

PROTEST PROCEDURES AND PROTEST BOND REQUIREMENTS

The Open File Period for this solicitation begins on _____ and ends on _____, 20____. Any protest of this solicitation is due by 4:30 p.m. CST on _____, 20____ to the Central Procurement Office at the address listed below:

Michael F. Perry
Chief Procurement Officer
-and-
Paul Krivacka
Director of Category Management and Chief Legal Counsel
Central Procurement Office
Dept. of General Services
WRS Tower, 3rd Floor
312 Rosa L. Parks Blvd.
Nashville, TN. 37243-1102
Tele: (615) 741-1035
Fax: (615) 741-0684

The Protest Bond Amount required for this solicitation is \$ _____.

Pursuant to Tenn. Code Ann. § 1-3-102, Computation of Days, the seven (7) calendar day period during which a protest of this procurement may be filed shall begin on the calendar day following the date of the Open File Period. Any protest of this solicitation must be received by the Central Procurement Office by 4:30 p.m. CST at the end of the seven (7) day calendar period.

Any protest of this solicitation must be made in writing, must state the ground of the protest and must include a protest bond or, as set forth below, a request for an exemption from the protest bond requirement if the lowest evaluated cost proposal is less than one million dollars (\$1,000,000.00).

Tenn. Comp. R. & Regs., ch. 0690-03-01-.12(2)(a) (2013) provides that:

Each solicitation shall contain a schedule indicating the dates and times for solicitation opening, the timeline for evaluation and the anticipated Award date. Once the state issues the Notice of Intent to Award, the Open File Period begins. The solicitation file shall be open for public inspection for seven (7) calendar days upon request. The Central Procurement Office or a Delegated State Agency shall give the requestor a reasonable opportunity to inspect the solicitation file. If there is no protest of the Notice of Intent to Award, the State will proceed with the contract award.

Pursuant to Tenn. Code Ann. § 12-3-514 and Tenn. Comp. R. & Regs., ch. 0690-03-01-.12(2) (2013), the Central Procurement Office's protest procedures and protest bond requirements are as follows:

Tenn. Code Ann. § 12-3-514

- (a) Prior to the commencement of an action in court concerning the controversy, any actual respondent who claims to be aggrieved in connection with a procurement authorized under this chapter may protest to the chief procurement officer. The protest shall be submitted in writing within seven (7) calendar days after such claimant knows or should have known of the facts giving rise to the protest. Any issues raised by the protesting party after the seven-day period shall not be considered as part of the protest. In the case of a pending award, a stay of award in accordance with subsection (e) may be requested.

- (b) The signature of an attorney or protesting party on a request for consideration, protest, motion, or other document constitutes a certification by the signer that the signer has read such document, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation. If a request for consideration, protest, pleading, motion, or other document is signed in violation of this subsection (b) before or after appeal to the chief procurement officer and the protest committee, the chief procurement officer or protest committee, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties, including the affected state agency, the amount of the reasonable expenses, including reasonable attorneys' fees incurred because of the filing of the protest, a petition for a stay of award, pleading, motion, or other paper.

- (c) Neither a protest nor a stay of award shall proceed under this section unless the protesting party posts a protest bond. The protesting party shall post with the chief procurement officer, at the time of filing a notice of protest, a bond payable to the state in the amount of five percent (5%) of the lowest cost proposal evaluated or, if a protest is filed prior to the opening of cost proposals, the bond payable shall be five percent (5%) of the estimated maximum liability provided in the procurement document. The protest bond shall be in form and substance acceptable to the state and shall be immediately payable to the state conditioned upon a decision by the protest committee that:
 - (1) A request for consideration, protest, pleading, motion, or other document is signed, before or after appeal to the chief procurement officer or protest committee, in violation of subsection (b);
 - (2) The protest has been brought or pursued in bad faith; or
 - (3) The protest does not state on its face a valid basis for protest.

- (d) The bond shall be payable to the state for any other reason approved by the protest committee. The state shall hold the protest bond for at least eleven (11) calendar days after the date of the final determination by the chief procurement officer. If the protesting party appeals the chief procurement officer's determination to the protest committee, the chief procurement officer shall hold the protest bond until instructed by the protest committee to either keep the bond or return it to the protesting party.

(1) At the time of filing notice of a protest of a procurement in which the lowest bid or lowest evaluated cost proposal is less than one million dollars (\$1,000,000), a minority-owned business, woman-owned business, service-disabled veteran-owned business, or small business protesting party may submit a written petition for exemption from the protest bond requirement of subsection (c). The petition shall include clear evidence of a minority-owned business, woman-owned business, service-disabled veteran-owned business, or small business status. On the day of receipt, the petition shall be given to the chief procurement officer. The chief procurement officer has seven (7) calendar days in which to make a determination. If an exemption from the protest bond requirement is granted, the protest shall proceed as though the bond were posted. Should the chief procurement officer deny an exemption from the requirement, the protesting party shall post the protest bond with the chief procurement officer as required in subsection (c) within five (5) calendar days of the determination.

(2) For purposes of this subdivision (d)(1):

(A) “Minority” means a person who is a citizen or lawful permanent resident of the United States and who is:

(i) African American: a person having origins in any of the black racial groups of Africa;

(ii) Hispanic: a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;

(iii) Asian American: a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands; or

(iv) Native American: a person having origins in any of the original peoples of North America;

(B) “Minority-owned business” means a minority-owned business that is a continuing, independent, for-profit business that performs a commercially useful function, and is at least fifty-one percent (51%) owned and controlled by one (1) or more minority individuals who are impeded from normal entry into the economic mainstream because of past practices of discrimination based on race or ethnic background;

(C) “Small business” means a business that is independently owned and operated, has total gross receipts of not more than ten million dollars (\$10,000,000) averaged over a three-year period, or employs no more than ninety-nine (99) persons on a full-time basis;

(D) “Tennessee service-disabled veteran-owned business” means a service-disabled veteran-owned business that is a continuing, independent, for-profit business located in this state that performs a commercially useful function, and is at least fifty-one percent (51%) owned and controlled by one (1) or more service-disabled veterans. In the case of a business solely owned by one (1) service-disabled veteran and such person's spouse, is at least fifty percent (50%) owned and controlled by the service-disabled veteran or in the case of any publicly owned business, at least fifty-one percent (51%) of the stock of which is owned and

controlled by one (1) or more service-disabled veterans and whose management and daily business operations are under the control of one (1) or more service-disabled veterans; and

- (E) “Woman-owned business” means a woman-owned business that is a continuing, independent, for-profit business that performs a commercially useful function, and is at least fifty-one percent (51%) owned and controlled by one (1) or more women; or, in the case of any publicly owned business, at least fifty-one percent (51%) of the stock of which is owned and controlled by one (1) or more women and whose management and daily business operations are under the control of one (1) or more women.
- (3) The chief procurement officer, in consultation with the head of the state agency, has the authority to resolve the protest. The chief procurement officer shall have no longer than sixty (60) calendar days from receipt of a protest to resolve the protest. The final determination of the chief procurement officer shall be given in writing and submitted to the protestor and the protest committee, and the comptroller of the treasury. If the chief procurement officer fails to resolve the protest within sixty (60) calendar days, the protesting party may request that the protest committee meet to consider the protest.
- (4) If a protest is not resolved by mutual agreement within sixty (60) calendar days, the protesting party may request the matter be considered at a meeting with the protest committee. The request for consideration before the protest committee shall be made in writing within seven (7) calendar days from the date of the chief procurement officer's final determination or within seven (7) calendar days following the chief procurement officer's failure to resolve the protest within sixty (60) calendar days after receipt of the protest.
- (e) Prior to the award of a contract, respondents who have protested may submit to the chief procurement officer a written petition for stay of award. Such stay shall become effective upon receipt by the state. The state shall not proceed further with the procurement process or with the award of the contract until the protest has been resolved in accordance with this section, unless the protest committee makes a written determination that continuation of the procurement process or the award of the contract without delay is necessary to protect substantial interests of the state. It shall be the responsibility of the chief procurement officer, with the assistance of the procuring agency, to seek such a determination by the protest committee. The chief procurement officer shall provide the minutes of the protest proceedings to each committee member and to the comptroller of the treasury and shall post the final determination within fifteen (15) business days to the single public procurement web site.
- (f) Nothing in this section shall be construed to require a contested case hearing as set forth in the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. The protesting party must exhaust all administrative remedies provided in this section prior to the initiation of any judicial review of the protest.
- (g) Should a protest be received by the state subsequent to a contract being completely executed pursuant to a procurement process, the Tennessee claims commission has exclusive jurisdiction to determine all monetary claims against the state, including, but not limited to, claims for the negligent deprivation of statutory rights pursuant to § 9-8-307(a)(1)(N).

- (h) Protests appealed to the chancery court from the protest committee shall be by common law writ of certiorari. The scope of review in the proceedings shall be limited to the record made before the protest committee and shall involve only an inquiry into whether the protest committee exceeded its jurisdiction, followed an unlawful procedure, or acted illegally, fraudulently, or arbitrarily without material evidence to support its action.

Tenn. Comp. R. & Regs. ch. 0690-03-01-.12 (2013)

- (1) Objection of Technical Requirements, Scope of Services or Specifications Prior to Evaluation of Responses.
- (a) The State shall use technical requirements and scopes of services that are non-restrictive. Concerns regarding any defects or ambiguities involving a solicitation shall be made in writing and delivered to the Central Procurement Office no later than seven (7) calendar days after the solicitation has been posted to the website of the Central Procurement Office or the Delegated State Agency as the case may be.
- (2) Protest After Notice of Intent to Award.
- (a) Any aggrieved respondent, who has submitted a response to a solicitation subject to these Rules and applicable law, may file a written protest with the Chief Procurement Officer. The protest must be received by the Central Procurement Office within seven (7) calendar days from the beginning of the Open File Period.
1. On the first day of the Open File Period, all respondents are deemed to know all facts documented in the State's procurement files.
 2. A written protest filed by a respondent with the Chief Procurement Officer shall enumerate and detail all grounds for the protest in accordance with these Rules.
 3. The Chief Procurement Officer may consider the following grounds for protest and no others:
 - (i) The contract award was arbitrary, capricious, an abuse of discretion or exceeded the authority of the Central Procurement Office or the Delegated State Agency.
 - (ii) The procurement process was conducted contrary to a constitutional, statutory or regulatory provision.
 - (iii) The Central Procurement Office or the Delegated State Agency did not follow the rules of the procurement as set forth in the solicitation in making the contract award, and such failure to follow the rules of the procurement materially affected the contract award.
 - (iv) The procurement process involved responses that were not independently arrived at in open competition, were collusive, or were submitted in bad faith.
 - (v) The contract award was the result of a technical or mathematical mistake or error during the evaluation process.

4. The Aggrieved Respondent challenging the procurement process or contract award has the burden of proof and persuasion with respect to the invalidity of the procurement process or contract award.
5. All protests allowed under this Rule shall first be filed with the Chief Procurement Officer. The Aggrieved Respondent shall have the right to file a protest directly with the Protest Committee, but only in the event the Chief Procurement Officer fails to acknowledge a protest within fifteen (15) calendar days of receipt of a protest, fails to resolve the protest within sixty (60) calendar days, or consents in writing to a direct appeal to the Protest Committee.
6. A written protest that is filed with the Protest Committee shall:
 - (i) Meet the requirements of T.C.A. § 4-56-103;
 - (ii) Be delivered to the Chief Procurement Officer and the Comptroller of the Treasury; and,
 - (iii) Raise only grounds that were raised before the Chief Procurement Officer.
7. All protests, supporting documentation and the resolution or decisions thereof, shall be filed with and maintained by the Central Procurement Office in accordance with T.C.A. § 10-7-503.
8. A protester is required to exhaust his or her administrative remedies as provided by these Rules. The failure of an Aggrieved Respondent to timely raise a ground for protest in accordance with these Rules shall be deemed a waiver of the Aggrieved Respondent's right to seek review of such ground before the Chief Procurement Officer or the Protest Committee.
 - (i) The final determination letter of a protest before the Chief Procurement Officer shall be reported to the Protest Committee and the Comptroller of the Treasury.
 - (ii) The final determination letter of a protest before the Protest Committee shall be reported to the Comptroller of the Treasury.

Protest Bond Example

The following is an example of a protest bond in a form that is acceptable to the Central Procurement Office:

PROTEST BOND

The Surety Company issuing bond shall be licensed to transact business in the State of Tennessee by the Tennessee Department of Commerce and Insurance. Bonds shall be certified and current Power-of-Attorney for the Surety's Attorney-in-Fact attached.

KNOW ALL BY THESE PRESENTS:

That we,

(Name of Protesting Party)

(Address of Protesting Party)

as the party filing a protest of the State of Tennessee's determination(s) regarding a solicitation process, (hereinafter called the "Protesting Party"), and

(Name of Surety)

(Address of Surety)

as Surety, (hereinafter called the "Surety"), do hereby acknowledge ourselves indebted and securely bound and held unto the State of Tennessee as Obligee, (hereinafter called the "Obligee"), and in the penal sum of

(Dollar Amount of Bond)

good and lawful money of the United States of America, for the use and benefit of those entitled thereto, for the payment of which, well and truly to be made, we bind ourselves, our heirs, our administrators, executors, successors, and assigns, jointly and severally, firmly by these presents.

BUT THE CONDITION OF THE FOREGOING OBLIGATION OR BOND IS THIS:

WHEREAS, the Obligee has issued a solicitation bearing the Number:

(Solicitation Number)

AND, the Protesting Party, as an actual respondent to the solicitation, claims to be aggrieved in connection with said procurement process;

AND, the signature of an attorney or the Protesting Party on a request for consideration, protest, motion, or other document constitutes a certificate by the signer that the signer has read such document, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation;

AND, neither a protest nor a stay of award shall proceed under the laws of the State of Tennessee unless the Protesting Party posts a protest bond, the Protesting Party does file this protest bond payable to the Obligee with a notice of protest regarding the procurement process;

AND, the Obligee shall hold the protest bond for at least eleven (11) calendar days after the date of the final determination on the protest by the chief procurement officer;

AND, if the Protesting Party appeals the chief procurement officer's determination to the protest committee, the chief procurement officer shall hold the protest bond until instructed by the protest committee to either keep the bond or return it to the Protesting Party.

NOW, THEREFORE, this obligation or bond shall remain in full force and effect and shall be immediately payable to the state conditioned upon a decision by the protest committee that:

1. A request for consideration, protest, pleading, motion, or other document is signed by an attorney or Protesting Party, before or after appeal to the chief procurement officer or protest committee, in violation of Tennessee Code Annotated, § 12-3-514(b);
2. The protest has been brought or pursued in bad faith;
3. The protest does not state on its face a valid basis for protest; or
4. For any other reason approved by the protest committee.

In which case, this obligation or bond shall be immediately payable to the Obligee. Otherwise, this obligation or bond shall be null and void.

IN WITNESS WHEREOF the Protesting Party has hereunto affixed its signature and Surety has hereunto caused to be affixed its corporate signature, and seal, by its duly authorized officers, on this

_____ day of _____ in the year _____.

WITNESS:

(Name of Protesting Party)

(Name of Surety)

(Authorized Signature of Protesting Party)

(Signature of Attorney-in-Fact)

(Name of Signatory)

(Name of Attorney-in-Fact)

(Title of Signatory)

(Tennessee License Number of Surety)