

7—2506.104(17A) Standards and remedies for vendor appeals.

2506.104(1) *Standard of review.* In all stages of the vendor appeal, the standard of review will be whether the solicitation process substantially complied with the legally binding procedures applicable to the award process at issue and, if not, whether there is prejudice to the nonprevailing vendor because:

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

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

For purposes of this rule, “legally binding procedure” means those procedures mandated by statute or administrative rule or expressly set forth in the text of the competitive solicitation. Agency guidance that is not in statute, administrative rule, or the text of the solicitation, including but not limited to training materials and procedural manuals, does not constitute legally binding procedure.

2506.104(2) *Burdens.* The appealing vendor bears the burden of proof and the burden of producing evidence in support of its allegations.

2506.104(3) *Standard of proof and prejudice to vendor.* The vendor must prove both noncompliance and prejudice by clear and convincing evidence.

2506.104(4) *Remedies available.* If the solicitation process is found to be unfair or noncompliant with legally binding procedures, the remedy will be narrowly tailored and specifically designed to remediate the specific noncompliance. Wholesale remedies invalidating or voiding solicitations will be avoided unless no other conceivable measure could remediate the noncompliance. Possible remedies may include but are not necessarily limited to remand to the agency with directions to remedy the specific noncompliance and reissue the award if the agency determines the contract is still necessary to meet the agency’s needs or objectives or, if remediation of the noncompliance is not possible, voiding the notice of intent to award with directions to the agency to proceed in the state’s best interests, which may include canceling the solicitation.

2506.104(5) *Authority over award decisions.* All final award decisions will be made by the agency. An administrative law judge’s authority is limited to affirming the agency’s action or remanding the issue to the agency for further consideration through a proposed decision. An administrative law judge lacks jurisdiction to compel the issuance of an award to a vendor other than a vendor awarded a contract by the agency.

2506.104(6) *Issues not for consideration.* The following types of challenges are not a basis for a vendor appeal. An attempted appeal that fits within one of the following categories will be dismissed:

a. Any claim related to existing contract administration. The administration of an existing contract is within the discretion of the agency. Disputes between a vendor and the agency are resolved in accordance with dispute-resolution clauses in a contract and not through a vendor appeal process.

b. Any claim of a subcontractor of an aggrieved vendor. Only vendors who submitted a bid or proposal in response to a solicitation have standing to appeal a notice of intent to award.

c. Any claim related to alternative procurement processes, such as purchase orders, statements of work, or other transactional documents executed under an existing contract, including such orders made under master agreements. Vendor appeals are allowed only in response to competitive solicitations and no other forms of state purchases.

d. Any claim related to suspensions or debarments of vendors.

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