

CITY OF SAN DIEGO, CALIFORNIA
COUNCIL POLICY

CURRENT

SUBJECT: HEARING PROCEDURES FOR DETERMINATIONS OF
CONTRACTOR RESPONSIBILITY AND BID PROTESTS
POLICY NO.: 000-29
EFFECTIVE DATE: April 5, 2012

BACKGROUND:

A “non-responsive” bid or proposal for a public contract may be summarily rejected. However, a contractor who is denied the award of a public contract because the contractor is determined to be “non-*responsible*” is legally entitled to a hearing to contest that determination before the contract is awarded to the next-best *bidder*.

PURPOSE:

The City’s primary objective when awarding Contracts is to use fair and unbiased selection procedures. This policy establishes hearing procedures for a contractor or vendor who wants to contest the City’s determination that he or she is not *responsible*. These hearing procedures may also be used if the *City Manager* determines, in his or her sole discretion, that a hearing is necessary in a bid protest to take testimony bearing on a disputed question of fact.

DEFINITIONS:

Bidder means a person or firm who submits a bid, proposal, or other document to the City competing for the award of a contract. A *bidder* does not include a subcontractor.

City Manager means the Mayor or a City officer or employee he or she designates to act on the City’s behalf.

Protest body means the panel of City employees or an Administrative Law Judge who will conduct the hearing and issue a decision.

Responsible or Responsibility refers to the quality, fitness, and capacity of a *bidder* to satisfactorily perform the proposed work. A *responsible bidder* has the quality, fitness, and capacity to satisfactorily perform the proposed work, while a *non-responsible bidder* does not.

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POLICY:

It is the policy of the City Council that the question of a *bidder's responsibility* be decided by an objective body if a hearing is requested by the *bidder* determined to be *non-responsible*. A *bidder* is not entitled to a hearing to question another *bidder's responsibility*. To facilitate an objective forum, this policy establishes an administrative hearing procedure to resolve questions of *responsibility*.

POLICY APPLICABILITY:

This policy applies to all contracts competitively awarded pursuant to Chapter 2, Article 2, Divisions 30, 31, 32, 33, 34, 36 and 38 of the Municipal Code.

A. ADMINISTRATIVE HEARING PROCEDURE:

1. Compliance with the Municipal Code: A hearing will be held only if the *bidder* requesting a hearing has complied with all the requirements of Municipal Code Section 22.3017.
2. Appointment of the *Protest Body*: The *City Manager* will either appoint a panel of City employees to serve as the *protest body* or, alternatively, contract with the State of California Office of Administrative Hearings (OAH) for an Administrative Law Judge (ALJ) to serve as the *protest body*.
 - a. Selection of City Employees: The *City Manager* will appoint a three member board to act as the *protest body*, consisting of City management level employees who have not participated in the award of the contract or the decision that is the subject of the hearing, and are not subject to the authority, direction, or discretion of an employee who has participated in the award or decision. This standard may be accomplished by excluding division personnel as prospective members of the *protest body* when that division has been involved in the award of the contract. The *City Manager* will designate one member as chairperson.

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- b. Disqualification of City Employees: In the event that a protesting *bidder* seeks to disqualify a member of the *protest body* on the grounds of bias, prejudice, or interest, the *bidder* must submit a written request to the *City Manager* within five calendar days of receiving notice of the hearing, stating the factual grounds for disqualification request. Based upon the *City Manager's* evaluation that the request has merit, the *City Manager* may replace the subject member of the *protest body* or contract with the OAH for an ALJ to serve as the *protest body*.
 - c. Selection of ALJ: If the *City Manager* decides to use the OAH for the hearing, the OAH will select an ALJ to act as the *protest body* pursuant to its own internal procedures.
 3. Notice of the Hearing: Upon the appointment of a *protest body*, the *City Manager* will set a date, time, and location of the hearing. Unless all parties agree to a hearing date with shorter notice, the *protest body* will send written notice of the hearing to the protesting *bidder* not less than five working days before the hearing. The notice will include the names of the members of the *protest body* and the date, time and location of the hearing.
 4. Presentation of Evidence and Arguments: The *protest body* will accept documents, hear testimony and arguments from the City and the protesting *bidder*. Evidence may be oral or written. Any documents or written argument and the names and addresses of witnesses must be submitted to the *protest body*, and exchanged between the City and the protesting *bidder*, no later than three working days prior to the hearing date. Any information or evidence submitted after the deadline may be excluded by the *protest body*. The *protest body* need not be bound by the common law or statutory rules of evidence and procedure, but may make inquiries in the matter through all means and in a manner best calculated to make a just factual determination. If an ALJ is to act as the *protest body*, however, the City and the *bidder* may consent to follow the hearing adjudication procedure set forth in California Government Code sections 11500 et seq. (also known as the Administrative Procedure Act). The hearing shall be open to the public. The *protest body* may continue the hearing as necessary for a fair and orderly presentation of evidence and arguments.

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5. Record of Hearing: All hearings shall be tape recorded by the *City Manager*, however, any party may request that a certified stenographer record the hearing proceedings in lieu of a tape recording. The requestor of the certified stenographer will bear all recording costs and must provide a complete copy of the hearing transcript to the *protest body* without cost.

6. Decision: After review of all evidence and arguments presented, the *protest body* will render a final determination by a majority vote if the *protest body* is comprised of persons other than an ALJ. The *protest body's* deliberations, and consultation with its legal counsel (if any), shall be confidential. The *protest body* will issue its decision on the protest as expeditiously as possible, but no later than thirty calendar days after the protest hearing. The *protest body* will send written notification of the decision to all parties. The decision of the *protest body* is final.
 - a. Findings: The *protest body's* decision shall be supported by findings which, in turn, shall be supported by the evidence presented at the hearing.

 - b. Burden and Standard of Proof: The City shall bear the burden of proof by a preponderance of the evidence for a determination that the *bidder* is *non-responsible*.

 - c. Final Decision Date: The decision of the *protest body* shall become final on the date of mailing of the decision, which will be by certified or express mail.

7. Judicial Review of Final Decision: Judicial review of the *protest body's* decision shall be governed by California Code of Civil Procedure sections 1094.5 *et seq.*

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B. DETERMINATIONS OF RESPONSIBILITY ARISING FROM THE
PREQUALIFICATION PROGRAM

Pursuant to the City's Contractor Standards Ordinance in Municipal Code Section 22.3004, a contractor determined to be *non-responsible* through the City's prequalification program is entitled to a hearing before the Budget and Finance Committee. Such hearings will be conducted in accordance with the administrative hearing procedure in Section A of this Council Policy except as follows:

1. The Budget and Finance Committee will be the *protest body*.
2. The *bidder* is a contractor denied eligibility to bid on some or all City contracts through the City's prequalification program.
3. The chairperson of the *protest body* will be the chair of the Budget and Finance Committee.
4. The chairperson will set and notify the parties of the time, date, and location of the hearing.
5. The deliberation of the *protest body* will be conducted in public in accordance with the Brown Act.
6. The decision of the *protest body* will be supported by findings, which will be stated for the record at the hearing when *protest body* announces its decision. The *protest body* will not issue a written decision.
7. The decision of the *protest body* will be final on the date it is announced at the hearing.

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C. DISCRETIONARY HEARINGS FOR OTHER BID PROTESTS

For bid protests based on grounds other than *responsibility*, if the *City Manager* determines, in his or her sole discretion, that a hearing is necessary to take testimony bearing on a disputed question of fact, the hearing will be conducted in accordance with the administrative hearing procedure in Section A of this Council Policy except as follows:

1. The *bidder* shall bear the burden of proof by a preponderance of the evidence.
2. The *City Manager* may limit the scope of the hearing to only those grounds where testimony is needed on a disputed question of fact.

HISTORY:

Adopted by Resolution R-285123 - 12/12/1994
Amended by Resolution R-293208 - 05/30/2000
Amended by Resolution R-296879 - 07/30/2002
Amended by Resolution R-300046 - 01/11/2005
Amended by Resolution R-307347 - 04/05/2012