the contract had yet to be awarded, the intent of the protest is to stay the contract award, have the procurement office determine that the aggrieved company should be awarded the contract, and award the contract to the company that initiated the protest. Should a public entity determine that the protest has merit, however, the reaction to this determination is not necessarily to summarily award the contract to the protesting company, but to reevaluate the contractor selection process. Following a reevaluation of the proposals, the contract might be awarded to any of the competing contractors.

Public entities normally have one designated official who receives protests, investigates the contractor selection process, and renders a decision regarding the merits of the protest. The

official who receives and acts on protests is normally designated for that responsibility based on their position within the public entity. Most of the determinations made on the merits of a protest find that the PET followed established procedures and selected the correct contractor. This is not unusual because most PET members are resolute employees who strive to select the best contractor for the project. If the aggrieved contractor is not satisfied with the public entity's determination regarding the merits of its protest, there is normally an appeal procedure wherein the contractor can appeal the determination to a higher authority such as the chief elected official or the governing body. If the appeal is denied by the higher authority, the aggrieved contractor can elect to pursue its complaint through litigation. Initiating litigation regarding contractor selection, however, is rare.

## 7.2 Preventing Protests

The receipt of a protest creates major concerns for state and local public entities. The very nature of a protest challenges the competence and/or ethical practices of the public entity as well as its officials and employees. Receipt of a protest normally delays contract award or work on the contract and, therefore, delays commencement of work needed to provide products or deliver services. Project commencement delays may lead to project cancellation. Although at least one state or local entity established procedures prohibiting the filing of protests of certain contractor selection decisions, aggrieved contractors were not prohibited from filing protests. Protests that have been filed, despite public entity procedures forbidding protests, have been acted upon.

Receipt of a protest normally requires considerable time and effort from the highest elected or appointed official, governing body, management personnel, procurement staff, legal counsel, and department personnel. It is in the public entity's best interests, therefore, to take legitimate steps to prevent protests. Public entity officials are encouraged to establish procedures to prevent protests, ensure that protests that could not be prevented are lodged according to public entity procedures, and that public entity procedures describe how protests received from aggrieved contractors are processed. This chapter provides insight into measures that can be taken to deter protests and to ensure that protests are lodged according to public entity procedures. There are, however, no measures that absolutely prevent protests or ensure that protests are made according to the procurement office's policies and procedures. Recommendations are made in this chapter on the public entity's reaction to the receipt of protests.

As mentioned in the earlier chapter on solicitations, it is essential that the selection criteria used in evaluating proposals be described in requests for proposals (RFPs). Such disclosure is essential to support the need for transparency. This presentation of the evaluation criteria during the initial contact with the prospective contractors demonstrates that the procurement office's relationship with the contractors is designed to ensure equal treatment of all prospective contractors. It is critical, however, that great care be taken when crafting the criteria to ensure that all essential features of the resultant proposals are considered. For example, if price is a criterion for contractor selection but was not included as a criterion in the RFP, contractors that were not selected for contract award due to a high proposed price have grounds to protest the award of the contract. Discerning procurement offices have demonstrated acceptance of the best practice of disclosing price as a proposal evaluation criterion in RFPs by increasing the

implementation of this practice from thirty six percent (36%) in 2006 to one hundred percent (100%) in both 2015 and 2021.

Another essential measure for the procurement office to protect against the possibility of receiving a protest, or protests, is to ensure that the evaluation of proposals is based solely on the criteria contained in the RFP. One tool to help ensure that the selection team restricts their evaluation to criteria included in the RFP is to provide a proposal evaluation template like the one included in Appendix J, Form for Evaluation of Proposals, for proposal evaluation team (PET) members. Procurement offices that provide such an evaluation template for their PET members should ensure that the criteria included on the evaluation form exactly matches the contractor selection criteria in the RFP. When the evaluation criteria in the RFP template is modified to better match the features of a particular project, this introduces the possibility that the same changes to the evaluation criteria are not made to the pro forma contract attached to the RFP. When this occurs, there is a mismatch between the RFP criteria and the criteria used by the PET. Therefore, it is recommended that the public entity provide PET members with a form for evaluating proposals in response to an RFP which contains the evaluation criteria exactly as they appear in the RFP. This action could be accomplished by including a cautionary note on the proposal evaluation form regarding the need to determine whether there is consistency between the two sets of criteria. Procurement offices that use computer software in the preparation of RFPs should incorporate features that prepare proposal evaluation forms, like the one in Appendix J, containing criteria exactly as reflected in the RFP. If RFP addenda modify the proposal evaluation criteria, it is essential that the form provided for PET members be updated to match the criteria modifications made via addenda.

Another measure to help insulate the procurement office against protests is to strive for structure and objectivity in the proposal evaluation process while avoiding unstructured and overly subjective techniques. Use of numerically weighted evaluation criteria, as described in the earlier chapter on solicitations, is an excellent strategy for building structure and objectivity into the evaluation process. This is especially beneficial when prospective contractors operate in a business climate that is known or believed to be highly competitive or contentious. The ability to demonstrate a superior quantitative rating process for the apparent successful contractor can greatly assist the procurement office in discouraging protests. For any protests that were filed despite these efforts, protests will be more easily defended if an exacting quantitative rating process was used to evaluate the proposals.

If an unsuccessful contractor is identified as aggrieved before a protest is filed, the procurement office should consider offering the aggrieved contractor a debriefing on the selection process. Should the contractor's concerns regarding the selection process be allayed, based on the debriefing, a formal protest may be avoided.

Procurement offices should consider inclusion of a debriefing procedure and a description of the debriefing process in their policies and procedures as well as in their solicitations. The existence of a debriefing procedure in a procurement office's policies and procedures and in their solicitations provides an opportunity for the procurement office to require contractors to obtain a debriefing prior to lodging a formal protest. The best practices RFP does include language that requires aggrieved contractors to obtain a debriefing prior to filing a formal protest.

### 7.3 Policies and Procedures for Dealing with Protests

Defining the method for handling protests in the procurement office's published policies and procedures, as well as in solicitations, may help keep protests manageable. Contracts that are approved by the procurement office's governing body or chief elected official, in rare instances, may be protested at a public meeting of the governing body. Most reasonable contractors honor written policies and procedures that require the filing of protests according to established practices. Contractors that are considering the filing of a protest will often contact the public entity to request information on the protest procedures. Policies and procedures should specify the need to file written protests within a specific period, say four working days, following notification that they were not awarded the contract or named as the apparent successful contractor. Without such a specified time, there would be no established limit to the date when an aggrieved contractor would be allowed to file a protest. The policies and procedures should also specify the official within the state or local public entity who receives and investigates proposal evaluation activities and decides on the merits of protests. In the absence of designating an official to receive and investigate protests, an aggrieved contractor might send its protest to an individual who is not familiar with the process for reacting to protests. The public entity may wish to consider assigning this responsibility to the incumbent who, based on the value or other criteria, normally executes the contract for the procurement office. Alternatively, the public entity may wish to identify the individual one level higher in the organization than the person who decided on the merits of the protest. It should be noted, however, that if the protesting contractor is not satisfied with the decision of the official who made the determination, the



protesting contractor whose protest was denied has the right to appeal the determination to a higher authority. If the contractor is not satisfied with the result of the appeal, the contractor may bring the matter to litigation. Even though policies and procedures for handling protests cannot fully insulate the procurement office against protests, the existence of fair and meaningful policies and procedures for handling protests provides needed protection for unsuccessful contractors to pursue their dissatisfaction with the selection process. Such policies and procedures also provide the procurement office with a rational methodology for reacting to the receipt of protests.

The reaction to a protest will vary based on whether the protest was received prior to award of the contract or following contract award. The policies and procedures should, therefore, separately address the reaction to protests received prior to award and protests that are received after contract award.

When the protest is made prior to award of the contract, two essential policy considerations to address in the policies and procedures are (1) the time frames established for resolving the protest and (2) whether to delay award of a contract in the event of a protest. The timeframe for resolving the protest could have a significant impact on the functioning of the state or local public entity. This fact is most obvious when a delay in contract award would adversely impact the public entity's ability to provide essential services. If a delay in the award of a contract for essential services is unavoidable, and the services have been provided through an earlier contract that is due to expire, consideration should be given to extending the existing contract for a time sufficient to resolve the protest. This alternative will permit continuation of service delivery

while the public entity reacts to the protest. When a protest is received prior to awarding a contract for a service that is not presently being provided on a contracted basis, award of the contract should be delayed, if possible, until the public entity can either sustain or deny the protest. Delaying award of the contract in this instance demonstrates good faith on the public entity's part and avoids the necessity to terminate the contract in the event the protest is sustained. In either event, it is obvious that the policies and procedures for dealing with protests require expeditious treatment to avoid subjecting the public entity to the possibility that it cannot provide essential services. The provision allowing sufficient time to investigate the source selection activities and make a rational determination based on the careful evaluation of the facts is essential to maintaining sound procurement practices.

When the protest is not received until after the contract has been awarded, there is less pressure on the public entity since the question of whether to award the contract is moot. The timeframe for deciding on the merits of the protest, however, rightfully demand expeditious action to resolve the matter. Should the source selection decision be reversed following contract award, the public entity may face excess costs through the necessity for some level of compensation to two contractors during the period from the original contract award date until the original contract is terminated and the replacement contract is in place.

Should all protests be referred to the governing body or chief elected official, there would be a needless referral of less significant, low value protests to the public entity's highest organizational level. Delays associated with the need to wait until all protests can be considered by the chief elected official, or set for the agenda for the governing body, would be unfair to all

interested parties. One approach to minimizing the number of protests referred to the governing body is to construct the policies and procedures such that protests are directed to the position where authority to execute the contract rests and provide for appeal to the position one level above the position with authority to execute the contract. This approach minimizes the number of protests referred to the chief elected official or the governing body as well as minimizing the time required to resolve the protests in response to the award of relatively low value contracts. The public entity, however, should not rely entirely on the existence of documented procedures for filing protests to eliminate protests made directly to the governing body. Whenever public entities conduct public meetings, aggrieved contractors may sense that such meetings provide a venue for lodging a protest even though that action would be contrary to public entity policies and procedures.

In addition to identifying the organizational level where protests are lodged and appealed, the policies and procedures should include maximum time periods permitted for filing protests, denying or upholding protests, making appeals in response to denied protests, and for denying or upholding appeals. Failure to establish maximum time periods for these actions leaves public entities open to receipt of protests and appeals for an indefinite period and can result in unacceptable decision delays by public entity officials.

#### 7.4 The Inclusion of Protest Procedures in Solicitations

State and local public entities may elect to remain silent in their solicitations with respect to procedures for filing a protest out of concern that including the procedures for protesting awards,

or recommended awards, in solicitations may result in more protests. If the concern is based on a belief that contractors might thereby first be informed of their right to file a protest, however, such concern is unnecessary because aggrieved companies are generally aware that there are provisions for lodging formal protests. One advantage to including protest procedures in the solicitation is that providing this information in the RFP discourages unconventional protests or the public entity being blindsided by contractors who prefer to present their concerns directly to the chief elected official or publicly to the governing body. When protest procedures are included in the solicitation, it is also more likely that protests will be made according to the established procedure and can be dealt with conventionally. Yet another advantage to including the protest procedure in the solicitation is that this also presents an opportunity to include a debriefing option and to require aggrieved contractors to obtain a debriefing before they can lodge a formal protest.

Notification in RFPs regarding the right of companies to request debriefings or file protests should include the time limits for requesting debriefings or filing protests as well as naming the officials to whom requests for debriefings and the filing of protests must be addressed.

#### 7.5 Coordination with Legal Counsel

Upon receipt of a protest, or even the threat of a protest, the individual receiving the protest or learning of the threat should contact their public entity's legal counsel. In addition to providing advice for dealing with aggrieved contractors, legal counsel should be advised of all protests due to the possibility that protests may eventually lead to litigation. The need to initiate coordination

efforts with legal counsel upon receipt of a protest should be included in written policies and procedures. Including such a requirement in written policies and procedures to coordinate protests or anticipated protests with in-house legal counsel helps to ensure continuation of this important practice in perpetuity. Should the unsuccessful contractor's protest be denied, the aggrieved contractor maintains the right to appeal the determination, bring their protest forward during a public meeting of the governing body, or initiate litigation. The fact that unsuccessful protests can be elevated to litigation is one key reason to involve the public entity's legal counsel at the first hint that an aggrieved contractor may file a protest. However, absent the potential for eventual litigation, legal counsel's insight into the protest or potential protest from an attorney's perspective can provide valuable insight for dealing with the aggrieved, unsuccessful contractor.

#### 7.6 Requests for Public Records in Conjunction with Protests

Aggrieved prospective contractors are permitted to seek copies of proposals and documentation developed by the proposal evaluation team (PET) through a public records act request. Should the public records be obtained after the protest has been filed, the original protest may be withdrawn or amended predicated on information discovered in the public record. If there is a modification to the protest, predicated on additional information contained in the public record, the timeline for responding to the protest is normally extended to permit the public entity time to react to the amended protest.

#### 7.7 Unconventional Protests

Unconventional protests may come in the form of blindsiding or a protest from a firm that was not solicited. A discussion of these two types of unconventional protests is provided below.

### 7.7.1 Blindsiding

Most aggrieved, unsuccessful contractors pursue their protests according to established policies and procedures. When the governing body is the final approval authority for contract award, however, the unsuccessful contractor could conceivably take their protest directly to the governing body during an open public session when award of the contract is being considered. There has been at least one case wherein an unsuccessful contractor pursued an unconventional protest. One of the company executives scheduled a meeting with the procurement official who brought the recommendation for contract award to the governing body. During that meeting the company executive told the procurement official that the company had erred while preparing their proposal and could not argue against the recommended contract award to its competitor. During the public session, a few days later when the governing body considered the contract recommendation, however, executives and employees from that unsuccessful contractor appeared at the public meeting to protest the recommendation. The company executive presented the protest directly to the governing body. During the airing of the protest, a dozen employees outfitted in black t-shirts imprinted with a protest message, staged a raucous demonstration. The protest was based on emotional considerations and unfounded claims that the evaluation criteria were ignored during the evaluation of proposals. Any public procurement official in this situation would feel blindsided and not as well prepared as desired to defend against such an unorthodox protest. Although the protest resulted in a delay in the award of the contract to offer both

competing contractors and opportunity to submit a final revised proposal (FRP), readers should be pleased to learn that in this case the governing body eventually voted to award the contract to the contractor originally recommended by the PET.

If the procurement office's RFP included information on requesting a debriefing and standard protest procedures, the governing body would be justified in rejecting the protest that was contrary to public entity procedure. The best practices RFP provided in Appendix B does include suggested language for advising prospective contractors of the proper procedure for requesting a debriefing and filing a protest.

Should a procurement professional experience such an unconventional protest at a public meeting, after having implemented the best practices recommended here, the appropriate reactions are:

- Personally address the governing body in open session
- Explain that the contractor selection process was fully described in the RFP and that the PET followed the proposal evaluation process
- Describe how the PET determined that the contractor recommended for contract award was found to offer the best value to the public entity
- Advise the governing body that the protest procedure was described in the RFP and that the protest should have been directed to the person designated to receive protests so that she or he could evaluate the merits of the protest
- If the protest was filed late, mention that fact as well
- Recommend that the governing body deny the protest

### 7.7.2 Protest from a Firm that was not Solicited

Another type of protest that might be anticipated at a public meeting of the governing body would be from a firm that was not solicited and is protesting the fact that they were not given an opportunity to compete for the contract. Absent the procurement office's deliberate action to exclude a known company that should have been included in the list of firms solicited, a company that does not lodge a protest until this late date is virtually admitting the failure of their sales or marketing team. Prudent members of the governing body are likely to reject such untimely protests unless it is apparent that the procurement office knew, or should have known, that the protesting company was unfairly excluded from the list of firms solicited. Should it be determined that the protesting firm be given an opportunity to submit a proposal, cancellation of the original solicitation and release of a new solicitation, with the protesting company added to the list of solicited firms, is the most reasonable course of action.

### 7.8 Conventional Protests

Unlike the extreme examples above with the black shirted protestors and the protest by the firm that was not solicited, most protests are made in a conventional manner according to the procurement office's procurement manual, and as described in the RFP. Although conventional protests normally need to be made in writing, the initial contact from the unsuccessful contractor expressing their dissatisfaction with the selection process is frequently made by telephone or in person. In most instances, a spoken explanation of the rationale for recommending award to a



competitor is reluctantly accepted. When the spoken explanation is not considered acceptable to the unsuccessful contractor, the procurement officer might offer a debriefing, or the contractor might ask for a copy of the procedure for initiating a protest. Although procurement manuals are public documents and oftentimes posted on the state or local public entity's website, contractors almost invariably request a copy of the policy and procedure from a public entity official. One notable exception is the contractor that consistently submits a protest on virtually every occasion when the contract is awarded or recommended for award to a competitor. Such habitual protestors are fully aware of the public entity's protest procedures and need not request a copy of the procedures.

Public entities should consider instituting the requirement for a debriefing prior to submittal of a protest. Debriefings are likely to convince certain contractors that the proposal evaluation process was not flawed, and thereby avoid a protest. Contractors would not normally be aware of the requirement to request a debriefing before filing a protest; therefore, this requirement should be included in the procurement office's RFP template. When a contractor asks about the procedures for filing a protest, they should be provided with the procedure and be advised that a request for a debriefing is required prior to filing a protest. Advising a contractor asking about procedures for filing a protest that they must request a debriefing prior to filing a protest may prevent receipt of a protest from that contractor.

Objection to the award of a contract or recommendation for award of a contract that is made over the telephone or during a face-to-face meeting is not normally considered as a protest and does not warrant a written determination. If a public entity representative receives an unwritten

protest, professional courtesy dictates that the contractor be advised that protests must be in writing. In the earlier case, however, when a protest is made directly to the governing body during a public meeting, that verbal protest is normally considered as a formal protest. When the procurement office's RFP template includes advice to prospective contractors regarding the procedures for lodging a protest, however, the governing body would be justified in summarily rejecting the unconventional protest because the contractor, having been duly advised of the need for a written protest, elected to ignore that advice.

## 7.9 Deciding on the Merits of a Protest

The individual responsible for evaluating the events leading to contract award, announcing the apparent successful contractor, recommendation for contract award, and then deciding on the merits of a protest usually finds it necessary to spend considerable time researching the facts before reaching a conclusion. The recommendation procedure to prepare for deciding on the merits of a protest is provided below:

### 7.9.1 Read the Protest

The written protest should be carefully read and all objections to the selection procedure and decision should be carefully noted. Since there is normally a time limit for investigating the facts regarding the protest and rendering the decision, it is essential that the person investigating the protest fully understand the nature and extent of the protest early in the investigative process. The aggrieved contractor should be contacted for clarification if the contractor's claim is not

plainly clear. Otherwise, the public entity's official charged with evaluating the merits of the protest may make faulty assumptions regarding the facts surrounding the protest.

Communications with protesting companies are preferably done in writing. When written communications are not possible, however, all verbal communications should be meticulously documented. This is necessary because in the event of an unfavorable determination regarding the protest and an unsuccessful appeal by the aggrieved contractor, the matter could be litigated.

The official who makes the determination on the merits of the protest should begin by drafting questions that need to be answered during the activities discussed below. Questions posed to members of the PET and their responses are usually central to the investigation of the facts surrounding the public entity's proposal evaluation process. A timely beginning to the drafting of appropriate questions to be posed to members of the PET will assist the public official investigating the contract selection process to conduct relevant PET member interviews and render a determination on the merits of the protest within the allotted time.

#### 7.9.2 Read the Solicitation

It is a good practice, at this point in the process, to begin noting any inconsistencies between the description of the source selection process described in the solicitation and the concerns of the aggrieved contractor. The questions for PET members drafted during the previous step should be expanded during this process. Refining the questions as more facts are discovered assists the responsible official to conduct more meaningful interviews. It is possible, however, that some earlier questions can be answered during the reading of the solicitation and, therefore, eliminated from inclusion in the interviews.

### 7.9.3 Read the PET Instructions

Any inconsistencies between the instructions provided the team members and the solicitation should be noted at this point in the process. Such inconsistencies could have resulted from a divergent proposal evaluation process that supports the aggrieved contractor's contentions. The official evaluating the facts, at this point, can further refine the questions for team members to determine whether they performed contrary to their instructions.

### 7.9.4 Review the Policy & Procedures

This step is necessary to determine whether the source selection process described in the solicitation and the instructions provided the team members were consistent with the procurement office's policies and procedures.

### 9.5 Review the Proposal Evaluation Record

This review is undertaken to determine whether the team members complied with the source selection process described in the solicitation, ensure that the team evaluated the proposals according to the criteria in the solicitation, determine whether weighted criteria were properly applied (if applicable), determine whether the team members properly evaluated price or the life cycle cost, search for inconsistencies between the instructions given to team members and the record of the proposal evaluation process, note inconsistencies between public entity policy and

procedures and the record of the source selection process, and draft additional questions to ask team members during subsequent interviews.

#### 7.9.6 Finalize the Questions for PET Members

At this point the questions that were drafted during the earlier activities should be edited and organized to place them in a logical sequence in preparation for interviewing the proposal evaluation team (PET) members. These activities prepare the public entity official responsible for evaluating the merits of the protest to conduct meaningful interviews of the PET members.

#### 7.9.7 Interview PET Members

Completion of the preceding tasks provides the public entity official evaluating the merits of the protest with thorough insight into the solicitation and source selection activities that occurred. Conducting these tasks also helps in documenting the PET's actions. It is, however, essential to interview the PET members to obtain in-depth knowledge of activities essential to deciding on the validity of the PET's recommendations. Failure to reach a fair and logical determination could unnecessarily lead to an appeal to a higher authority within the public entity or litigation to resolve the matter through the court system. The objective of the interviews is to evaluate the activities of the team members during the proposal evaluation process and assess their compliance with the ground rules established in the solicitation, instructions given to team members, and public entity policy and procedures. While a review of the source selection documentation provides meaningful insight into the propriety of the team's activities, the interview process

provides considerable insight into the mindset of the team members and the level of their objectivity and sincerity in selecting the contractor that is best qualified to perform the services contracted out by the public entity.

#### 7.9.8 Synthesize the Information to Decide on the Merits of the Protest

At this point in this process, the public entity official:

- Synthesizes information acquired through reading the protest, solicitation, and instructions provided to PET members
- Reviews the public entity's policies and procedures governing protests
- Scrutinizes records developed by the PET members during the source selection process, and
- Reviews the results of the PET member interviews

Scrutinizing, reviewing, and synthesizing this information prepares the official evaluating the protest to form an opinion with respect to the merits of the protest and to decide on the propriety of the PET's decision. The process should include consideration of the possibility that favoritism was afforded the apparent successful contractor. Although it is unlikely that favoritism was present in the proposal evaluation process, the mere chance that favoritism could have been a factor requires consideration of this possibility.

This process could reveal that the PET could have committed errors such as using proposal evaluation criteria taken from a standard template when, in fact, the criteria in the standard RFP template had been modified to correspond with the project. However, minor irregularities would

not automatically result in a reversal of the contractor selection decision or establish a need to cancel the award of the contract and solicit proposals anew. For example, a proposal evaluation sheet that listed the criteria in the RFP template, despite minor adjustments having been made to the criteria when they were included in the actual RFP, may not render the proposal evaluation as specious. If it could be determined and documented that the PET would have reached the same conclusion if the error had not been committed, there is a possibility that a determination could be made that the award was proper, and that the proposals were evaluated properly despite certain inconsequential errors.

If it is determined that the PET erred and that the contract award decision was flawed, but that there were insufficient grounds to award the contract to the protesting company, there is a compromise solution that would fall short of cancelling the solicitation and calling for a new RFP to be sent to all contractors on the original list of solicited contractors. A recommended compromise solution is to request all the contractors that were originally selected to submit final revised proposals (FRPs). This recommended alternative ensures that all prospective contractors are treated equally. Should FRPs be requested from fewer than all the responders, the procurement file should be documented with the rationale for not requesting FRPs from any company that submitted a proposal but was not asked to submit an FRP. This documentation is necessary in the event a company that was not offered an opportunity to submit a FRP elects to protest that decision. If the original solicitation did not specify a structured evaluation procedure or weighted criteria, local procedures may permit refinement to the selection process in the FRPs by introducing a more structured evaluation process and possibly the use of weighted criteria or the proposal evaluation process recommended in Chapter 5, Management of Pre-Proposal

Communications and Evaluation of Proposals. If it is decided to modify the evaluation process from the original RFP, it is necessary to advise all contractors being requested to submit FRPs of the need to consider the revised evaluation procedures and revised ground rules.

#### 7.10 Document the Determination

Once an opinion has been formed with respect to the merits of the source selection decision, the official evaluating the merits of the protest must memorialize his/her decision and prepare a response to the aggrieved contractor. A more formal approach may involve a memorandum to the record to memorialize the merits of the source selection decision plus a letter to the aggrieved contractor. However, in most cases the file copy of the letter to the aggrieved contractor should suffice.

In practice, the evaluation of the merits of the source selection team results will lead to a determination that the team did follow public entity procedures and did make the proper source selection decision. In this event, the company that expended the time, effort, and expense to prepare a proposal and to follow through with considerable added effort to protest the contractor selection is certainly deserving of a comprehensive written response to their protest. The public entity official making the decision to deny the protest normally signs the letter advising the protesting company of the details of her/his determination. The letter advising the protesting company of such an adverse determination should include instructions for filing an appeal. Without instructions for filing an appeal, the aggrieved contractor may send the appeal to the incorrect official or proceed directly to litigation. The appeal instructions should include the



name and address of the official who should receive the appeal as well as the deadline for filing the appeal and the timeline for the public entity's response. Failure to provide this information will likely damage the public entity's right to follow through on its determination if the aggrieved contractor sends its appeal to the wrong official or files the appeal after the due date.

If investigation of the activities of the source selection team led to a determination that the contract should have been awarded to the aggrieved contractor or some other contractor, then an entirely different course of action is required. When it is determined that the contractor was improperly selected, the alternative actions for the public entity to consider are:

- Terminate the contract and award it to the appropriate company
- Request an FRP from all the responsible contractors that submitted responsive proposals or proposals that could likely be made responsive. In this event, consideration may be given to providing more structure and objectivity to the source selection process for evaluation of the FRPs.
- Cancel the solicitation and release a revised solicitation. Just as with the request for FRPs, consideration may be given to incorporating greater structure and objectivity into the source selection process for evaluating the new proposals.

Incorporation of greater structure and objectivity into the source selection process, whether requesting an FRP or releasing a revised solicitation, can be achieved by following the best practices for public procurement discussed in earlier chapters.

When evaluation of the protest, solicitation, instructions provided to members of the PET, public entity policies and procedures, record of the source selection process, and interviews of PET members clearly lead to the determination that the contract should have been awarded to the aggrieved contractor, however, the source selection decision must be reversed. If the contract had been awarded erroneously, the termination clause for the improperly awarded contract requires review to determine the process and timeline for terminating that contract and awarding a replacement contract to the aggrieved contractor.

When reversing a source selection decision, notification of the contractor originally selected for contract award is required. If the contract had not been awarded, a letter to the originally selected contractor is recommended. However, because either one of these alternatives is considered as a major setback for the contractor that was originally selected for award of the contract, a telephone call alerting the previously selected contractor of this decision prior to receiving the letter is advised. Full disclosure of the facts leading to the reversal of the selection decision should be provided in the letter. This is essential because complete disclosure of the facts leading to the public entity's reversal of the selection decision is the best approach to discouraging yet another protest.

When it is necessary to reverse the source selection decision following contract award, termination of the contract that was erroneously awarded is also required. The termination for convenience provision is appropriate for terminating the contract. Full disclosure of the reasons for reversing the contractor selection decision and terminating the contract should be included in the first communication to the contractor facing contract termination. Complete disclosure of the facts leading to the public entity's reversal of the selection decision is the best approach to discouraging a protest from the contractor that was originally selected for award of the contract. Just as in the case where the contract had not been awarded, the contractor should be advised of this decision by telephone prior to receipt of the letter. The receipt of a personal telephone call to deliver the announcement of such an adverse decision helps to avoid the impersonality associated with a letter containing this unwelcome news.

The added workload and general negativity accompanying the receipt and processing of protests should cause public procurement offices to periodically review the content of their solicitations and source selection practices with the objective of implementing measures for preventing protests as discussed previously in this chapter.

#### 7.11 Conclusion

Protests filed by aggrieved contractors may be based on perceived irregularities in the solicitation document or announcement of the apparent successful contractor. Protests regarding perceived irregularities in the solicitation are the least serious of the two. Such protests, however, should be given careful consideration and evaluation. Should the public entity's official designated to respond to the protest determine that the solicitation was proper with respect to the

aggrieved contractor's complaint, the protest should be responded to in writing by detailing the reasons for denying the protest. If the protest of the provisions of the solicitation have merit, the solicitation should be corrected via addendum or cancelled and replaced with a corrected solicitation. In either event, consideration should be given to extending the response due date to provide prospective contractors time to react to the changed or revised solicitation.

Protests that are filed by contractors aggrieved because they feel that the contractor selection process is flawed, or that one of their competitors was otherwise improperly selected for award of a contract, have a greater negative impact on the public entity. Receipt of a protest is always unwelcomed because it is an indication that a contractor perceives that the public entity's contractor selection process is deficient or that the integrity of the public entity's officials or employees is questioned. Reaction to receipt of a protest normally creates a significant strain on the public entity's resources because considerable time is required by the official designated to investigate the circumstances surrounding the contractor selection process. However, this is a necessary process that is needed to decide on the merits based on the justification for the protest. The investigation normally consumes additional time from the participants in the proposal evaluation process who must be interviewed by the public entity official who investigates the contractor selection process. A protest made prior to award of a contract most likely delays award of the contract, delays the commencement of the project, and could conceivably result in cancellation of the project.

The significance of the impact on public entity operations due to receipt of a protest makes implementation of measures to avoid receipt of protests a high priority for state and local public

entities. Legitimate measures to help prevent the filing of protests by aggrieved contractors include a logical process for managing the contractor selection process and providing needed transparency by:

- Treating all prospective contractors equally
- Disclosing the proposal evaluation process and criteria in the RFP
- Strictly adhering to the process and evaluating proposals solely on the criteria stated in the RFP
- Describing the public entity's procedure for filing protests in the RFP
- Requiring prospective contractors to obtain a debriefing prior to filing a protest.

Due to the criticality and sensitivity of protests and because of the complexity of the process for investigating the proposal evaluation actions, procurement offices are urged to develop policies and procedures for dealing with protests. Complete and comprehensive policies and procedures require sufficient detail to include implementation of all the measures recommended here for avoiding protests. Policies and procedures should include the need to coordinate with in-house legal counsel when protests are anticipated or filed. It is recommended that the public entity's policies and procedures for investigating the proposal evaluation process be included in its procurement manual.

A thorough and complete investigation of the circumstances surrounding the proposal evaluation process includes a critical reading of the protest filed by the aggrieved contractor as well as reading the solicitation, the procurement offices protest policy and procedures, the proposal evaluation team's instructions, and noting any inconsistencies between these documents. Once

this background information has been gathered, the official investigating the proposal evaluation process is ready to review the evaluation team's record of their activities leading to the selection of the successful contractor. The public entity official who will determine the merits of the protest needs to begin drafting questions to pose to members of the PET early on in this process. The questions should be refined as needed in response to facts discovered during the entire investigative process. Once the questions are finalized, the official can schedule and conduct PET member interviews.

Following the interviews, the official who must decide on the merits of the protest will have assimilated a large amount of data to synthesize in preparation for deciding on the merits of the protest. The determination needs to be communicated to all interested parties. Details of the decision are normally communicated in writing to document the determination. A letter is normally sent to the contractor whose protest was denied. However, a telephone call or a personal meeting in advance of the written decision is recommended since merely mailing a letter is likely to seem an impersonal method for delivering such disappointing news. Providing information on the option to appeal the decision may avert the initiation of litigation by the contractor. If it becomes necessary to terminate a contract, the notification to that contractor should also be in writing and preceded with a personal notification of the unpleasant news.