

## 67-9232. Challenges and Appeals.

### (1) Bid specifications.

(a) There shall be, beginning with the date of ~~receipt~~posting of the notice of a bidsolicitation on the state's electronic bid board, a period of not more than ten (10) working days in which any vendor, qualified and able to sell or supply the ~~items~~property to be acquired, may ~~notify~~submit to the administrator ~~in writing of his intention to a~~challenge to the specifications. The challenge shall be in writing and shall specifically state the exact nature of ~~his~~the challenge. The specific challenge shall describe the location of the challenged portion or clause in the specification document, unless the challenge concerns an omission, explain why any provision should be struck, added or altered, and contain suggested corrections.

(b) Upon receipt of the challenge, the administrator shall either direct the procurement lead to modify the specification and re-post amend the bidsolicitation; deny the challenge, and such denial shall be considered the final agency decision,~~;~~ or ~~he shall~~ present the matter to the director for appointment of a determinations officer. If the director appoints a determinations officer, then all vendors, who are invited to bid on the property sought to be acquired, shall be notified of the appeal and the appointment of a determinations officer~~r~~ and may indicate in writing their agreement or disagreement with the challenge within five (5) days. The notice to the vendors may be provided on the state's electronic bid board. ~~Any vendor may note his agreement or disagreement with the challenge.~~ The determinations officer may, on his own motion, refer the challenge~~d~~ portion and any related portions of the challenge to the author of the specification to be rewritten with the advice and comments of the vendors capable of supplying the property, rewrite the specification himself and/or reject all or any part of any challenge. If specifications are to be rewritten, the matter shall be continued until the determination officer makes a final determination of the acceptability of the revised specifications.

(c) ~~The~~ administrator shall direct the procurement lead to reset the bid-solicitation opening-closing no ~~later~~less than ~~fifteen~~ten (10) days after final determination of challenges or the amendment of the specifications. ~~If the administrator denies the challenge, then the bid opening date shall not be reset.~~

(d) The final decision of the determinations officer or administrator on the challenge to specifications shall not be considered a contested case within the meaning of the administrative procedure act;~~- and~~ the final decision of the determinations officer or the administrator of the division of purchasing on the challenge to specifications shall not be subject to further administrative or judicial review~~provided that a vendor disagreeing with specifications may include such disagreement as a reason for asking for appointment of a determinations officer pursuant to subsection (3) of this section.~~

### (2) Nonresponsive bids.

(a) There shall be, beginning with the day following ~~receipt~~issuance of the letter or electronic notice of rejection in a formal sealed solicitation process, a period of five (5) working days in which a bidder vendor whose bid was found nonresponsive may appeal such decision to the director of the department of administration. The appeal must be in writing, and set forth in specific terms the reasons why the bid should have been found responsive. A nonresponsive bid, within the meaning of this chapter, is a bid that does not comply with the bid-solicitation invitation and specifications requirements. Within five (5) working days from receipt of the appeal, and shall not apply to a vendor whose bid is considered but

~~who is determined not to be the lowest responsible bidder as defined in this chapter.~~ The director shall:

(i) Deny the application; ~~or~~

(ii) Sustain the appeal and reinstate the bid; or

~~(iii)~~ Appoint a determinations officer to review the record and submit a recommended order to the director to affirm or reverse the administrator's decision of bid responsiveness.

(b) The director shall, upon receipt of a written recommendation from the determinations officer, sustain, modify or reverse the administrator's nonresponsive bid decision. An appeal conducted under the provisions of this subsection shall not be considered a contested case and shall not be subject to further administrative or judicial review under the provisions of chapter 52, title 67, Idaho Code.

(3) Lowest responsive bidder.

(a) A vendor whose bid is considered but determined not to be the lowest responsible bid, may, within five (5) working days following ~~receipt-issuance~~ of the letter or electronic notice that he is not the lowest responsible bidder, apply to the director for appointment of a determinations officer. The application shall be in writing, and set forth in specific terms the reason why the administrator's decision is thought to be erroneous. Upon receipt of the application, the director shall within five (5) working days:

(i) Deny the application, and such denial shall be considered the final agency decision;

(ii) Reverse the administrator's decision, and direct the procurement lead to re-issue award notices accordingly;

(iii) Direct the administrator to cancel the solicitation, if such action is determined by the Ddirector to be in the best interest of the state;

~~(iv)~~ Appoint a determinations officer to review the record to determine whether the administrator's selection of the lowest responsible bidder was in correct; or

~~(iii)~~ Appoint a determinations officer with authority to conduct a contested case hearing in accordance with the provisions of chapter 52, title 67, Idaho Code.

(b) A determinations officer appointed pursuant to paragraph (a)~~(iii)~~ of this subsection shall inform the director by written recommendation, whether, in his opinion, the administrator's selection of the lowest responsible bidder is correct. The determinations officer in making this recommendation may rely on the documents of record, statements of employees of the state of Idaho participating in any phase of the selection process, and statements of any vendor submitting a bid. A contested case hearing shall not be allowed and the determinations officer shall not be required to solicit statements from any person. Upon receipt of the recommendation from the determinations officer, the director shall sustain, modify or reverse the decision of the administrator on the selection of the lowest responsible bidder or the director may appoint a determinations officer pursuant to paragraph (a)~~(iii)~~ of this subsection.

(c) A determinations officer appointed pursuant to paragraph (a)(~~iv~~) of this subsection shall conduct a contested case hearing and upon conclusion of the hearing shall prepare findings of fact, conclusions of law and a recommendation order for the director of the department of administration. Upon receipt of the findings of fact, conclusions of law and recommended order, the director shall enter a final order sustaining, modifying or reversing the decision of the administrator on the selection of the lowest responsible bidder.

(d) The department of administration is not required to delay, halt, or modify the procurement process pending the result of an appeal, determinations officer review, contested case hearing, or judicial review. There shall be no right under any legal theory to recover a form of damages or expenses arising from a bid award or an appeal of a bid award. If judicial review pursuant to subsection (3)(c) of this sections finds a bid award to be a violation of law, the director shall:

(i) If a contract has not been awarded: cancel the solicitation; or, revise the solicitation to comply with law.

(ii) If a contract has been awarded: ratify and affirm the contract if doing so is in the best interest of the state; or, terminate the contract.

(4) Sole source procurement.

(a) In the case of a sole source procurement, there shall be a period of not more than five (5) working days from the last date of public notice in which any vendor, able to sell or supply the property to be acquired, may notify-submit to the administrator~~director~~, in writing, of his intention to a challenge to the sole source procurement and briefly explain the nature of the challenge.

(b) Upon receipt of the challenge, the director shall either:

(i) Deny the application;

(ii) Sustain the challenge and direct the administrator to rescind the sole source authorization and conduct a competitive solicitation; or

(iii) Appoint a determinations officer to review the record and submit a recommended order to the director to affirm or reverse the administrator's sole source determination.

(c) The director shall, upon receipt of a written recommendation from the determinations officer, sustain, modify or reverse the administrator's sole source determination. An appeal conducted under the provisions of this subsection shall not be considered a contested case and shall not be subject to further administrative or judicial review under the provisions of chapter 52, title 67, Idaho Code.

(5) Challenges and appeals submitted outside of the permitted time established in this section shall be rejected as untimely; provided, however, that the period for filing an appeal under this section shall be suspended upon the filing by the appealing vendor of a request for public records related to the solicitation pursuant to chapter 2, title 74, Idaho Code. The period for filing an appeal shall resume upon the response to such request pursuant to section 74-104, Idaho Code.

(6) The director shall provide a response to all challenges and appeals within the time established in this section; provided, however, that the director may make a determination that additional time is required due to factors including, but not limited to, the length and complexity of the appeal or challenge, and the availability of employees involved in the solicitation process. If the director determines that additional time is required, the director shall provide notice of the need for additional time to the vendor submitting the appeal within the time established in this section. The director shall provide a response as soon as possible, and in all cases within thirty (30) days of receipt of the appeal or challenge.

(7) The administrator may, on his own initiative, file a complaint with the director for a hearing before a determinations officer. The director shall appoint a determinations officer who shall make written recommendations to the director and the director shall render whatever decision is necessary to resolve the complaint. A complaint pursuant to this section shall not be considered a contested case pursuant to chapter 52, title 67, Idaho Code, and the decision of the director shall not be subject to further administrative or judicial review.

~~(68)~~ The director is hereby authorized and directed to appoint a determinations officer whenever one is required by this chapter. The officer shall meet and render whatever determination is called for. When a complaint is filed pursuant to subsection (2) of this section, no bid may be awarded until the final decision is rendered by the director; provided that in all other cases where a determinations officer is appointed by the director, the director shall have the power to allow the acquisition contract to be awarded to the successful bidder prior to or after the decision of the determinations officer if he determines such award to be in the best interest of the state. Any determinations officer appointed pursuant to this section shall exist only for the duration of unresolved complaints on an acquisition and shall be dismissed upon resolution of all such complaints. The determinations officer shall be guided in his determination by the best economic interests of the state for both the near future and more extended periods of time. In addition to the powers conferred on the determinations officer, the director may:

- (a) Impose the penalty prescribed by section 67-9231(3), Idaho Code;
- (b) Enjoin any activity which violates this chapter;
- (c) Direct that bids be rejected, or sustained;
- (d) Direct that specifications be rejected, sustained or modified; and
- (e) Direct further legal action.

(79) Challenges or appeals conducted pursuant to Except as set forth in subsection (1), (2), (3)(a)(i) or (3)(a)(iii)(c) of this section, an appeal pursuant to this section shall not be considered to be a contested case as that term is defined in the administrative procedure act pursuant to chapter 52, title 67, Idaho Code, and the director shall not be subject to further administrative or judicial review. An appeal conducted pursuant to subsection (3)(a)(iii) of this section shall be conducted as a contested case according to the provisions of chapter 52, title 67, Idaho Code.