CHAPTER 11
VENDOR APPEALS

Chapter rescission date pursuant to Iowa Code section 17A.7: 1/1/28

129—11.1(8B) Purpose.

11.1(1) The office is required to institute procedures to ensure effective and efficient compliance with information technology standards established by the office, and to develop policies and procedures that apply to all information technology goods and services acquisitions and ensure the compliance of all participating agencies. In furtherance of that objective, these rules establish the process by which vendors may challenge the office's or participating agencies' administration of competitive selection processes, prequalification processes, or reverse auction processes administered by the office or participating agencies as authorized by the office. A vendor's failure to utilize this process shall be deemed a failure to exhaust administrative remedies.

11.1(2) These rules shall not apply if a purchasing entity has adopted its own rules governing award or disqualification decisions of or by the purchasing entity that conflict with these rules. However, even if a purchasing entity has adopted its own vendor appeal rules, the purchasing entity may elect to follow these rules in the case of information technology goods and services acquisitions to the extent the purchasing entity has stated its intention to follow these rules in the competitive selection documents or other applicable solicitation documents.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.2(8B) Definitions. The definitions in Iowa Code section 8B.1 and rule 129—10.2(8B) shall apply to this chapter. In addition, the following definitions shall also apply:

"Award," for purposes of this chapter, means the selection of a vendor to receive a contract, master information technology agreement, or order for information technology as the outcome of a competitive selection process or reverse auction process, or decision to not prequalify or remove a vendor from a prequalified list as part of a prequalification process.

"Head of the purchasing entity" means the head of the purchasing entity or that person's designee.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.3(8B) Filing an appeal.

11.3(1) *Notice of intent to appeal.* Any vendor that filed a timely bid or proposal and that is aggrieved or adversely affected by an award ("appellant"), including a decision of the purchasing entity to disqualify a vendor, may appeal the decision by filing a notice of intent to appeal with the entity issuing the competitive selection documents or other applicable solicitation documents ("purchasing entity") to the purchasing entity's address as identified in the competitive selection documents or other applicable solicitation documents. The purchasing entity must actually receive the notice of intent to appeal within the time frame specified in the competitive selection documents or other applicable solicitation documents for the notice of intent to appeal and thereby the appeal to be considered timely. If the competitive selection documents or other applicable solicitation documents are silent on the time frame to appeal, the time frame shall be five days from the date of the issuance of the notice of intent to award. Failure to timely file a notice of intent to appeal will result in dismissal.

11.3(2) *Initial disclosures—public, redacted proposals and evaluation materials.* Following the purchasing entity's receipt of the notice of intent to appeal, the purchasing entity will transmit to the appellant a public copy from which claimed confidential or proprietary information has been excised of the awardee's proposal and, to the extent applicable, evaluation committee materials, documentation, analysis, and results. Upon written request of the appellant, the purchasing entity will provide a public copy from which claimed confidential or proprietary information has been excised of unsuccessful vendors' proposals. The appellant shall be entitled to no additional discovery, materials, or information in furtherance of the appellant's appeal unless and until the proceedings advance to a second-tier review.

11.3(3) *Notice of appeal.* Within five days of the appellant's receipt of the initial disclosures required by subrule 11.3(2), the appellant shall file a formal notice of appeal with the purchasing entity to the purchasing entity's address as identified in the competitive selection documents or other applicable solicitation documents. Such notice of appeal shall conform to and comply with the form and format and content requirements set forth in subrules 11.3(4) and 11.3(5). The purchasing entity must actually receive the notice of appeal within the five-day time frame. Failure to timely file a notice of appeal will result in dismissal.

11.3(4) *Form and format.* Notices of appeal should be concise and logically arranged. No other technical forms of pleading are required.

11.3(5) *Contents.* Notice pleading is not permitted. The notice of appeal shall:

a. Include the name, address, email address, and telephone and facsimile numbers of the vendor;

b. Be signed by the vendor or the vendor's authorized representative;

c. Identify the specific award forming the basis of the vendor's challenge;

d. Set forth information establishing the timeliness of the appeal;

e. State the specific legal and factual grounds upon which the vendor is appealing the award, in a manner that ties the underlying factual assertions to the legal grounds forming the basis of the appeal;

f. Describe how the vendor is aggrieved or adversely affected by the award;

g. If applicable, explain whether and why the vendor failed to raise the issue(s) raised in the appeal through a request for clarification process or other question and answer process available during the competitive selection process;

h. State that the vendor agrees and consents to, and by submitting its notice of appeal to the purchasing entity stipulates to the entry of, a protective order as a condition precedent to receiving any documents or information containing or comprised of, in whole or in part, confidential or proprietary information relevant to the vendor's appeal should the matter proceed to a second-tier review; and

i. Set forth the specific relief requested, i.e., whether the vendor is requesting that the award be reversed in its entirety or remanded back to the purchasing entity to correct any legal errors.

11.3(6) *Public records.* A notice of appeal shall be considered a public record and may be distributed to third parties, including to the vendor's competitors, in accordance with rule 129—11.4(8B). If the vendor believes the notice of appeal contains information that should be maintained by the purchasing entity as proprietary or confidential in accordance with applicable law, the vendor must conspicuously identify such a request on the first page of the notice of appeal; mark each page upon which confidential or proprietary information appears; submit a public copy from which claimed confidential or proprietary information has been excised (information must be excised in such a way as to allow the public to determine the general nature of the information removed and to retain as much of the otherwise public evidence and information as possible); enumerate the specific grounds in Iowa Code chapter 22 or other applicable law that support treatment of the specific information as confidential in the notice of appeal; and explain why disclosure of the specific information would not be in the best interest of the public in the notice of appeal. Notwithstanding the foregoing, intervenors, including competitors of the vendor filing the notice of appeal, may still receive an unredacted copy of a notice of appeal subject to the protective order requirements and processes set forth in this chapter.

11.3(7) *Failure to comply.* An appeal may be dismissed for failure to comply with any of the requirements of this rule.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.4(8B) Notice of receipt of appeal to awardee and intervention.

11.4(1) *Notice of likely appeal.* Following the purchasing entity's receipt of a timely notice of intent to appeal, the purchasing entity shall promptly give notice of the likely appeal to the awardee(s), if any.

11.4(2) *Intervention.* The awardee(s) may intervene within five days of such notification by filing a notice of intent to intervene with the purchasing entity.

11.4(3) *Initial disclosures—notice of appeal and public, redacted proposals and evaluation materials.* Following the purchasing entity's receipt of a timely formal notice of appeal in accordance with subrule 11.3(3), the purchasing entity will transmit to the intervenor(s) a public copy from which claimed confidential or proprietary information has been excised of the formal notice of appeal and the appellant's

proposal and, to the extent applicable, evaluation committee materials, documentation, analysis, and results. Subject to agreement and consent by the awardee(s) to the entry of a protective order in accordance with the provisions of this chapter governing protective orders, the purchasing entity may provide unredacted copies of the formal notice of appeal to the intervenor(s). If the intervenor(s) does not agree to the entry of a protective order, the purchasing entity will only provide the awardee(s) with a public, redacted copy of the notice of appeal. Upon written request of the intervenor, the purchasing entity will provide a public copy from which claimed confidential or proprietary information has been excised of unsuccessful vendors' proposals. The intervenor(s) shall be entitled to no additional discovery, materials, or information unless and until the proceedings advance to a second-tier review.

11.4(4) *Intervention.* Within five days of the appellant's receipt of the initial disclosures required by subrule 11.4(3), the intervenor(s) may submit a written justification defending the award, which written justification shall generally conform, to the extent applicable, to the filing, form and format, and content requirements, and be subject to the same public records requirements and limitations set forth in rule 129—11.3(8B) applicable to notices of appeal.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.5(8B) First-tier review.

11.5(1) *Internal review.* Following the receipt of a notice of appeal in accordance with rule 129—11.3(8B) and written justification or expiration of the period for intervention in accordance with rule 129—11.4(8B), the purchasing entity shall conduct an internal review of the grounds upon which the vendor challenges the award and the facts and circumstances involved. The purchasing entity shall issue a brief written decision affirming, modifying, or reversing, in whole or in part, the award and order any relief as determined appropriate by the purchasing entity.

11.5(2) *Consultation with office.* The office may consult with and assist other purchasing entities in conducting the review required by this rule.

11.5(3) *Waiver.*

a. An issue that is not raised in the original notice of appeal shall be deemed waived for purposes of any first-, second-, or third-tier review or judicial review proceeding or appeal therefrom. For the avoidance of doubt, such issues may not be raised for the first time at a second-tier review hearing.

b. If a competitive selection document or other solicitation document contains a request for clarification process, or other similar question and answer process, failure of a vendor to raise an issue (including but not limited to related to the bid specifications) that could have been raised as part of that process shall constitute a waiver of any objection or argument as part of any first-, second-, or third-tier review or judicial review; such waiver is intended to ensure that purchasing entities are able to correct material issues or errors with competitive selection documents or award processes as early as possible in an orderly and efficient fashion, in a manner that is fair to all prospective vendors, and in a manner that avoids costly and time-consuming litigation to purchasing entities and the state.

11.5(4) *Final decision and request for second-tier review.* The purchasing entity's written decision shall become final unless within five days of the issuance thereof a vendor that is aggrieved or adversely affected by such decision files a request for second-tier review. A request for second-tier review shall generally conform, to the extent applicable, to the filing, form and format, and content requirements, and be subject to the same public records requirements and limitations, set forth in rule 129—11.3(8B) applicable to notices of appeal. An issue that was raised in the original notice of appeal but that is not again raised in a request for second-tier review shall be deemed waived for purposes of any second- or third-tier review or judicial review proceeding or appeal therefrom. For the avoidance of doubt, such unraised issues may not be raised for the first time at a second-tier review hearing.

11.5(5) *Nonparticipation of agency head or designee.* The head of the purchasing entity or that person's designee who will serve as final decision maker in the event of a third-tier review, as applicable, shall not participate in the internal review or formulation of the written decision required by this rule.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.6(8B) Informal debriefing. Within five days of the issuance of a first-tier review decision, on the purchasing entity's own motion or if requested by the appellant or intervenor following an adverse first-tier

review decision, the purchasing entity may grant an opportunity for the adversely affected party to appear before the purchasing entity for an informal discussion and debriefing of the basis of the first-tier decision and surrounding facts and circumstances forming the basis of such decision. This is an elective step in the process and is not required as a prerequisite to initiating a second-tier review. Likewise, the purchasing entity is neither required to offer nor required to grant a request for an informal debriefing.

11.6(1) An informal debriefing is intended to provide an interested party with an opportunity to share in an informal setting the party's concerns with the process leading to the award. A party is not required to attend an informal debriefing, but attendance is strongly encouraged.

11.6(2) Because proposals, notices of appeal, and evaluation committee materials, documentation, analysis, and results may contain confidential or proprietary information, a party's participation may be contingent on the party's agreeing and consenting to the entry of a protective order in accordance with the provisions of this chapter governing protective orders, or the discussion will be limited to the public, redacted contents of materials or information forming the basis of any discussion.

11.6(3) A party may be represented by legal counsel at an informal debriefing.

11.6(4) Following the informal debriefing, the purchasing entity may affirm, modify, or reverse, in whole or in part, its prior decision, or the appellant may withdraw its appeal.

11.6(5) The head of the purchasing entity or that person's designee who will serve as final decision maker in the event of a third-tier review, as applicable, shall not participate in an informal debriefing conducted in accordance with this rule or in preparing any decision or order affirming, modifying, or reversing, in whole or in part, a prior decision.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.7(8B) Second-tier review.

11.7(1) *Hearing scheduled.* Upon receipt of a request for second-tier review, the purchasing entity shall contact the administrative hearings division of the department of inspections and appeals to conduct a hearing. The vendor appeal shall be a contested case proceeding and shall be conducted in accordance with the provisions of the office's administrative rules governing contested case proceedings, unless the provisions of this chapter provide otherwise. In applying the office's administrative rules governing contested case proceedings where the purchasing entity is an entity other than the office, the terms "office" and "chief information officer" shall be deemed to refer to the applicable purchasing entity and head of the purchasing entity as defined in this chapter, respectively. The department of inspections and appeals shall send a written notice of the date, time and location of the appeal hearing to the aggrieved vendor or vendors. The presiding officer shall hold a hearing on the vendor appeal within 60 days of the date the request for second-tier review was received by the purchasing entity.

11.7(2) *Appeal security.* To the extent required in the competitive selection documents or other applicable solicitation documentation, the vendor initiating the appeal shall supply to the purchasing entity an appeal security equal to 25 percent of total contract value with the request for second-tier review. For the purpose of this rule, "contract value" means the aggregate total compensation the vendor is likely to receive under the entire term of the contract, including all extensions and renewals, if awarded. If the contract value is not readily discernable, the purchasing entity will supply the vendor with an estimate upon request, which estimate shall be final. A vendor forfeits an appeal security if, as determined by the purchasing entity, following resolution of the appeal, the appeal is determined to have had little or no factual or legal basis and was primarily filed to frustrate the procurement process or cause hardship for the purchasing entity or another vendor. Failure to supply the purchasing entity with the appeal security required by this rule shall result in dismissal of the appeal.

11.7(3) *Discovery.* Any discovery by the appellant is limited to what actually occurred at the purchasing entity as it relates to the award process in accordance with the review standards set forth in this chapter. Overbroad or unduly burdensome discovery requests shall not be permitted.

a. Additional disclosures. In addition to the materials, documents, and information disclosed as part of the initial disclosures processes set forth in rules 129—11.3(8B) and 129—11.4(8B), and, to the extent such materials, documents, or information contain or are comprised of confidential or proprietary information, subject to a protective order entered in accordance with rule 129—11.11(8B), the purchasing entity will promptly transmit to the other parties any additional, relevant materials, documents, or

information identified as part of its internal review during the first-tier review. Generally, relevant materials, documents, or information include:

(1) The competitive selection documents and any amendments thereto;

(2) Bids, proposals, or other like responses submitted by prospective vendors; and

(3) Documentation generated during the evaluation process, including the final results.

b. Discovery requests. As a condition of requesting a second-tier review, the appellant is required to promptly respond to discovery requests made by the purchasing entity to the appellant, which requests may, by way of example only, be designed to probe whether the appellant failed to disclose information relevant to the award process that would have resulted in the appellant's disqualification or whether the appellant engaged in any previously unreported inappropriate contact with the purchasing entity that would have resulted in the appellant's disqualification. An appellant that would have been disqualified lacks standing and is not prejudiced by the purchasing entity's decision to issue an award to a different vendor.

c. Protective orders. Because proposals, notices of appeal, and evaluation committee materials, documentation, analysis, and results may contain confidential or proprietary information, a party's access to such materials, documents, or information is contingent on the entry of a protective order in accordance with the provisions of this chapter governing protective orders, or the party's access will be limited to the public, redacted contents of such materials, documents, or information.

11.7(4) *Witnesses and exhibits.* The parties shall contact each other regarding witnesses and exhibits at least ten days prior to the date set for the hearing. In order to avoid duplication or the submission of extraneous materials, the parties must meet either in person or by telephonic or electronic means prior to the hearing to discuss the evidence to be presented.

11.7(5) *Hearings.*

a. Telephonic or electronic hearings preferred. Except where the determination of material factual issues presented turns on the credibility of witnesses, or where otherwise ordered by the presiding officer on the presiding officer's own motion, hearings shall be conducted by telephonic or electronic means. A party requesting an in-person hearing shall bear the burden of forwarding sufficient reasons to justify an in-person hearing. If the hearing is conducted by telephonic or electronic means, the parties must deliver all exhibits to the office of the presiding officer at least three days prior to the time the hearing is conducted.

b. Recording and transcription. Oral proceedings in connection with a vendor appeal may be either recorded by mechanized means or transcribed by a certified shorthand reporter at the request of a party. A party requesting that a certified shorthand reporter transcribe the hearing shall bear the costs. Parties may obtain copies of recordings or transcriptions of proceedings from the presiding officer or certified shorthand reporter, as applicable, at the requester's expense.

c. Retention time. The purchasing entity shall file and retain the recording or transcription of oral proceedings for at least five years from the date of the decision.

11.7(6) *Proposed decision.* The presiding officer shall issue a proposed, written decision within 30 days of the hearing.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.8(8B) Third-tier review. The proposed decision from a second-tier review shall become the final decision of the purchasing entity within ten days after the presiding officer has mailed the proposed decision to the parties unless prior to that time a party submits a request for third-tier review of the proposed decision in accordance with the provisions of this rule or the purchasing entity initiates review of the proposed decision on its own motion.

11.8(1) A party appealing the proposed decision to the head of the purchasing entity shall mail or deliver a request for third-tier review to the purchasing entity's headquarters and to the office's headquarters. A request for third-tier review shall generally conform, to the extent applicable, to the filing, form and format, and content requirements, and be subject to the same public records requirements and limitations, set forth in rule 129—11.3(8B) applicable to notices of appeal. An issue that was raised in the original notice of appeal and again raised in a request for second-tier review but not raised in the request for third-tier review shall be deemed waived for purposes of any third-tier review or judicial review proceeding or appeal therefrom. For the avoidance of doubt, such unraised issues may not be raised for the first time at any oral proceedings held in connection with a request for third-tier review.

11.8(2) The party appealing the proposed decision shall be responsible for causing the transfer of and otherwise submitting the record forming the basis of prior stages to the presiding officer, including filing the recording and transcript generated as part of the second-tier review. The party appealing the proposed decision shall bear the cost of such transfer and submission, including the cost of obtaining the recording and transcript generated as part of the second-tier review.

11.8(3) Any party may submit to the purchasing entity exceptions to and a brief in support of or in opposition to the proposed decision within 15 days after the mailing of a request for third-tier review. The submitting party shall mail copies of any exceptions or brief it files to all other parties to the proceeding. The head of the purchasing entity shall notify the parties if the head of the purchasing entity deems oral arguments by the parties to be appropriate.

11.8(4) When the head of the purchasing entity consents or on the head of the purchasing entity's own motion, oral arguments may be presented. A party wishing to make an oral argument shall specifically request it. The head of the purchasing entity shall notify all parties in advance of the scheduled time and place for oral arguments. An oral argument may be either recorded by mechanized means or transcribed by a certified shorthand reporter at the request of a party. A party requesting that a certified shorthand reporter transcribe an oral argument shall bear the costs. Parties may obtain copies of recordings or transcriptions of proceedings from the head of the purchasing entity or certified shorthand reporter, as applicable, at the requester's expense.

11.8(5) The head of the purchasing entity shall review the proposed decision based on the record developed and issues properly raised and decided in all prior stages. The issues for review shall be those specified in the party's request for third-tier review and which were properly raised or decided during all prior stages. The head of the purchasing entity shall not take any further evidence. The head of the purchasing entity shall issue a final decision of the purchasing entity. The decision shall be in writing and shall conform to the requirements of Iowa Code chapter 17A.

11.8(6) The office may consult with and assist another purchasing entity in conducting a third-tier review.

11.8(7) Any party may file an application for rehearing in accordance with Iowa Code section 17A.16(2) and rule 129—6.30(8B,17A).

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.9(8B) Standards, burdens, and remedies applicable in vendor appeal. The following standards, burden of proof and persuasion, and available remedies shall apply at all stages of review before the purchasing entity, including first-, second-, and third-tier reviews.

11.9(1) *Standard of review/prejudice.* Before the purchasing entity, the standard of review to be applied during a vendor appeal, including for purposes of either a first-, second-, or third-tier review, is whether the procurement process substantially complied with the relevant rules or legally binding procedures applicable to the award process at issue and, if not, whether there is prejudice to the nonprevailing vendor(s) because:

a. The noncompliance demands a conclusion that the award process was not conducted fairly, openly or objectively; and

b. Compliance with the rule or legally binding procedure would have resulted in a different outcome.

11.9(2) *Burden of proof and persuasion.* Before the purchasing entity, including for purposes of a first-, second-, or third-tier review, the aggrieved or adversely affected vendor seeking to set aside a notice of intent to award bears the burden of proof and persuasion as the moving party. The burden of proof is clear and convincing evidence.

11.9(3) *Remedies for noncompliance.* Before the purchasing entity, at any stage, including as part of a first-, second-, or third-tier review, if a determination is made that an award process failed to substantially comply with the standard set forth in subrule 11.9(1) and resulted in the requisite prejudice, the remedy for such founded noncompliance shall be narrowly tailored and specifically designed to remediate the specific noncompliance. Wholesale remedies invalidating or voiding solicitations should be avoided unless the facts and circumstances are such that no conceivable measures could be taken to remediate the founded noncompliance.

a. Remedies for founded noncompliance may include, but shall not be limited to:

(1) Remanding the award back to the evaluation committee or other applicable selection group with directions to take steps to remedy the noncompliance and reissue the award if the purchasing entity determines the contract is still necessary to meet the purchasing entity's governmental or business needs or objectives;

(2) Where the facts and circumstances are such that no conceivable measures could be taken to remediate the founded noncompliance, voiding the award process and resulting contract and requiring that the contract be recompeted if the purchasing entity determines a contract is still necessary to meet the purchasing entity's governmental or business needs or objectives.

b. In determining the appropriate remedy, consideration shall be given to all the circumstances surrounding the award, including the seriousness of the deficiency, the degree of prejudice to other parties or to the integrity of the procurement system, the good faith of the parties, the cost to the purchasing entity, the urgency of the solicitation, and the impact on the purchasing entity's mission and best interests of the state.

11.9(4) *Award of costs against appellant.* If at any point in the appeal process an appeal is determined to have had little or no factual or legal basis and was primarily filed to frustrate the procurement process or cause hardship for the purchasing entity or another vendor, the purchasing entity may order any one or combination of the following against the appellant:

a. Dismissal of the appeal;

b. The payment of costs incurred in administering the process, including any hearing and related expenses;

c. The payment of attorneys' fees and consultant and expert witness fees;

d. Suspension or debarment from future opportunities; or

e. Forfeiture of the appeal security supplied in accordance with subrule 11.7(2).

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.10(8B) Stay of agency action for vendor appeal.

11.10(1) *When available.*

a. Any party appealing the issuance of a notice of award may petition for stay of the award pending its review. The petition for stay shall be filed with the notice of appeal, shall state the reasons justifying a stay, and shall be accompanied by an additional appeal bond equal to 120 percent of the total contract value. If the contract value is not readily discernable, the office will supply the vendor with an estimate upon request, which estimate shall be determinative. A vendor forfeits an appeal security if, as determined by the purchasing entity, following resolution of the appeal the appeal is determined to have had little or no factual or legal basis and was primarily filed to frustrate the procurement process or cause hardship for the purchasing entity or another vendor.

b. Any party adversely affected by a final decision and order may petition the purchasing entity for a stay of that decision and order pending judicial review. The petition for stay shall be filed with the purchasing entity within five days of receipt of the final decision and order and shall state the reasons justifying a stay.

11.10(2) *When granted.* In determining whether to grant a stay, the purchasing entity shall consider the factors listed in Iowa Code section 17A.19(5)*"c."*

11.10(3) *Vacation.* A stay may be vacated by the issuing authority upon application of the purchasing entity or any other party.

11.10(4) *Where no stay.* Except where provided otherwise in the contract between the parties, in the absence of a stay, the purchasing entity may, in its discretion, proceed to enter into a contract with the awardee during the pendency of the appeal. In the event the purchasing entity enters into a contract with the awardee during the pendency of an appeal and the contract is ultimately determined to be void through this appeal process, following the exhaustion of all opportunities for further appeal including intra-agency appeal or judicial review or appeal therefrom, the original awardee shall only be entitled to amounts, if any, due and owing for actual services or deliverables provided up to the date the contract is declared void and the opportunity for further appeal has fully expired.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.11(8B) Protective orders.

11.11(1) *General rule/purpose.* To facilitate the fair and objective evaluation of proposals and cost-effective administration of vendor appeal processes, information and materials of or related to procurement processes or awards will not be released or otherwise available for public inspection prior to the issuance of the notice of intent to award or final disposition of any vendor appeal taken in accordance with this chapter, whichever occurs later. By submitting materials, documents, or information to the office as part of a competitive selection process or other award process, the vendor agrees and consents to the purchasing entity's distribution of such materials, documents, or information to third parties, including other vendors that may be the submitting vendor's competitors, as part of an appeal process, including, subject to the entry of a protective order in accordance with this rule, materials, documents, or information comprised, in whole or in part, of confidential or proprietary information. For purposes of any materials, documents, or information disclosed as part of a vendor appeal, parties are only entitled to materials, documents, or information comprised, in whole or in part, of confidential or proprietary information after a protective order has been entered in accordance with this rule. By filing a notice of appeal in accordance with rule 129—11.3(8B) or a written justification in accordance with rule 129—11.4(8B), the appellant or the awardee, as applicable, agrees and consents to the entry of a protective order in substantially the same form as set forth in this rule as a condition precedent to receiving any documents or information containing or comprised of, in whole or in part, confidential or proprietary information related to the appeal. In the absence of a protective order, parties will only receive public, redacted copies of materials or information.

11.11(2) *How issued.* In order to facilitate the exchange of information and materials as is necessary to facilitate an efficient and effective appeal process, the purchasing entity may enter a protective order(s) on its own motion or on the request of any party seeking access to confidential or proprietary information. The purchasing entity generally will not issue a protective order where an appellant is not represented by counsel, in which case the parties will only receive a public, redacted copy(ies) of information and materials.

11.11(3) *Form of protective order.* Protective orders entered in accordance with this rule shall be issued in substantially the following form and shall establish procedures for access to confidential and proprietary information, identification and safeguarding of that information, and submission of redacted copies of documents omitting confidential and proprietary information.

(Name Of Purchasing Entity)

(Name of Appellant), **Appellant,** **V.** **(Name of Purchasing Entity),** **Respondent,** **(Name of Intervenor(s), if any),** **Intervenor.**	**Docket No. ____ ("Action")** **Protective Order**

Certain information that may be exchanged in discovery involves the production of trade secrets, confidential business information, or other confidential or proprietary information. Accordingly, (Name of Purchasing Entity) ("Purchasing Entity") enters the following protective order ("Order") to govern the proceedings. Where the term "Purchasing Entity" as used herein refers to the Purchasing Entity serving in an adjudicatory capacity in connection with this Action, such reference, to the extent the procedural posture of the Action at the time necessitates such an understanding, shall be understood as referring to any tribunal serving as an agent of the Purchasing Entity in connection with this Action and its personnel.

1. Each Party may designate as confidential for protection under this Order, in whole or in part, any document, information or material that constitutes or includes, in whole or in part, confidential or proprietary information or trade secrets of the Party or a Third Party to whom the Party reasonably believes it owes an obligation of confidentiality with respect to such document, information or material ("Protected Material"). Protected Material shall be designated by the Party producing it by affixing a legend or stamp on such document, information or material as follows: "CONFIDENTIAL" or "RESTRICTED – ATTORNEYS' EYES ONLY" (referred to both individually and collectively as "Label"). A Label shall be

placed clearly on each page of the Protected Material (except native files, deposition and hearing transcripts) for which such protection is sought. A Label shall be included in the title of the designated native files. For any deposition and hearing transcripts, a Label shall be placed on the cover page of the transcript (if not already present on the cover page of the transcript when received from the court reporter) by each attorney receiving a copy of the transcript after that attorney receives notice of the designation of some or all of that transcript as "CONFIDENTIAL" or "RESTRICTED – ATTORNEYS' EYES ONLY."

2. With respect to documents, information or material designated "CONFIDENTIAL" or "RESTRICTED – ATTORNEYS' EYES ONLY" (referred to both individually and collectively as "DESIGNATED MATERIAL"), subject to the provisions herein and unless otherwise stated herein or provided by applicable law or rule, this Order governs, without limitation: (a) all documents, electronically stored information, and/or things as defined by the Iowa Rules of Civil Procedure; (b) all prehearing and hearing or deposition testimony, or documents marked as exhibits or for identification in depositions and hearings; (c) pleadings, exhibits to pleadings and other filings; (d) affidavits; and (e) stipulations. All copies, reproductions, extracts, digests and complete or partial summaries prepared from any DESIGNATED MATERIALS shall also be considered DESIGNATED MATERIAL and treated as such under this Order.

3. Protected Material (i.e., "CONFIDENTIAL" or "RESTRICTED – ATTORNEYS' EYES ONLY") may be designated as such at any time. Inadvertent or unintentional production of documents, information or material that has not been designated as DESIGNATED MATERIAL or Labeled shall not be deemed a waiver in whole or in part of a claim for confidential treatment. Any party that inadvertently or unintentionally produces Protected Material without designating it as DESIGNATED MATERIAL may request destruction of that Protected Material by notifying the recipient(s) as soon as reasonably possible after the producing Party becomes aware of the inadvertent or unintentional disclosure and providing replacement Protected Material that is properly designated. The recipient(s) shall then destroy all copies of the inadvertently or unintentionally produced Protected Material and any documents, information or material derived from or based on such Protected Material.

4. "CONFIDENTIAL" documents, information and material may be disclosed only to the following persons, except upon receipt of the prior written consent of the producing party, upon order of the Purchasing Entity, or as set forth in paragraph 12 herein:

(a) outside counsel of record in this Action for the Parties. The Attorney General's Office shall be considered outside counsel of the Purchasing Entity for purposes of this Order;

(b) employees of such outside counsel assigned to and reasonably necessary to assist such counsel in the litigation of this Action;

(c) in-house counsel for the Parties who either have responsibility for making decisions dealing directly with the litigation of this Action, or who are assisting outside counsel in the litigation of this Action, provided the names and titles of such in-house counsel have been disclosed to the designating party;

(d) up to and including three (3) designated representatives of each of the Parties to the extent reasonably necessary for the litigation of this Action, except that either party may in good faith request the other Party's consent to designate one or more additional representatives, the other Party shall not unreasonably withhold such consent, and the requesting Party may seek leave to designate such additional representative(s) if the requesting Party believes the other Party has unreasonably withheld such consent;

(e) outside consultants or experts (i.e., not existing employees or affiliates of a Party or an affiliate of a Party) retained for the purpose of this litigation, provided that: (1) such consultants or experts are not presently employed by the Parties hereto for purposes other than this Action; and (2) before access is given, the consultant or expert has completed the Acknowledgment Form attached as Exhibit A hereto and the same is served upon the producing Party with a current curriculum vitae of the consultant or expert at least ten (10) days before access to the Protected Material is to be given to that consultant or expert to afford the producing Party an opportunity to object to and notify the receiving Party in writing that it objects to the disclosure of the Protected Material to the consultant or expert. The Parties agree to promptly confer and use good faith to resolve any such objection. If the Parties are unable to resolve any objection, the objecting Party may file a motion with the Purchasing Entity within fifteen (15) days of the notice, or within such

other time as the Parties may agree, seeking resolution of the dispute with respect to the proposed disclosure. No disclosure shall occur until all such objections are resolved by agreement of the Parties or order of the Purchasing Entity;

(f) independent litigation support services, including persons working for or as court reporters, graphics or design services, jury or trial/hearing consulting services, and photocopy, document imaging, and database services retained by counsel and reasonably necessary to assist counsel with the litigation of this Action; and

(g) the Purchasing Entity serving in an adjudicatory capacity in connection and its personnel or tribunal serving as an agent of the Purchasing Entity in connection with this Action and its personnel.

5. A Party shall designate documents, information or material as "CONFIDENTIAL" only upon a good faith belief that the documents, information or material contains confidential or proprietary information or trade secrets of the Party or a third party to whom the Party reasonably believes it owes an obligation of confidentiality with respect to such documents, information or material.

6. Documents, information or material produced pursuant to any discovery request in this Action, including but not limited to Protected Material designated as DESIGNATED MATERIAL, shall be used by the Parties only in the litigation of this Action and shall not be used for any other purpose. Any person or entity who obtains access to DESIGNATED MATERIAL or the contents thereof pursuant to this Order shall not make any copies, duplicates, extracts, summaries or descriptions of such DESIGNATED MATERIAL or any portion thereof except as may be reasonably necessary in the litigation of this Action. Any such copies, duplicates, extracts, summaries or descriptions shall be classified DESIGNATED MATERIALS and subject to all of the terms and conditions of this Order.

7. To the extent a producing Party believes that certain Protected Material qualifying to be designated CONFIDENTIAL is so sensitive that its dissemination deserves even further limitation, the producing Party may designate such Protected Material "RESTRICTED – ATTORNEYS' EYES ONLY."

8. For Protected Material designated RESTRICTED – ATTORNEYS' EYES ONLY, access to, and disclosure of, such Protected Material shall be limited to individuals listed in paragraphs 4(a), 4(b), 4(e), 4(f) and 4(g).

9. Nothing in this Order shall require production of documents, information or other material that a Party contends is protected from disclosure by the attorney-client privilege, the work product doctrine, or other privilege, doctrine, or immunity. If documents, information or other material subject to a claim of attorney-client privilege, work product doctrine, or other privilege, doctrine, or immunity is inadvertently or unintentionally produced, such production shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any such privilege, doctrine, or immunity. Any Party that inadvertently or unintentionally produces documents, information or other material it reasonably believes are protected under the attorney-client privilege, work product doctrine, or other privilege, doctrine, or immunity may obtain the return of such documents, information or other material by promptly notifying the recipient(s) and providing a privilege log for the inadvertently or unintentionally produced documents, information or other material. The recipient(s) shall gather all copies of such documents, information or other material and return them to the producing Party, except for any pages containing privileged or otherwise protected markings by the recipient(s), which pages shall instead be destroyed and certified as such to the producing Party within ten (10) business days.

10. There shall be no disclosure of any DESIGNATED MATERIAL by any person authorized to have access thereto to any person who is not authorized for such access under this Order. The Parties are hereby ORDERED to safeguard all such documents, information and material to protect against disclosure to any unauthorized persons or entities.

11. Nothing contained herein shall be construed to prejudice any Party's right to use any DESIGNATED MATERIAL in taking testimony at any deposition or hearing provided that the DESIGNATED MATERIAL is only disclosed to a person(s) who is: (i) eligible to have access to the DESIGNATED MATERIAL by virtue of his or her employment with the designating party; (ii) identified in the DESIGNATED MATERIAL as an author, addressee, or copy recipient of such information; (iii) although not identified as an author, addressee, or copy recipient of such DESIGNATED MATERIAL, has, in the ordinary course of business, seen such DESIGNATED MATERIAL; (iv) a current or former officer,

director or employee of the producing Party or a current or former officer, director or employee of a company affiliated with the producing Party; (v) counsel for a Party, including outside counsel and in-house counsel (subject to paragraphs 8 and 9 of this Order); (vi) an independent contractor, consultant, and/or expert retained for the purpose of litigating this Action (subject to paragraph 4 of this Order); (vii) court reporters and videographers; (viii) the Purchasing Entity serving in an adjudicatory capacity in connection and its personnel or tribunal serving as an agent of the Purchasing Entity in connection with this Action and its personnel; or (ix) other persons entitled hereunder to access to DESIGNATED MATERIAL. Such DESIGNATED MATERIAL shall not be disclosed to any other persons unless prior authorization is obtained from counsel representing the producing Party or in an order issued by the Purchasing Entity or tribunal serving as an agent of the Purchasing Entity in connection with this Action.

12. Parties may, at the deposition or hearing or within thirty (30) days after receipt of a deposition or hearing transcript, designate the deposition or hearing transcript or any portion thereof as "CONFIDENTIAL" or "RESTRICTED – ATTORNEYS' EYES ONLY" pursuant to this Order. Access to the deposition or hearing transcript so designated shall be limited in accordance with the terms of this Order. Until expiration of the 30-day period, the entire deposition or hearing transcript shall be treated as "Confidential" in accordance with this Order.

13. Any DESIGNATED MATERIAL that is filed in connection with this Action shall be filed under seal and shall remain under seal until further order of the Purchasing Entity. The filing party shall be responsible for informing the Purchasing Entity or tribunal serving as an agent of the Purchasing Entity in connection with this Action that the filing should be sealed and for placing the legend "FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER" above the caption and conspicuously on each page of the filing. Exhibits to a filing shall conform to the labeling requirements set forth in this Order. If a prehearing pleading filed with the Purchasing Entity or tribunal serving as an agent of the Purchasing Entity in connection with this Action, or an exhibit thereto, discloses or relies on confidential documents, information or material, such confidential portions shall, except to the extent otherwise provided for or required by applicable law or rule, be redacted to the extent necessary and the pleading or exhibit filed publicly with the Purchasing Entity or tribunal serving as an agent of the Purchasing Entity in connection with this Action.

14. The Order applies to prehearing discovery. Nothing in this Order shall be deemed to prevent the Parties from introducing any DESIGNATED MATERIAL into evidence at any hearing of this Action, or from using any information contained in DESIGNATED MATERIAL at any hearing of this Action, subject to any prehearing order issued by the Purchasing Entity or tribunal serving as an agent of the Purchasing Entity in connection with this Action.

15. A Party may request in writing to the other Party that the designation given to any DESIGNATED MATERIAL be modified or withdrawn. If the designating Party does not agree to redesignation within ten (10) business days of receipt of the written request, the requesting Party may apply to the Purchasing Entity for relief. Upon any such application to the Purchasing Entity, the burden shall be on the designating Party to show why its classification is proper. Such application shall be treated procedurally as a motion to compel pursuant to Iowa Rule of Civil Procedure 1.517, subject to that Rule's provisions relating to sanctions. In making such application, the requirements of the Iowa Rules of Civil Procedure shall be met. Pending the Purchasing Entity's ruling or order on such application, or the ruling or order by the tribunal serving as an agent of the Purchasing Entity in connection with this Action, the original designation of the designating Party shall be maintained and respected.

16. Each outside consultant or expert to whom DESIGNATED MATERIAL is disclosed in accordance with the terms of this Order shall be advised by counsel of the terms of this Order, shall be informed that he or she is subject to the terms and conditions of this Order, and shall sign an acknowledgment that he or she has received a copy of, has read, and has agreed to be bound by this Order. A copy of the Acknowledgment Form is attached as Exhibit A.

17. To the extent that any discovery is taken of persons who are not Parties to this Action and in the event that such third parties contended the discovery sought involves trade secrets, confidential business information, or other proprietary information, such third parties may agree to be bound by this Order.

18. To the extent that discovery or testimony is taken of third parties, the third parties may designate as "CONFIDENTIAL" or "RESTRICTED – ATTORNEYS' EYES ONLY" any documents, information, or other material, in whole or in part, produced or given by such third parties. The third parties shall have ten (10) business days after production of such documents, information, or other materials to make such a designation. Until that time period lapses or until such a designation has been made, whichever occurs sooner, all documents, information or other material so produced or given shall be treated as "CONFIDENTIAL" in accordance with this Order.

19. Within thirty (30) days of final termination of this Action, including any appeals, all DESIGNATED MATERIAL, including all copies, duplicates, abstracts, indexes, summaries, descriptions, and excerpts or extracts thereof (excluding excerpts or extracts incorporated into any privileged memoranda of the Parties and materials which have been admitted into evidence in this Action), shall be returned to the producing Party or, where agreed to by the producing Party, destroyed by the receiving Party. The receiving Party shall verify the return or destruction, as applicable, by affidavit furnished to the producing Party upon the producing Party's request.

20. The failure to designate documents, information, or material in accordance with this Order and the failure to object to a designation at a given time shall not preclude the filing of a motion at a later date seeking to impose such designation or challenging the propriety thereof. The entry of this Order and/or the production of documents, information, and material hereunder shall in no way constitute a waiver of any objection to the furnishing thereof, all such objections being hereby preserved.

21. Any Party knowing or believing that any other Party subject to this Order is in violation of or intends to violate this Order and after raising the question of violation or potential violation with the opposing Party and having been unable to resolve the matter by agreement, such Party may move the Purchasing Entity or tribunal serving as an agent of the Purchasing Entity in connection with this Action for such relief as may be appropriate in the circumstances. Pending disposition of the motion by the Purchasing Entity or tribunal serving as an agent of the Purchasing Entity in connection with this Action, the Party alleged to be in violation of or intending to violate this Order shall discontinue the performance of and/or shall not undertake the further performance of any action alleged to constitute a violation of this Order.

22. Production of DESIGNATED MATERIAL by each of the Parties shall not be deemed a publication of the documents, information and material (or the contents thereof) produced so as to void or make voidable whatever claim the Parties may have as to the proprietary and confidential nature of the documents, information or other material or its contents.

23. Nothing in this Order shall be construed to effect an abrogation, waiver, or limitation of any kind on the rights of each of the Parties to assert any applicable discovery or hearing privilege.

24. Each of the Parties shall also retain the right to file a motion with the Purchasing Entity or tribunal serving as an agent of the Purchasing Entity in connection with this Action: (a) to modify this Order to allow disclosure of DESIGNATED MATERIAL to additional persons or entities if reasonably necessary to prepare and present this Action and (b) to apply for additional protection of DESIGNATED MATERIAL.

25. Nothing in this Order applies to a Party's use of its own DESIGNATED MATERIAL which it designated as such pursuant to this Order, or to material which the Party had available to it through means other than discovery in this proceeding.

26. **(SAMPLE REGULATORY COMPLIANCE PROVISION—INSERT ALTERNATE OR ADDITIONAL LANGUAGE IF NATURE OF DATA OR INFORMATION POTENTIALLY INVOLVED IN ACTION REQUIRES AS MUCH)** The Parties recognize that they may be required to produce in response to discovery requests patient information protected by the Health Insurance Portability and Accountability Act of 1996 and its implementing regulations found at 45 C.F.R. parts 160, 162, and 164 ("HIPAA"). Any such information exchanged shall be subject to this Order, shall be used solely for the purpose of the litigation of this Action, and shall at all relevant times be protected by the Parties from further redisclosure by the Parties. Any document containing information protected by HIPAA shall be filed under seal and shall not be open to public examination. At the conclusion of the litigation of this Action, all documents exchanged that contain information protected by HIPAA shall be either returned to the disclosing Party or destroyed, with the exception that copies of such records may be retained for

document retention purposes only. At the end of any relevant document retention obligation, the documents protected by this provision of this Order shall be either returned to the disclosing Party or destroyed.

Exhibit A—(Name of Purchasing Entity)

(Name of Appellant), **Appellant,** **V.** **(Name of Purchasing Entity),** **Respondent,** **(Name of Intervenor(s), if any),** **Intervenor.**	**Docket No. ____ ("Action")** **Protective Order Acknowledgment Form ("Acknowledgment Form")**

Certain information that may be exchanged in discovery involves the production of trade secrets, confidential business information, or other confidential or proprietary information.

I, _____, declare that:

1. My address is _____.

My current employer is _____.

My current occupation is _____.

2. I have received a copy of the Protective Order in this Action. I have carefully read and understand the provisions of the Protective Order.

3. I will comply with all of the provisions of the Protective Order. I will hold in confidence, will not disclose to anyone not qualified under the Protective Order, and will use only for purposes of this action any information designated as "CONFIDENTIAL" or "RESTRICTED – ATTORNEYS' EYES ONLY" that is disclosed to me.

4. Promptly upon termination of these actions, I will return or destroy, as applicable, all documents and things designated as "CONFIDENTIAL" or "RESTRICTED – ATTORNEYS' EYES ONLY" that came into my possession, and all documents and things that I have prepared relating thereto, to or at the direction of the outside counsel for the party by whom I am employed.

5. I hereby submit to the jurisdiction of the Purchasing Entity or tribunal serving as an agent of the Purchasing Entity in connection with this Action for the purpose of enforcement of the Protective Order in this Action.

I declare under penalty of perjury that the foregoing is true and correct.

Signature _____

Date _____

IT IS SO ORDERED.

Dated this the ___ day of ____ ____.

(name of Purchasing Entity Representative or Agent Issuing Protective Order)

11.11(4) *Violation of terms of protective order.* Any violation of the terms of a protective order may result in the imposition of sanctions as the purchasing entity deems appropriate, including prohibition from participation in the remainder of the protest, dismissal of the protest, or suspension or debarment from future opportunities.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

129—11.12(8B) Issues not for consideration. The following are types of challenges that shall not form the basis of a vendor appeal. Any attempted vendor appeal that fits into one of the following categories shall be dismissed anytime sufficient information is obtained to determine the appeal fits into one of the following categories.

11.12(1) *Contract administration.* Relating to contract administration. The administration of an existing contract is within the discretion of the purchasing entity. Disputes between a vendor and the agency are resolved pursuant to the disputes clause of the contract.

11.12(2) *Subcontract protests.* Appeals of the award or selection, or proposed award or selection, of a subcontractor. Such selection is determined pursuant to the applicable clauses of the contract.

11.12(3) *Protests of orders.* Individual orders, statements of work, or other transactional documents executed under an existing contract, including a master information technology agreement.

11.12(4) *Alternative procurement methods.* A decision to procure information technology through a method other than a competitive selection process, reverse auction process, or prequalification process. Alternative procurement methods that do not properly form the basis of a vendor appeal under this chapter include but are not limited to:

a. A cooperative procurement agreement pursuant to Iowa Code section 8B.24(5)*"a."*

b. A negotiated contract under any of the circumstances set forth in Iowa Code section 8B.24(5)*"b"*(1) to (3).

c. An intergovernmental agreement with a governmental entity that has the resources available to supply the information technology sought.

d. An emergency procurement.

e. A sole source procurement.

11.12(5) *Suspensions or debarments.* Suspensions or debarments.

[**ARC 4826C**, IAB 12/18/19, effective 1/22/20]

These rules are intended to implement Iowa Code chapter 8B.

[Filed ARC 4826C (Notice ARC 4730C, IAB 10/23/19), IAB 12/18/19, effective 1/22/20]