

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.

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