**MPC Reform**

**Bid Protests - Small Procurements**

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**1.0 Introduction**

A protest is a challenge to a solicitation or contract award. Bid protests are an important mechanism to ensure that a procurement process is fair and competitive.

The Model Procurement Code (MPC, 2000) is a joint effort of sections of the Public Contract Law and State and Local Government Law to create transparent, competitive, and reliable processes by which public funds are expended on contracts with private businesses.

The MPC espouses the principles of competition, transparency, equal treatment, and grants remedy to an aggrieved bidder, offeror, or contractor to challenge a state or local government procurement (Section 9-101).

The MPC, however, does not create separate bid protest procedures for smaller procurements (less than or equal to $50K).

Considering fairness for all participants, I propose reforming the MPC to include a separate and express bid protest procedure for small procurements. This will go a long way in maintaining public trust and guaranteeing equal treatment for all participants - regardless of business size or procurement dollar amount.

1. **Who Can Protest**

An actual or prospective bidder, offeror, or contractor aggrieved in connection with a solicitation or contract award (Section 9-101).

Protest must be filed with the Chief Procurement Officer or the Head of a Purchasing Agency.

* 1. **When to Protest**

The protest shall be submitted in writing within 14 days after such aggrieved person knows or should have known of the facts.

* 1. **Forms of Decision**

Protest may be resolved by mutual agreement between the aggrieved party and the agency or through the issuance of a formal decision by the Chief Procurement Officer or the Head of the Agency. In the case of an adverse decision, the aggrieved bidder, offeror, or contractor may seek relief in the State’s court [Section 9-401(1)] or have the decision reviewed by the Procurement Appeals Board (Section 9-506).

**3.0 Stay of Procurement Action**

In the event of a timely protest under Section 9-401(1), (Waiver of Sovereign Immunity in Connection with Contracts), or Section 9-401(1) (Solicitation and Award of Contracts), or under Section 9-505 (Jurisdiction of Procurement Appeals Board), the State or Local Authority shall not proceed further with the solicitation or with the award of the contract until the Chief Procurement Officer, after consultation with the head of the Using Agency or the head of a Purchasing Agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the State or Local Authority.

In the above case, the protesting party may be entitled to cost. In addition to any other relief, when a protest is sustained and the protesting party should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney’s fees.

The protesting bidder or offeror’s aim is to get redress and receive a fair hearing and decision, guaranteeing that arbitrary treatment wasn’t at play.

**4.0 Current MPC versus Proposed for Smaller Procurements**

The current MPC lacks express protest option for smaller procurements. Apart for the schedule to file a protest when the facts shall have been known, the MPC does not mention any timeline for various protest steps. Hence, I proposed the following timeline vis-a vis the current MPC:

|  |  |
| --- | --- |
| **Current MPC** | **Proposed MPC** |
| 14 days filing requirement. | 10 days filing requirement |
| Notification of protest filed….No timeline. | CPO to notify all participants of protest within 2 working days following receipt. |
| Commencement of protest review…..No timeline | Protest review within 1 working day after notice |
| Issuance of protest decision…No timeline | Protest decision within 5 working days |
| Protest decision appeal..…….No timeline. | Protest decision appeal within 3 working days after notification. |
| Review and acceptance of appeal…….No timeline. | Review and acceptance of appeal – decision within 2 working days. |
| **Number of days for final adjudication of protest action….No timeline.** | **Number of days for adjudication of protest action – 14 working days maximum** |

**5.0 Lessons Learned As a Result of Bid Protest**

The bid protest mechanism helps agencies to learn from their mistakes. Knowing what doesn't work in a situation helps to avoid making the same mistake, and knowing what works enables the attainment of goals in a seamless manner. Lessons acquired can be used to get a better understanding of protests, how to prevent them, and/or deal with them if they do occur.

From the standpoint of the purchasing agency and the offeror/contractor, having an effective and efficient bid protest procedure is essential to guaranteeing that a contracting officer abides by the regulations and treats offerors fairly and respectfully. The bid protest procedure ensures that taxpayers funds are used properly and gives offeror/contractor assurances of transparency and accountability.

Allowing a separate process for small purchases, promotes equality and offers everyone the opportunity to challenge solicitations and award decisions despite business size and/or procurement dollar value.

**6.0 Separate Process for Small Procurements**

The MPC has a bid protest and appeal mechanism, but lacks a separate process for small procurements (less than or equal to $50K). This gap must be addressed by a reform to include small procurement protest mechanism to expeditiously review the following:

* Agency’s failure to follow evaluation criteria,
* Unreasonable technical evaluation,
* Unreasonable cost or price evaluation,
* Inadequate documentation of the record,
* Unequal treatment of offerors,
* Unreasonable past performance evaluation, and
* Flawed selection decisions.

Having a process that serves all, upholds the principle of equity and fair treatment.

The Armed Services Board of Contract Appeals (ASBCA) has faster and simpler procedures for contract claims under $50,000, under ASBCA Rule 12.[[1]](#footnote-1)

I highly recommend a review of the ASBCA process for lessons to incorporate into the MPC’s process for smaller procurements.

**7.0 Burden of Cost**

All parties will need to devote time and attention to a separate and express bid protest system for small procurements. Offerors/contractors will incur costs to retain a specialized team of attorneys to protect their interests. Provisions must be made to help small businesses shoulder some of the cost they will have to incur to sustain protest action.

**8.0 Conclusion**

Bid protests are important to state and local governments because they ensure that acquisition processes are fair, competitive, transparent, and protect the integrity of purchasing agencies.

Reviewing and responding to bid protests require agencies to reassess their procurement processes for improvement. This results in competitive and transparent procurement procedures that benefit not only the purchasing agencies, but bidders, offerors/contractors, and the public at large.

A separate and express process for small procurement is even valuable in restoring the public trust and confidence that the system is fair and serves all participants equitably.

**References:**

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1. Rules of the ASBCA - [Final Rule Formatting pgl.pdf (asbca.mil)](https://www.asbca.mil/Rules/forms/Final%20Rule%20Formatting%20pgl.pdf#page=1) [↑](#footnote-ref-1)