

ACTION MEMO

AC TRANSIT DISTRICT
Board of Directors
Executive Summary

GC Memo No. 07-224
Meeting Date: October 17, 2007

Committees:

- | | | | |
|----------------------------|--------------------------|------------------------------|-------------------------------------|
| Planning Committee | <input type="checkbox"/> | Finance Committee | <input checked="" type="checkbox"/> |
| External Affairs Committee | <input type="checkbox"/> | Operations Committee | <input type="checkbox"/> |
| Rider Complaint Committee | <input type="checkbox"/> | Paratransit Committee | <input type="checkbox"/> |
| Board of Directors | <input type="checkbox"/> | Financing Corporation | <input type="checkbox"/> |

SUBJECT: CONSIDER APPROVAL OF AMENDMENTS TO BOARD POLICY NO. 354 – PROCUREMENT PROTEST PROCEDURES AND RECOMMEND ADOPTION OF DRAFT RESOLUTION

RECOMMENDED ACTION:

- Information Only Briefing Item Recommended Motion

Recommend adoption of revisions to Board Policy 354 – Procurement Protest Procedures by the Board of Directors and the Draft Resolution

Fiscal Impact:

Not Applicable.

Background/Discussion:

The matter is coming to the Board as part of the required biennial review of Board fiscal policies. Staff has reviewed Board Policy No. 354 and concluded that the only amendment necessary is the language contained in Section VII. Protest Submission, subsection B. The section should be amended to read as follows.

BOARD ACTION: **Approved as Recommended** [] **Other** []
 Approved with Modification(s) []

[To be filled in by District Secretary after Board/Committee Meeting]

The above order was passed on _____, 2007.

Linda Nemeroff, District Secretary
By _____

GC Memo No. 07-224

**Subject: Consider approval of amendments to Board Policy 354 — Procurement
Protest Procedures**

Date: October 17, 2007

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- B. Protests based upon grounds other than the content of the solicitation ~~solicitation~~ as well as all protest appeals should be addressed to:

AC Transit
~~Manager of Capital Planning/Grants Administration~~ **Manager,**
Capital Development, Legislation, and Grants
1600 Franklin Street
Oakland, CA 94612

A draft resolution for your consideration is attached. If the Committee concurs with the amendment the resolution will be assigned a number and sent on to the Board for adoption.

Prior Relevant Board Actions/Policies:

Board Policy No. 354 was last amended February 2002

Attachments:

- A. Draft Resolution No. 07-049
B. Board Policy No. 354, with changes

Approved by: Kenneth C. Scheidig, General Counsel

Prepared by: Anne Fudge, Executive Coordinator

Date Prepared: October 4, 2007

ALAMEDA-CONTRA COSTA TRANSIT DISTRICT

RESOLUTION NO. 07-049

**A RESOLUTION AMENDING THE PROTEST PROCEDURES
FOR ALL PROCUREMENT AND CONTRACTING ACTIVITIES
AND REPEALING RESOLUTION NO. 2039**

WHEREAS, on February 7, 2002, the District adopted Resolution No. 2039 in accordance with the Federal transit Administration's Circular 4220.1D which required that FTA grantees establish a written protest procedure to handle and resolve disputes relating to District procurement and contracting activities; and

WHEREAS, District policy requires the District to comply with all applicable federal, state, local laws and regulations; and

WHEREAS, the Board of Directors requires staff to periodically review the fiscal policies in order to keep them current and in compliance with federal requirements; and

WHEREAS, the protest procedures as adopted by Resolution No. 2039 currently require amending for purposes of updating.

NOW, THEREFORE, THE BOARD OF DIRECTORS OF THE ALAMEDA-CONTRA COSTA TRANSIT DISTRICT RESOLVES AS FOLLOWS:

SECTION 1. The amended protest procedures contained in Exhibit 1 to Board Policy No. 354 are hereby approved and are to be implemented by the General Manager effective this date.

SECTION 2. Resolution No. 2039 is hereby repealed.

SECTION 3. This Resolution shall take effect immediately upon its passage by four affirmative votes of the Board of Directors.

RESOLUTION NO. 07-049 was passed and adopted this ____ day of November 2007.

Greg Harper, President

Attest:

Linda Nemeroff, District Secretary

I, Linda Nemeroff, District Secretary for the Alameda-Contra Costa Transit District, certify that the foregoing Resolution was passed and adopted at a Regular Meeting of the Board of Directors held on the _____ day of November 2007 by the following roll call vote:

AYES: DIRECTORS:

NOES: DIRECTORS:

ABSENT: DIRECTORS:

ABSTAIN: DIRECTORS:

Linda Nemeroff, District Secretary

Approved as to form:

Kenneth C. Scheidig, General Counsel

AC Transit

POLICY No. 354

BOARD POLICY

Category: **FINANCIAL MATTERS**

PROCUREMENT PROTEST PROCEDURES

Amended: February 2002

I. PURPOSE AND APPLICABILITY

In accordance with Resolution No. 2039 adopted by the AC Transit Board of Directors on February 7, 2002, Board policy requires that the District establish formal procedures for the filing of protests in connection with District procurement activities. All protests shall be processed in accordance with the procedures established herein.

These protest procedures shall apply to all types of procurement activities, including formal competitive bidding and requests for proposal. Potential bidders/ proposers will be advised of the District's protest procedures in its solicitations for bids and requests for proposals. Failure to follow the District's protest procedures may result in the rejection of a protest.

The District shall notify the Federal Transit Administration of all protests involving FTA funding.

II. DEFINITION OF PROTEST

A protest under these procedures is defined as an allegation, made with respect to a particular procurement action, that asserts that the District, in performing that action:

- A. Failed to follow or comply with applicable federal or state law or regulation, District policy or procedure relative to developing, soliciting, evaluating, negotiating and/or awarding a procurement contract.
- B. Failed to comply with the relevant requirements and procedures contained in the solicitation.
- C. Failed to follow District protest procedures.

III. TYPES OF PROTESTS

There are two basic types of protests:

- A. Protests Based Upon the Content of the Solicitation:

Protests based upon restrictive specifications or alleged improprieties in the bidding procedure or contract specifications, which are apparent or reasonably should be discovered prior to bid opening.

B. Protests Based Upon Grounds Other Than the Content of the Solicitation:

Protests based upon alleged improprieties that are not apparent or which could not reasonably have been discovered prior to bid opening, such as disputes over the staff recommendation for contract award.

IV. STANDING TO PROTEST

In order to file a valid protest, an individual, association, corporation, company or other legal entity must be an actual or prospective supplier of goods or services, whose direct economic interest would be affected by the award or failure to award a contract. A protest filed by anyone who fails to establish standing to protest shall be rejected.

V. TIMELINESS OF PROTESTS

In order to be considered timely, a protest of a procurement action must be filed after a solicitation is issued and meet the following time constraints:

A. Protests Based Upon the Content of the Solicitation in procurements other than Negotiated Procurements under California Public Contract Code §20217:

Any protest concerning any of the contents of the solicitation must be filed prior to the bid opening or proposal submission date and time.

B. Protests Based Upon Grounds other than the Content of the Solicitation in procurements other than Negotiated Procurements under California Public Contract Code §20217:

Protests must be filed no later than ten (10) calendar days after the District's notice of intent to award, or notice of award, or notice of non-award, which occurs first.

C. Protests in Negotiated Procurements for Rolling Stock and other Technology under California Public Contract §20217:

1. Protests in Negotiated Procurements based upon the Content of the Solicitation (Request for Proposals or RFPs) must be filed with the District within ten (10) calendar days after the RFP is first advertised. Such protests may be renewed by refiling the protest with the District within fifteen (15) calendar days after the staff recommendation for award has been made available to the public.

2. Protests based upon grounds other than the Content of the Solicitation (Request for Proposals or RFPs) must be filed within fifteen (15) calendar days after the staff recommendation for award has been made available to the public.

VI. CONTENT OF PROTESTS

Protests must be submitted in writing. The Protest Form available from the District should be submitted with the protest whether or not additional information is provided by the protester. All relevant referenced material supporting the protest should be attached. Protests should include the following:

- A. The IFB (Invitation for Bids) or Request for Proposals (RFP) number. If any addendum or addenda issued by the District in connection with a solicitation is the basis for a protest, the protest must also identify that addendum(a). If any other District communication is the basis for a protest, it should also be identified.
- B. The name and address of the protester. If the name or address is different than that shown on any bid or proposal of the protestor, the protest should include a reference to the original name and/or address. Because standing to protest may be an issue, protests filed under a name other than the name stated on the bid or proposal submitted should indicate the basis supporting standing to protest.
- C. A full and complete statement specifying in detail the grounds for the protest, including identification of any laws, regulations, or procedures violated, and providing all pertinent facts in support of the protest.
- D. The specific remedy requested by the protester.
- E. Identification of person(s) and address(es) of those to whom District communications on the matter of the protest should be directed.

VII. PROTEST SUBMISSION

- A. Protests should be directed to:

AC Transit
Procurement and Materials Director
10626 International Blvd.
Oakland, CA 94603

- B. Protests based upon grounds other than the content of the ~~solicitation~~ solicitation as well as all protest appeals should be addressed to:

AC Transit
~~Manager of Capital Planning/Grants Administration~~ Manager, Capital Development, Legislation, and Grants
1600 Franklin Street
Oakland, CA 94612

- B. In all cases, the exterior of the envelope should be marked: "Attention: Protest Material" and reflect the pertinent IFB or RFP number.

VIII. PROCESSING OF PROTESTS

Protests will be processed as follows:

- A. Protests based upon the Content of the Solicitation in procurements other than Negotiated Procurements under California Public Contract Code §20217:

The Procurement and Materials Director will issue a written decision prior to the opening date for bids or closing date for the submission of proposals. If the decision cannot be made within these time periods, the bid opening or proposal submission date for the procurement may be extended by the District.

- B. Protests based on grounds other than the Content of the Solicitation in Procurements other than Negotiated Procurements under California Public Contract Code §20217:

The General Manager will issue a written decision within ten (10) working days after the receipt of the protest by the District. If the General Manager's decision cannot be rendered within this time period, the District will notify the protester of the new date when a decision on the protest will be issued.

If the General Manager upholds the protest, the General Manager's decision will include remedial action to be taken.

If the General Manager denies the protest, the written notice of the decision will include notice of the protester's appeal rights.

- C. Protests in Negotiated Procurements for Rolling Stock and other Technology under California Public Contract Code section §20217:

- 1. In protests based upon the Content of the Solicitation, the Procurement and Materials Director will issue a written decision prior to the opening of proposals.
- 2. In protests based upon grounds other than the Content of the Solicitation, the General Manager will issue a written decision within ten (10) working days after the receipt of the protest by the District. If the General Manager's decision cannot be issued within this time period, the District will notify the protester of the new date when a decision on the protest will be issued.
- 3. Protesters shall have an opportunity to appear and be heard before the District prior to the opening of proposals in the case of protests based on the content of the request for proposals, or prior to final

award in the case of protests based on other grounds or the renewal of protests based on the content of the request for proposals.

IX. APPEAL OF PROTEST DECISIONS

A. Appeal of Decision of Purchasing and Materials Manager:

Protesters may appeal an adverse decision by the Procurement and Materials Director to the District's General Manager by submitting an appeal, in writing, within five (5) working days after the date of issuance of the Procurement and Materials Director's decision. The appeal must state the basis for disputing the decision. The decision of the General Manager to grant or deny the appeal will be final.

B. Appeal of Decision of General Manager:

Protesters may appeal an adverse decision by the General Manager to the District Board of Directors by submitting an appeal, in writing, within five (5) working days after the date of issuance of the General Manager's decision. The appeal must state the grounds for disputing the decision of the General Manager.

Appeals should be directed to the Manager of Capital Planning/Grants Administration.

C. Board of Director Appeal Process:

1. At the next regularly scheduled Board meeting following receipt of notice of appeal from the decision of the General Manager, the Board will consider whether it wishes to entertain the appeal and schedule an appeal hearing to be heard by the Board of Directors at a future Board meeting. The decision whether to hear the appeal will be based on the Board's review of the following documents: the protest submitted by the protester, the decision of the General Manager denying the protest, the appeal submitted by the protester, and any additional documentation submitted by staff to the Board. If a majority of the Board of Directors votes against entertaining the appeal, the decision of the General Manager will become final.
2. If a majority of the Board votes to consider the appeal, the Board will notify the protester of the date of the hearing before the Board of Directors.
3. At the hearing on the appeal, the protesting party will be afforded a reasonable opportunity to present its case. Unless otherwise permitted by the Board, presentations will be limited to oral argument and documentary evidence. The Board may allow for a question and answer period following presentation of the appeal.

4. Upon conclusion of the hearing, the Board will either render a decision or continue the matter for decision at the next regularly scheduled Board of Directors meeting.

X. PROTESTS TO THE FEDERAL TRANSIT ADMINISTRATION (FTA)

- A. In accordance with the provisions of FTA Circular 4220.1D, the Procurement and Materials Director, or designee, will be responsible for providing information regarding protests of federally funded procurements to the Manager of Capital Planning/Grants Administration on a quarterly basis for inclusion in the FTA quarterly Progress
- B. The FTA will only review protests regarding the failure of the District to have written protest procedures or its failure to follow such procedures.
- C. A protester must exhaust all administrative remedies available through the District before pursuing a protest with the FTA. Following an adverse final decision by the District, the protestor may file a protest with the FTA. Protests should be filed with the San Francisco Region IX Office no later than five (5) working days after a final decision is rendered under the District's protest procedures. In instances where the protester alleges that the District failed to make a final determination on the protest, protesters shall file a protest with the FTA no later than five (5) working days after the protester knows or should have known of the District's failure to render a final determination on the protest. A copy of the protest should also be sent to the District.