

**COMMON ISSUES
IN
PROTESTS AND APPEALS**

| Invitations for Bids | |
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| Responsiveness is the Issue | The key question is: Would it be possible to bind the bidder to perform, in accordance with our specifications, without any further negotiations, changes, agreements, etc.? If not, the bid is non-responsive. |
| | Beware of <i>responsibility</i> questions masquerading as responsiveness issues. Remember, responsibility deals with the vendor and responsiveness concerns the bid. Things like adequate experience, plant size, financials, etc. are responsibility issues. The bidder can be allowed to submit documentation that deals with responsibility AFTER the bid opening, even if the IFB required that it be included in the bid package. (<i>The exception is a bid bond or other bid security. §24-105-201(3) CRS.</i>) Also, you can request additional supporting materials to ensure that the bidder is responsible, and you need not request the same material from the other bidders (<i>§24-103-401 CRS</i> and supporting rules). |
| Mistakes in Bids R24-103-202a-09 | If you suspect a mistake, ask the bidder to confirm. If the bidder alleges mistake, follow these rules: |
| | Minor informalities. These are matters of form over substance and can be corrected without prejudicing other bidders, e.g. wrong number of copies, signed in the wrong place, failed to acknowledge an amendment, if it's clear that bidder did see the amendment. Minor informalities can be waived or corrected. |
| | Mistakes where the intended bid is clear – correct the bid accordingly. |
| | Mistakes where the intended bid is unclear – can allow the bidder to withdraw the bid if he can show proof that an error was made. Notice that the bidder does not have an option to correct in this situation. |
| Requests for Proposals | |
| “Reasonable” evaluations | Your determination of which offeror is “most advantageous” is final and conclusive unless it is clearly erroneous, arbitrary, capricious, or contrary to law. (<i>§24-103-701 CRS</i>). Therefore, it is important to show a reasonable basis for the decision. |
| | If numerical evaluation is used, be SURE to follow-up on inconsistent scores, resolve discrepancies or document legitimate professional differences of opinion. |
| | Try to limit the ratings to 4 or 5 point scale. The broader the scale, the harder it is to explain the difference between ratings, e.g. If you can rate a factor from 1-100, what is the |

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| | difference between an 81 and a 79? |
| | Contrary to what you might expect, the more factors and sub-factors you score, the more difficult it is to establish a reasonable basis for each score and to differentiate between the factors. |
| Scoring References | If at all possible, DON'T score references. The best use of references is a Pass/Fail check on the winner prior to issuing a Notice of Intent to Award. |
| | You might also use them as a way to confirm each vendor's experience. Again, this would be Pass/Fail. |
| | If you just have to score references, be sure to ask the exact same questions about each offeror, use a five point – or fewer – scale to rate each question, and if possible, have the same person check all references and score this factor for every offeror. |
| | If you have references as a separate factor/score from experience, be sure all the evaluators can describe the difference between them. |
| Scoring Orals | You must handle orals in one of two ways: |
| | The orals represent an opportunity for clarifications, possibly followed by minor changes to the proposals and/or BAFO's. In this case, the results of the orals would be reflected in changes to the preliminary scores based on the clarifications. In this case, the orals would usually be limited to those offerors determined to be in the competitive range. The RFP should indicate that orals are a possibility but should caution the offerors that they will not necessarily have an opportunity to revise their proposals, give an oral presentation, discuss their proposals, or make a BAFO. |
| | The orals are scored as an independent part of the evaluation. In this case, disclose this as a factor or factors in the RFP, and describe how the orals fit into the overall evaluation process. Normally, all offerors would be given the opportunity to make an oral presentation. |
| Whose Decision is This, Anyway? | The evaluation plan must describe how the decision will be made. Never give a "final decision" role to an uninvolved party or body. If a high level person or body insists on being kept apprised of the evaluation process, give them a defined role in the process. See §24-103-701 CRS and R24-103-203-11. |
| Offeror References - Checking or Not Checking | Make sure the RFP is clear on requesting references and how they will be utilized in the evaluation process. |
| Award upon initial receipt of proposals - is this enough to adequately choose a contractor | Committees should plan the phases for evaluation and include the opportunity for discussions, clarifications, oral presentations etc. |
| Consistency in what answers we give and what is reflected in the RFP and the evaluation | Pre-proposal conferences generate questions and answers, be careful in how answers are handled in the session and how they are included, or not included, in the record. |
| Evaluating Cost in RFPs - What are best practices- how is the | 24-103-203. Competitive Sealed Proposals. (7) The award shall be made to the responsible offeror whose |

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| <p>award justified in terms of value?</p> <p>The proper weighting of cost is important to allow for an award to be made to the best solution which also provides good value to the State.</p> | <p>proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made. A contract resulting from a competitive sealed proposal is not awarded until any protest made in connection with the proposal has been resolved pursuant to §24-109-102 CRS. No property interest of any nature shall accrue until the contract is awarded and signed by both parties.</p> |
| <p>Cost Proposal Evaluation</p> | <p>Consider handling the cost proposal evaluation in purchasing or in combination with committee chair. Cost factors that are objective should not be allowed to be scored by various committee members with their subjective input.</p> |
| <p>Protest Decisions - Make an effort to resolve at this stage.</p> <p>The best time to defend the decision to award is prior to issuing the intent to award notice. It is critical that a thorough review of all aspects of the solicitation process is made. You must be satisfied that the award decision is defensible.</p> <p>The Code and Rules expect that all items of concern are addressed and if found valid action is taken to resolve.</p> <p>The code and rules expect that a decision will be made upon seven days of receipt of the protest. Make every effort to meet this timeframe, but if needed, you may request more time from the protestor. The bottom line is taking the necessary time to properly review the issues/concerns of the protestor</p> | <p>24-109-101. Resolution of Controversies.</p> <p>(1) The head of a purchasing agency or a designee is authorized to settle and resolve any questions regarding:</p> <p>(a) Any protest concerning the solicitation or award of a contract;</p> <p>(b) Debarment or suspension from consideration for award of contracts; and</p> <p>(c) Any controversy arising between the state and a contractor by virtue of contract between them, including, without limitation, controversies based upon breach of contract, mistake, misrepresentation, or any other cause for contract modification or rescission.</p> <p>24-109-102. Protested Solicitations and Awards.</p> <p>(1) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the head of a purchasing agency or a designee. The protest shall be submitted in writing within seven working days after such aggrieved person knows or should have known of the facts giving rise thereto.</p> <p>(2) The head of a purchasing agency or a designee shall have the authority to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. A written decision regarding the protest shall be rendered within seven working days after the protest is filed. The decision shall be based on and limited to a review of the issues raised by the aggrieved bidder, offeror, or contractor and shall set forth each factor taken into account in reaching the decision. This authority shall be exercised pursuant to rules promulgated to provide for the expeditious resolution of the protest.</p> |
| <p>Do not introduce additional factors into the evaluation process after receipt of proposals</p> | <p>Use vigilance with evaluators; do not allow factors beyond those indicated in the RFP to be introduced in the process.</p> |

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