

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).

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