

# DHHS POLICIES AND PROCEDURES

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**Section VII:** Office of Procurement and Contracting Services  
(Office of Procurement, Contracts and Grants; Business Systems and Training)

**Title:** Vendor Protests

**Approved by:**

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**Revision History:**

## Purpose

With the exceptions noted herein, this document establishes policy, procedures, and guidelines for managing vendor protests for the North Carolina Department of Health and Human Services (DHHS or Department). The underlying purposes of this Policy are:

- (a) to simplify, clarify, and modernize the protest procedures governing contracts awarded by DHHS;
- (b) to provide for increased public confidence in public procurement;
- (c) to ensure the fair and equitable treatment of all vendors that participate in procurement activities managed by DHHS;
- (d) to increase stewardship and to maximize, to the fullest extent practicable, the purchasing value of public funds awarded by DHHS;
- (e) to foster effective, broad-based, and inclusive competition; and
- (f) to provide safeguards for the maintenance of quality and integrity within the procurement process.

## Authority

Authorization to develop procedures for protests of contract awards for:

- Non-Information Technology (IT) goods and services below the agency's delegation is granted pursuant to [NCGS § 143-53\(a\)\(1\)](#) and [01 NCAC 05B.1519](#),
- Information Technology (IT) goods and services below \$25,000 is granted pursuant to [09 NCAC 06B .1102\(b\)](#), and
- Information Technology (IT) goods and services greater than \$25,000 is granted pursuant to [09 NCAC 06B .1102 \(c\)](#).

Should any provision or part thereof contained herein conflict with any applicable law or rule, the applicable law or rule shall control. Also, should any provision or part thereof contained herein conflict with the solicitation document of a contract sought to be protested, the solicitation document shall control.

## Applicability

This policy and these procedures apply to any Interested Vendor who is aggrieved in connection with the solicitation or award of a contract by the Department.

Except as provided herein, this Policy shall apply to every procurement of goods or services made with public funds irrespective of their source, including state and federal assistance monies.

This Policy shall not apply to 1) grants or 2) non-competitive awards between the Department, including its Divisions or other subdivisions, and other governmental entities.

Neither this Policy nor anything contained herein shall be applicable to the Division of Health Benefits (DHB). DHB is expressly excluded from the policies and procedures contained herein while operating under Alternative Procedures, but it may choose to follow them.

Unless otherwise provided by law, this Policy applies to contracts solicited or entered into after the effective date.

### **Policy**

Excepted where excluded or as otherwise provided herein, it is the policy of the Office of Procurement, Contracts and Grants (OPCG) to provide Interested Vendors with an opportunity to administratively resolve protests related to contract awards. All protests that are Timely Filed and contain sufficient information will be accorded consideration, although not every protest submitted to DHHS will necessarily be afforded a protest meeting. Along with other limitations on protests referenced herein, protests relating to cancellation of invitations for bids (IFB) or requests for proposals (RFP) and protests relating to the rejection of all bids or proposals are not permitted.

### **Delegation of Authority**

To enable the Department of Health and Human Services to operate effectively and expediently, procurement authority is delegated by the Secretary of DHHS (Agency Executive), through the Deputy Secretary to the Assistant Secretary for Procurement, Grants and Contracts (Assistant Secretary). Said delegation includes the authority to hear and decide protests, and issue a final agency determination.

### **Public Access to Procurement Information**

1. Procurement information shall be a public record to the extent provided in NCGS [§132-6](#), and shall be available to the public as provided in such statute. All solicitations and contract awards shall be posted on the State's website (IPS) or the Agency's website.
2. Documents that contain trade secrets or confidential proprietary information are exempt from public disclosure. In order for this provision to be applicable, the bidder/offeror/vendor must provide, with the response, a separate copy of its response with trade secrets or confidential proprietary information properly redacted.

### **Definitions**

1. "Contract" means an agreement entered into by DHHS and another party (or parties) setting out the obligations of the parties concerning a procurement of goods or services resulting from a competitive solicitation, waiver of competition, or other procurement decision.
2. Unless the solicitation document of the Contract awarded and sought to be protested states otherwise regarding the time for the filing a protest, in which case the time stated therein shall control, "Timely Filed" means the proper receipt of a protest letter and any supporting documentation before 5:00 p.m. on the 30<sup>th</sup> calendar day (15<sup>th</sup> calendar day if protested award is IT and greater than \$25,000) after the contract award decision was posted to the State's website (IPS) or the Agency's website. Protesting Vendors and Interested Vendors must monitor such website for the posting of an award, as the Department will not assume the obligation of notifying anyone but the Awarded Vendor of the contract award.
3. "Protesting Vendor" for the purpose of filing a protest, as used in this Policy, means an actual responsive bidder or offeror whose direct economic interest would be affected by the award of a

contract or by the failure to award a contract. Also, a Protesting Vendor must meet the definition of an “Interested Vendor” provided below.

4. “Awarded Vendor” includes any other responsive bidders or offerors that participated in the solicitation for award of a contract, is not the Protesting Vendor, and is the selected or apparent contract awardee(s).
5. “Interested Vendor” includes any responsive bidders or offerors who participated in the solicitation for award of a contract.
6. "Written" or "Writing" means a communication recorded in a medium of expression that can be preserved, read, retrieved, and reproduced for an indefinite period of time, including information in a form that is electronically transmitted and stored.

### **Submission of Protests**

1. An Interested Vendor, having submitted a responsive offer to an advertised solicitation and finding cause to protest, shall make a written request to the Assistant Secretary, setting forth, in detail, the specific grounds for challenging the rejection of its proposal or for challenging the contract award, as applicable.
2. A formal protest must be in writing and properly filed with the Department by an Interested Vendor within thirty (30) calendar days (15 calendar days if protested award is IT and greater than \$25,000) after the contract award is posted to the State’s website (IPS) or the Agency’s website. All Protesting Vendors and Interested Vendors shall be solely responsible for monitoring such website for the posting of an award without any other notice from the Department of the award. Late filed protests will not be accepted and are time-barred.
3. To be properly filed, a formal protest by the Protesting Vendor must be actually received by the Department at the address indicated in the solicitation document by one of the following methods: 1) Delivered via traceable mail. The following methods of acceptable mailing are: a) United States Postal Service certified or registered mail, return receipt requested; b) United Parcel Service; c) FedEx; or, d) some other courier service providing proof of date and time delivered. Note that simply mailing a protest does not constitute service upon DHHS; but rather, DHHS must timely receive the protest; or 2) In-person delivery to the Contract Specialist at the address stated in the solicitation document; or 3) electronic mail (to the email address provided in the solicitation document or provided on the OPCG website). A Protesting Vendor must be able to prove timely receipt by DHHS. Protesting Vendors are cautioned that DHHS is a large governmental agency, and strict compliance with service requirements is required by DHHS in order to manage and process documents received by it in a timely manner.
4. The protest packet must include:
  - a. Name, mailing address, e-mail address, and telephone number(s) of the Protesting Vendor.
  - b. All information establishing that the vendor submitting the protest is, in fact, an Interested Vendor for the purpose of filing a protest.
  - c. Solicitation number.
  - d. A detailed statement of the legal or factual grounds for the protest.
  - e. A description of resulting prejudice to the Protesting Vendor.
  - f. Statement as to the form of relief requested.

Note: Monetary damages are not available through the agency protest process. The agency is not authorized to award money damages of any kind. As such, monetary damages, such as bid preparation costs or lost profits, cannot be redressed through the agency’s bid protest process or decision.

- g. Request for a decision by the agency.
  - h. Copies of relevant documents.
5. The protest must be signed by an authorized company representative, who certifies that they have read such document, that to the best of their knowledge, it is well grounded in fact, and that it is not submitted for any improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement.
  6. It is important to note that in the event of a protest, hearing or review, the agency is under no obligation to delay, halt, or modify the procurement process.
  7. Vendors are cautioned that protests sent via U.S. Mail, including Express Mail, may not be delivered by the Mail Service Center to the agency's purchasing office by the due date. Interested Vendors are urged to take the possibility of delay into account when submitting a protest by U.S. Postal Service, courier, or other delivery service.

Protests shall be filed with the Department of Health and Human Services by choosing one the preferred delivery methods that follow:

(a) Direct Delivery

North Carolina Department of Health and Human Services  
Office of Procurement, Contracts and Grants  
ATTN: Assistant Secretary  
801 Ruggles, Drive, Hoey Building  
Raleigh, NC 27603

(b) Courier

North Carolina Department of Health and Human Services  
Office of Procurement, Contracts and Grants  
ATTN: Assistant Secretary  
2008 Mail Service Center  
Raleigh, NC 27699-2008

(c) Email

A protest packet submitted via electronic mail must not be password protected but shall be in a .PDF or .XLS format and be capable of being copied to other sources.

**TO:** [Protests@dhhs.nc.gov](mailto:Protests@dhhs.nc.gov)

**SUBJECT:** Protest\_[Contract #]\_[Interested vendor's name or company name]

8. DHHS shall provide a copy of the protest request to the State CIO within ten (10) calendar days, or the SPO within five (5) calendar days of receipt.

### **Grounds for Vendor Protests**

Under N.C. Gen. Stat. § 150B-23(a), the Protesting Vendor must present evidence proving beyond a preponderance of the evidence that in denying it the award of the Contract, the Department substantially prejudiced its rights AND that the Department:

1. Exceeded its authority or jurisdiction;
2. Acted erroneously;
3. Failed to use proper procedure;
4. Acted arbitrarily or capriciously; or
5. Failed to act as required by law or rule.

### **Protest Considerations**

The Assistant Secretary will consider the merits of all Timely Filed protests to determine if a protest meeting would be purposeful. A protest meeting may be denied for other reasons, including but not limited to:

- Protest not filed by an Interested Vendor,
- Protest not filed within the required time limits,
- Protest lacks a detailed statement of the factual grounds or that fail to clearly state legally sufficient grounds of protest,
- Procurements conducted or awarded by entities not under the jurisdiction of the Department of Health and Human Services,
- Subcontractor protests will not be accepted unless the agency has agreed in writing and the award to the subcontractor is made by the agency,
- Other reasons as may be warranted and pertinent to the particular procurement.

### **Attendees**

The agency's protest meeting is not a formal adjudicatory proceeding. The proceeding is investigatory and non-adversarial. The purposes of the protest meeting are to review the basis of the protest, to evaluate the facts and merits of the protest, and to gather information in order to prepare an agency decision.

To conduct a comprehensive and focused investigation, recommended attendance is limited to the following:

1. The protest meeting will be chaired by the Assistant Secretary or a designee appointed by a Deputy Secretary of DHHS to serve in the place of the Assistant Secretary. Should a Deputy Secretary appoint a designee to chair the protest meeting, that designee shall have the authority of the Assistant Secretary referenced herein.
2. The Protesting Vendor must be present for the protest meeting (either in-person or, as may be mutually agreed to by the parties, by any State-approved electronic meeting platform as further referenced below).
3. The Protesting Vendor may bring a representative (legal or otherwise) if it so chooses. Should the Protesting Vendor choose to bring a representative, the Protesting Vendor understands that statements from the vendor and any representatives are binding and will be considered in the final agency decision.
4. The Protesting Vendor must inform the Assistant Secretary, in writing at least two (2) business days in advance, of its intent to involve legal counsel in the meeting.
5. If the Protesting Vendor has informed the Assistant Secretary of its intent to include legal counsel, then a representative(s) of DHHS legal team will be in attendance.
6. Agency members with substantive interest in the protested procurement may attend, including the OPCG Procurement Director, OPCG Contract Specialist, Division Contract Specialist, and Division Contract Manager.
7. At the sole discretion of the Assistant Secretary, the Department may include the Awarded Vendor and/or its representatives in the protest meeting.

8. Others in attendance may include a note taker, court reporter, timekeeper, or other roles, as necessary to support the meeting process. Protest meetings are not automatically recorded or transcribed by a court reporter or other means, and the decision to involve a court reporter or otherwise record or transcribe the protest meeting is at the sole discretion of the Assistant Secretary.
9. It is an important policy of DHHS to provide reasonable accommodations to all persons attending a protest meeting needing them. A Protesting Vendor should inform the Assistant Secretary in writing of the needed accommodation(s) as soon as such need is known to the Protesting Vendor, but in any event, no later than two (2) business in advance of the protest meeting, so that DHHS has sufficient time to make arrangements. Grounds to postpone a protest meeting include insufficient time to make reasonable accommodations until such accommodations can be made.

### **Protest Meeting**

1. The protest meeting may be held in person or via any State approved electronic meeting platform. By agreeing to a virtual (electronic) meeting, the Protesting Vendor consents to a digital recording of the hearing.
2. A protest is not a formal judicial proceeding. Generally, a protest is for investigatory purposes and provides an opportunity for the Department to review its own decision.
3. Since the bid protest meeting is held for investigatory purposes, as opposed to court proceedings or administrative hearings, neither the rules of evidence nor administrative procedures apply. Therefore, there is no cross-examination or hearsay objections.
4. While the rules of evidence do not apply due to the nature of the proceeding, at the time of decision the Assistant Secretary will determine the weight or credibility to give any document or statement offered or provided during the meeting.
5. The Assistant Secretary designates the order in which participants are heard. When recognized, participants may present any relevant documentation and make statements in support of its position.
6. Generally, the meeting agenda will include:
  - Introduction of meeting participants.
  - Explanation of the protest purpose and process, planned meeting duration, and overview of meeting rules.
  - The Protesting Vendor (or their representative) will present a summarized statement of the legal and factual grounds for the protest, including a description of how the Protesting Vendor was adversely affected by the agency's decision resulting in prejudice to the vendor, and a statement as to the form of relief requested.
  - The OPCG Procurement Director (or designee) will present the facts and intent of the procurement, including background, procurement and contracting approach, evaluation criteria and method, and outcome.
  - The Protesting Vendor (or their representative) will be given the opportunity to present any facts that they deem are relevant to the protest.
  - If, in the sole discretion of the Assistant Secretary, the Awarded Vendor is allowed to participate, the extent of the Awarded Vendor's participation in the protest meeting is also at the sole discretion of the Assistant Secretary.
  - The Assistant Secretary will ask questions of all parties and will recognize others that may have questions. After the parties have had an opportunity to present information and have answered follow-up questions posed by the Assistant Secretary, the meeting will generally be closed.

- After the meeting is closed, parties will not be allowed to submit additional information. However, subject to the discretion of the Assistant Secretary, the parties may be allowed to submit supplemental information after the meeting.
- The Assistant Secretary will inform the Protesting Vendor of the next steps in the protest process.
- The meeting will adjourn.

**THE FOLLOWING PROCEDURES APPLY TO PROTESTS OF AWARDS FOR NON-INFORMATION TECHNOLOGY GOODS AND SERVICES BELOW THE AGENCY'S DELEGATION [PURSUANT TO NCGS [§143-53 \(A\)\(1\)](#) AND [01 NCAC 05B.1519](#)], AND INFORMATION TECHNOLOGY GOODS AND SERVICES BELOW \$25,000 [PURSUANT TO [09 NCAC 06B .1102\(B\)](#)]**

**Agency Initial Response**

1. If the Assistant Secretary determines that the protest meeting is meritless and/or would serve no useful purpose, then the Assistant Secretary shall, within 10 calendar days from the date of receipt of the request, respond in writing to the Vendor and refuse the protest meeting request. A copy of the notification shall be provided to the SPO or the State CIO as appropriate.
2. If the Assistant Secretary grants the protest meeting, the meeting will be held within thirty (30) calendar days of the date the protest was filed. The Protesting Vendor will be notified of the meeting's details not less than seven (7) calendar days prior to the meeting date.
3. The Protesting Vendor shall acknowledge receipt of the meeting invitation and either accept the meeting, reject the meeting, or request the meeting to be rescheduled.
  - a. If the vendor accepts the meeting invitation, the meeting will be scheduled and confirmed.
  - b. If the vendor fails to acknowledge the meeting or rejects the meeting entirely, the vendor waives all rights to seek any remedy provided by the Agency under the protest procedure.
  - c. The vendor may request, in writing, the meeting to be rescheduled. The Assistant Secretary will grant the vendor's request once, after which the Assistant Secretary will consider and treat any subsequent rescheduling requests the same as a rejection.
4. A copy of the vendor protest meeting notification shall be provided to the SPO, State CIO and the Awarded Vendor whose actual or potential award is the subject of the protest. Notifications shall include a statement of whether any purchase order or performance has been suspended or terminated, or if any such action is contemplated.
5. Notification to the Awarded Vendor does not, in any way, imply or infer that the Awarded Vendor is invited to participate in the meeting or to defend the award (or potential award) being protested. Upon notification of the protest meeting, the Awarded Vendor may request publicly available documents and submit a written response to the protest.
6. Upon written request, the Protesting Vendor will be provided any written responses received from the Awarded Vendor(s), and the Awarded Vendor will be provided any information contained within the Protesting Vendor's protest packet that is not marked "Confidential".

**Agency Decision**

1. The Assistant Secretary will consider all information relevant to the protest, and may, at his or her discretion, suspend, modify, or cancel the protested award prior to issuance of a formal protest decision.

2. A decision on the protest may include, but is not limited to, upholding or denying the protest, in whole or in part; requiring specific rectifiable action, or other relief as deemed necessary and appropriate. Neither the Protesting Vendor, Awarded Vendor, nor any Interested Vendor shall be entitled to monetary damages, costs, or expenses (including but not limited to attorney's fees) of any kind.
3. A decision shall be made no later than ten (10) calendar days from the date of the protest meeting unless it is determined that additional time is necessary to address the issues presented.
4. The Agency reserves the right to waive or extend the time requirements for decisions and final determinations, upon notification and agreement of the Protesting Vendor, if circumstances so warrant.
5. The Agency's decision is final and shall include the appeal rights under [Article 3 of NCGS §150B](#).
6. A copy of the Assistant Secretary's letter shall be forwarded to the State Purchasing Officer (SPO), or the State CIO, as appropriate.

## Appeals

1. Nothing contained in this policy is intended to limit or impair the rights of any vendor to seek and pursue additional remedies through the administrative or judicial process.
2. If the Protesting Vendor disagrees with the agency's decision, the Protesting Vendor may commence a "contested case" administrative proceeding through the Office of Administrative Hearings within the time allowed by statute and otherwise in accordance with NCGS [§150B, Article 3](#).

The agency shall notify the SPO or State CIO in writing of any further administrative or judicial review of the Contract award.

## **THE FOLLOWING PROCEDURES APPLY TO INFORMATION TECHNOLOGY AWARDS BY AGENCY GREATER THAN \$25,000 PURSUANT TO [09 NCAC 06B .1102](#).**

### Agency's Initial Response

1. If the Assistant Secretary determines that the protest meeting is meritless and/or would serve no useful purpose, then the Assistant Secretary shall, within 10 calendar days from the date of receipt of the request, respond in writing to the Protesting Vendor and refuse the protest meeting request. A copy of the notification shall be provided to the State CIO.
2. If the Assistant Secretary grants the protest meeting, the meeting will be held within thirty (30) calendar days of the date the protest was filed. The Protesting Vendor will be notified of the meeting's details not less than seven (7) calendar days prior to the meeting date.
3. The Protesting Vendor shall acknowledge receipt of the meeting invitation and either accept the meeting, reject the meeting, or request the meeting to be rescheduled.
  - a. If the vendor accepts the meeting invitation, the meeting will be scheduled and confirmed.
  - b. If the vendor fails to acknowledge the meeting or rejects the meeting entirely, the vendor waives all rights to seek any remedy provided by the Agency under these protest procedures.
  - c. The vendor may request, in writing, the meeting to be rescheduled. The Assistant Secretary will grant the vendor's request once, after which the Assistant Secretary will consider and treat any subsequent rescheduling requests the same as a rejection.

4. A copy of the vendor protest meeting notification shall be provided to the State CIO and the Awarded Vendor whose actual or potential award is the subject of the protest. Notification to the Awarded Vendor and the State CIO shall include a statement of whether any purchase order or performance has been suspended or terminated, or if any such action is contemplated.
5. Notification to the Awarded Vendor does not, in any way, imply or infer that the Awarded Vendor is invited to participate in the meeting or to defend the award (or potential award) being protested. Upon notification of the protest meeting, the Awarded Vendor may request publicly available documents and submit a written response to the protest.
6. Upon written request, the Protesting Vendor will be provided any written responses received from the Awarded Vendor(s), and the Awarded Vendor will be provided any information contained within the Protesting Vendor's protest packet that is not marked "Confidential".

### **Final Agency Decision**

1. The Assistant Secretary will consider all information relevant to the protest, and may, at his or her discretion, suspend, modify, or cancel the protested award prior to issuance of a formal protest decision.
2. A decision on the protest generally includes upholding or denying the protest, in whole or in part; requiring specific rectifiable action, or other relief as deemed necessary and appropriate.
  - (a) If the Assistant Secretary determines no violation of rules or statutes occurred, he or she will inform the Protesting Vendor, the Awarded Vendor, and State CIO in writing. The letter will set forth the reasons for the determination.
  - (b) If performance has not begun and the Assistant Secretary determines that a violation of the rules or statutes has occurred, he or she will inform the Protesting Vendor, the Awarded Vendor, the State CIO, and each Interested Vendor in writing. The letter will set forth the reasons for the determination and the appropriate remedial action.
  - (c) If performance has begun and the Assistant Secretary determines that a violation of the rules or statutes has occurred, he or she will inform the Protesting Vendor, Awarded Vendor, State CIO, and each Interested Vendor in writing. The letter will set forth the reasons for the determination, may conclude that the awarded contract is void, and may provide planned re-solicitation information, if known.
3. Neither the Protesting Vendor, the Awarded Vendor(s), nor any Interested Vendors shall be entitled to monetary damages, costs, or expenses (including but not limited to attorney's fees) of any kind.
4. A decision shall be made no later than ten (10) calendar days from the date of the protest meeting unless it is determined that additional time is necessary to address the issues presented. The Agency reserves the right to waive or extend the time requirements for decisions, upon notification and agreement of the Protesting Vendor, if circumstances so warrant.
5. The decision of the Assistant Secretary on a protest is final and conclusive unless the Protesting Vendor requests Further Administrative Review by the State CIO. When Further Administrative Review involves a contract awarded by the agency that is twenty-five thousand dollars (\$25,000) or more in value, the agency shall be a party in any further review processes.

### **Further Administrative Review**

1. If the Protesting Vendor disagrees with the agency's decision, the Protesting Vendor may request a hearing and final decision by the State CIO in accordance with [09 NCAC 06B .1102](#) and [Article 3A of G.S. 150B](#).
2. Such request must be written and received in the State CIO's office no later than sixty (60) calendar days after the date of the final agency decision (as determined by the receipt date or letter date, whichever is later).
3. Nothing contained in this policy is intended to limit or impair the rights of any vendor to seek and pursue additional remedies through the administrative or judicial process.