

Santa Barbara Metropolitan Transit District
PROCUREMENT PROTEST PROCEDURES¹

Revised November 1, 2008

9.1 Purpose and Applicability

The procedures described in this section have been established to ensure uniform, timely, and equitable consideration of all complaints received by MTD concerning its procurement activities. The Procurement Officer shall be responsible for the conduct and administration of procurement protests pursuant to the procedures established in this Section and Section 7.0 of [the MTD Procurement Manual]. The following protest procedures shall be employed for procurements conducted by MTD. Such protests shall be applicable only to procurements wherein MTD requests bids, proposals or offers for goods or services financed in whole or in part by public funds. Procurements involving FTA funds are subject to additional protest procedures established by that agency. Procedures applicable to FTA funded procurements are so identified.

9.2 Definitions

The following definitions apply to terms used in this section:

Days: Unless otherwise specified, refers to MTD working days.

File or Submit: Refers to the date of receipt by MTD.

Interested Party: All bidders or proposers involved in an MTD procurement. This may also include a subcontractor or supplier who shows substantial economic interest in a provision of the IFB or RFP, or in the interpretation of such provision.

Bid: Refers to and includes: i) the terms “offer” and “proposal” as employed in this document; ii) sealed bids; iii) competitive negotiation, and; iv) non-competitive negotiation.

9.3 Bases for Protest

If in the course of a procurement action an interested party has reason to believe that: a) free and open competition does not exist, or; b) MTD solicitation documents contain restrictive specifications, such party may file a protest in accordance with the procedures described herein.

In addition to the above, protests may be filed based upon the following factual or alleged circumstances:

- (a) Violation of federal, state or local law or regulation;
- (b) Sole source procurements;
- (c) Award made to other than the low bidder;
- (d) Failure to adhere to evaluation criteria set forth in solicitation documents, or use of additional criteria not so published;
- (e) Changes to evaluation criteria made during the evaluation process;
- (f) Local or DBE preferences;

¹ Excerpted from Chapter 9 of the MTD *Procurement Manual* as revised in March 2003 and amended in April 2003.

- (g) Solicitation advertising violating applicable laws or regulations;
- (h) Conduct of negotiations after bid opening in sealed bid procurements;
- (i) Provision of inadequate time to prepare a bid or proposal.

Protests of MTD procurements filed by interested parties shall be considered in two general categories: 1) those filed prior to award, and; 2) protests occurring after award has been made.

9.4 Pre-Award Protests

The following procedures shall be followed for all protests filed prior to award:

1. Protests must be filed no later than ten (10) days prior to the date established in the solicitation for receipt of bids or proposals.
2. Protests must be submitted in writing to the attention of the Procurement Officer. The written protests shall include:
 - (a) The name, address, and telephone number of the protestor;
 - (b) The MTD solicitation number and project description;
 - (c) A statement of the grounds for the protest, accompanied by all supporting documentation. All grounds must be fully supported with documentation;
 - (d) The resolution sought from MTD by the protestor.
3. The Procurement Officer shall receive the protest and issue written notification to the protestor within five days that the matter is undergoing review. Notice of the protest shall be given in writing to all known recipients of solicitation documents.
4. Procurement activity shall be suspended pending resolution of a protest unless one or more of the following conditions exists:
 - (a) The goods or services being procured are urgently required;
 - (b) Delivery or performance will be unduly delayed by failure to make an award promptly;
 - (c) Failure to make prompt award will result in termination of a critical MTD function or activity or otherwise cause undue harm to the District, or;
 - (d) The General Manager prepares a written finding that such protest is clearly frivolous in nature, and therefore does not warrant a disruption of the procurement process.

The Procurement Officer shall be responsible for making a written determination that circumstances require MTD to proceed with a procurement during a pending protest. Unless such determination is made the procurement shall be suspended pending resolution of the protest. All parties known to have received solicitation documents shall be notified in writing of such suspension by the Procurement Officer.

5. All protests received within the specified period shall be examined by the Procurement Officer who shall evaluate the matter and, within five (5) days, forward a recommendation concerning its disposition to the General Manager. No additional material shall be accepted for consideration during the protest review unless specifically requested in writing by MTD.
6. The General Manager may attempt to resolve the protest with the affected party. If: a) within five (5) days after receipt of recommendations from the Procurement Officer the General Manager elects not to attempt such resolution, or; b) if resolution is attempted but not achieved within twenty (20) days after

receipt of the aforementioned recommendations, the General Manager shall forward the matter to the MTD Board of Directors (hereinafter “Board”) for resolution. For these purposes “resolution” shall mean the written withdrawal of a protest by the originating party.

7. The MTD Board shall formally consider the protests at a public meeting within fourteen (14) calendar days after the date on which the matter is forwarded by the General Manager. Protesting parties shall be notified in writing of the date on which their matters shall be considered by the MTD Board. Such parties shall be afforded an opportunity to present their case at the Board meeting.

8. The MTD Board shall then make a formal decision on such protests at a public meeting. The decision of the Board, along with a formal record of the protest, shall become a matter of public record, and shall be considered final. The Procurement Officer shall notify protesting parties in writing of any protest decision made by the Board. Except under conditions described in #4 above, such decision by the MTD Board shall be made prior to award of any contract related to the subject procurement.

9. Should the Board deny the protest, MTD shall proceed with the procurement process. In the case of FTA funded procurements no contract shall be awarded within five (5) days following the Board’s decision unless such award is necessary due to circumstances described in #4 above. If the decision of the Board is to uphold the protest, then MTD shall proceed pursuant to Board direction.

9.5 Post-Award Protests

Protests received after award of contract shall be considered only if received within five (5) days following the date on which such award is made. Post-award protests received after that time shall not be considered. Post-award protests shall be processed in the same fashion as that employed for pre-award protests. However, the award shall remain valid and procurement activities shall continue unless the General Manager determines in writing that suspension of such award is necessary pending protest resolution. In that event the awardee shall be so notified in writing, and the Procurement Officer shall effect an agreement with the Contractor for suspension of activity.

9.6 FTA Protest Review Procedures²

The FTA has developed an appeals process for reviewing protests of MTD’s procurement decisions.

1. Requirements for the Protester. The protester must:

- (a) Qualify as an “Interested Party.” Only an “interested party” qualifies for the FTA review of its appeal. An “interested party” is a party that is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award the third party contract at issue.
 - (1) Subcontractors. A subcontractor does not qualify as an “interested party” because it does not have a direct economic interest in the results of the procurement.
 - (2) Consortia/Joint Ventures/Partnerships/Teams. An established consortium, joint venture, partnership, or team that is an actual bidder or offeror and is acting in its entirety, would qualify as an “interested party” because it has a direct economic interest in the results of the procurement. An individual member of a consortium, joint venture, partnership, or

² Excerpted from Chapter VII of Federal Transit Administration Circular 4220.1F *Third Party Contracting Guidance* issued November 1, 2008.

team, acting solely in its individual capacity, does not qualify as an “interested party” because it does not have a direct economic interest in the results of the procurement.

(3) Associations or Organizations. An association or organization that does not perform contracts does not qualify as an “interested party,” because it does not have a direct economic interest in the results of the procurement.

(b) Exhaust Administrative Remedies. The protester must exhaust its administrative remedies by pursuing MTD’s protest procedures to completion before appealing the recipient’s decision to the FTA.

(c) Appeal Within Five Days. The protester must deliver its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has received actual or constructive notice of MTD’s final decision. Likewise, the protester must provide its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has identified other grounds for appeal to the FTA. For example, other grounds for appeal include MTD’s failure to have or failure to comply with its protest procedures or failure to review the protest.

2. Extent of FTA Review. As provided in the Common Grant Rule for governmental recipients, the FTA will limit its review of third party contract protests as follows:

(a) MTD’s Procedural Failures. The FTA will consider a protest if MTD:

- (1) Does not have protest procedures, or
- (2) Has not complied with its protest procedures, or
- (3) Has not reviewed the protest when presented an opportunity to do so.

(b) Violations of Federal Law or Regulations. The FTA will not consider every appeal filed by a protestor of MTD’s protest decision merely because a Federal law or regulation may be involved. Instead, the FTA will exercise discretionary jurisdiction over those appeals involving issues important to the FTA’s overall public transportation program. The FTA will refer violations of Federal law for which it does not have primary jurisdiction to the Federal authority having proper jurisdiction.

(c) Violations of State or Local Law or Regulations. The FTA will refer violations of State or local law to the State or local authority having proper jurisdiction.

3. FTA Determinations to Decline Protest Reviews. The FTA’s determination to decline jurisdiction over a protest does not mean that FTA approves of or agrees with MTD’s decision or that the FTA has determined the contract is eligible for Federal participation. The FTA’s determination means only that the FTA does not consider the issues presented to be sufficiently important to the FTA’s overall program that the FTA considers a review to be required.