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|  | <i>Massachusetts Bay Transportation Authority</i> |
| | Procurement Manual POLICIES & PROCEDURES |
| | EXHIBIT 1.3 MBTA APPEALS AND PROTEST PROCEDURES January 2018 |


A. INTRODUCTION

The following procedures apply to all MBTA procurements that involve federal FTA grant funds, including those that originate from and are the responsibility of the Materials Management Department (Goods and Services Purchases) and the Design and Construction Department (Construction and Professional Services contracts). For those procurements that do not involve federal FTA grant funds, it is within the MBTA's discretion to depart from these procedures based upon the general counsel's determination that it is in the best interest of the MBTA to do so.

Interested parties (Interested Party means an actual or prospective bidder, proposer or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract) must follow the procedures specified for the particular procurement that is being appealed/protested. In the event that an interested party has an appeal/protest for a procurement/contract that involves an area of responsibility not identified herein, the appeal/protest must be sent to the MBTA's Chief of Staff, General Manager's Office, Ten Park Plaza, Boston, for review. A protest will be processed in the time frames and structure as specified below. In addition, the MBTA will disclose information regarding the protest to the Federal Transit Administration (FTA) in writing and notify them informed of any changes or developments affecting the status of the protest.


B. PRE-BID APPEALS – CONSTRUCTION AND PROFESSIONAL SERVICES

1. If it is the opinion of any interested party that the Specifications/Scope of Work or any other requirement of the proposed procurement are in any way ambiguous, incorrect, incomplete or restrictive, the interested party shall contact the Authority, in writing, via U.S. Mail with an accompanying email, at least ten (10) business days prior to the bid opening date or proposal submittal date. The letter should be addressed to the Director of Contract Administration of the MBTA at 10 Park Plaza – Room 6720, Boston, MA 02116. The letter should identify the procurement that is underway (Contract/RFP number and description) and the specific issue to be addressed. Any protest about the content of a specification is waived if not filed prior to the bid opening or proposal submittal date. The Director of Contract Administration will review the interested parties protest and will respond, in detail, to each substantive issue raised by the interested party

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within three (3) business days. If the matter requires further evaluation, the Director of Contract Administration will notify the protesting party in writing (by U.S. Mail with an accompanying email) of the extended review period. A final response will be issued by the Director of Contract Administration upon final review of the matter. One of the following steps will be taken prior to the bid opening date or proposal submittal date:


- a. The Authority may elect to conduct an informal conference on the merits of a protest with interested parties;
 - b. If, upon review, the Authority determines that a change should be made to the specification and/or the bid documents, an addendum will be issued to all interested parties;
 - c. If the Authority determines that no change should be made to the specification and/or the bid documents, but that it is necessary to clarify any point made by the interested party, a Letter of Clarification will be issued to all interested parties; or
 - d. If the Authority determines that neither a change nor a clarification should be made to either the specification or the bid documents, then, the interested party should be notified in a timely fashion in writing (by email and telephone, if possible) of the Authority's determination.
2. If the interested party does not believe that the response addressed his/her concerns, he/she may appeal this decision to the General Counsel, in writing, prior to the bid opening date or the proposal submittal date. The matter will be reviewed and a response will be made in accordance with steps a. through d. above. The bids or proposals may be opened and the Authority may elect to proceed with an award during the pendency of a protest, if the Authority determines that:
- a. The items to be procured are urgently required; or
 - b. Delivery or performance will be unduly delayed by failure to make the award promptly; or
 - c. Failure to make prompt award will otherwise cause undue harm to the MBTA.
3. **ONCE THE GENERAL COUNSEL'S DETERMINATION HAS BEEN MADE, THE AUTHORITY'S DECISION IS FINAL AND WILL NOT BE**

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RECONSIDERED UNLESS THERE IS ADDITIONAL INFORMATION WHICH WAS NOT AVAILABLE TO THE APPEALING PARTY AT THE TIME THE APPEAL WAS MADE.

C. POST-BID APPEALS – CONSTRUCTION & PROFESSIONAL SERVICES

1. Post -Bid appeals by an interested party shall be made in writing via U.S. Mail with an accompanying email within three (3) business days of the bid opening date or the notification date of a selected proposer and shall be made as follows:
 - a. The initial protest or appeal shall be made to the Director of Contract Administration of the MBTA at 10 Park Plaza – Room 6720, Boston, MA 02116 who will collect the factual information pertaining to the appeal.
 - b. After discussion and appropriate -review, the Director Contract Administration will forward a recommendation to the Assistant General Manager for Design and Construction (AGM).
 - c. If the AGM does not concur with the recommendation, the AGM will obtain any other additional information required so that a determination can be made, at which time the interested party will be notified in writing of the Authority's determination within five (5) business days. If the matter requires further evaluation, the AGM will notify the protesting party in writing (by U.S. Mail with an accompanying email) of the extended review period. A final response will be issued by the AGM upon final review of the matter.
 - d. If the interested party does not agree with the determination, he/she may appeal directly to the Authority's General Counsel in writing within three (3) business days of the AGM's determination.
 - e. The General Counsel will review all facts of the appeal and will make a final determination and will advise the interested party of his decision within five (5) business days. If the matter requires further evaluation, the General Counsel will notify the protesting party in writing (by US Mail with an accompanying email) of the extended review period. A final written response will be issued by the General Counsel upon final review of the matter.


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2. ONCE THE GENERAL COUNSEL'S DETERMINATION HAS BEEN MADE, THE AUTHORITY'S DECISION IS FINAL AND WILL NOT BE RECONSIDERED UNLESS THERE IS ADDITIONAL INFORMATION WHICH WAS NOT AVAILABLE TO THE APPEALING PARTY AT THE TIME THE APPEAL WAS MADE.

D. GENERAL INSTRUCTIONS/INFORMATION

1. In the event that the subject contract procurement is federally funded, all prospective interested parties are notified of the following:
 - a. FTA's review of the protest will be limited to the MBTA's failure to have or follow its written protest procedures. The appeal to FTA must be received by the cognizant FTA regional or Headquarters Office within five (5) working days of the date the protester knew or should have known of the violation. The protest/appeal is to be in accordance with FTA Circular 4220.1F (as periodically updated).
 - b. Note: The interested party must exhaust all administrative remedies with the MBTA before electing to pursue a protest with the Federal Transit Administration (FTA).

2. In the event that a protest is pending:
 - a. The MBTA reserves the right to proceed with the procurement, which may include the opening of bids or proposals and the subsequent award of a contract, regardless of the existence of a protest that is pending, in the event that a determination has been made that:
 1. The supplies or services to be contracted for are urgently required;
 2. Delivery or performance will be unduly delayed by failure to make award promptly;
 3. Failure to make a prompt award will otherwise cause undue harm to the MBTA or the Federal Government.
 4. If award is made, the procurement file will be documented to explain the basis of award. Written notice of the decision to


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proceed with the award will be sent to the protester and other interested parties.

E. PRE-BID APPEALS – GOODS AND SERVICES

1. General: If it is the opinion of any interested party that the specifications are in any way ambiguous, incorrect, incomplete, or restrictive, the interested party shall contact the Authority, in writing via U.S. mail with an accompanying email, at least five (5) business days, or in the case of designated large procurements, ten (10) business days prior to the bid opening date. The letter should identify the procurement that is underway (IFB/RFP number and description) and the specific issue that is to be addressed. The Chief Procurement Officer will review the interested parties protest and will respond, in detail, to each substantive issue raised by the interested party. One of the following steps will be taken prior to the bid opening date:
 - a) The Authority may elect to conduct an informal conference on the merits of a protest with interested parties.
 - b) If, upon review, the Authority determines that a change should be made to the specification and/or the bid documents, an addendum will be issued to all interested parties.
 - c) If the Authority determines that no change should be made to the specification and/or the bid documents, but that it is necessary to clarify any point made by the interested party, a Letter of Clarification will be issued to all interested parties.
 - d) If the Authority determines that neither a change nor a clarification should be made to either the specification or to the bid documents, then the interested party shall be notified in a timely fashion in writing (by email and telephone if possible) of the Authority's determination.

If the interested party does not believe that the response addresses his/her concerns, he/she may appeal the decision to the General Counsel, in writing, prior to the bid opening date. The matter will be reviewed and a response will be made in accordance with steps a) through d) above. The bids may be opened and the Authority may elect to proceed with an award during the pendency of a protest, if the Authority determines that:

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- A. The items to be procured are urgently required; or
- B. Delivery or performance will be unduly delayed by failure to make the award promptly; or
- C. Failure to make prompt award will otherwise cause undue harm to the MBTA.

F. POST-BID APPEALS – GOODS AND SERVICES

1. Post-bid appeals or protests from any interested party shall be made, in writing via U.S. Mail with an accompanying email, within three (3) business days of the bid opening date and/or the Notice of Award Determination date and shall be made as follows:
 - a) The protest or appeal shall be made to the Chief Procurement Officer who will review the matter and notify the interested party in writing of the Authority's determination within five (5) business days. If the matter requires further evaluation, the Chief Procurement Officer will notify the protesting party in writing (by email and U.S. mail) of the extended review period. A final response will be issued by the Chief Procurement Officer upon final review of the matter.
 - b) If the interested party does not agree with the Chief Procurement Officer's determination, he/she may appeal to the Authority's General Counsel in writing within three (3) business days of the Chief Procurement Officer's determination.
 - c) The General Counsel will review all facts of the appeal and will notify the interested party of his decision within five (5) business days. If the matter requires further evaluation, the General Counsel will notify the protesting party in writing (by email or U.S. mail) of the extended review period. A final response will be issued by the General Counsel upon final review of the matter.

Once the General Counsel's determination has been made, the Authority's decision is final and will not be reconsidered unless there is additional information which was not available to the appealing party at the time the appeal was filed.

2. In the event that a protest is filed prior to award:

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The MBTA reserves the right to proceed with the procurement, which may include the opening of bids and the subsequent award of a contract, regardless of the existence of a protest that is pending, in the event that a determination has been made that:

- a. The supplies or services to be contracted for are urgently required; or
 - b. Delivery or performance will be unduly delayed by failure to make award promptly; or
 - c. Failure to make prompt award will otherwise cause undue harm to the MBTA or the Federal Government.
3. If award is made, the procurement file will be documented to explain the basis for the award. Written notice of the decision to proceed with the award will be sent to the protestor and other interested parties. Interested parties may elect to issue a protest to the FTA if the interested party reasons that the MBTA failed to have or follow written protest procedures. Such protests to FTA must be filed in accordance with FTA Circular 4220.1F.

- G.** The Common Grant Rule assigns responsibility to recipients of FTA funds for resolving all contractual and administrative issues arising out of third party procurements, including source evaluation and selection, protest of awards, disputes, and claims. FTA charges the recipient with the initial responsibility to resolve protests of third party contract awards. FTA expects each recipient to have appropriate written protest procedures as part of its requirement to maintain or acquire adequate technical capacity to implement the project.

The Common Grant Rule also requires FTA grant recipients to notify FTA when it receives a third party contract protest, and to keep FTA informed about the status of the protest. Recipients are expected to provide FTA with the following information:

- 1) Subjects: A list of protests involving third party contracts and potential third party contracts that:
 - a) Have a value exceeding \$100,000 or
 - b) Involve a controversial matter, irrespective of amount, or
 - c) Involve a highly publicized matter, irrespective of amount.

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2) Details: The following information about each protest:

- a) A brief description of the protest,
- b) The basis of disagreement, and
- c) If open, how far the protest has proceeded, or
- d) If resolved, the agreement or decision reached, and
- e) Whether an appeal has been taken or is likely to be taken.

3) When and Where: The recipient should provide this information:

- a) In its next quarterly Milestone Progress Report, and
- b) At its next Project Management Oversight Review, if any.

4) FTA Officials to Notify: When a recipient denies a bid protest, and especially if an appeal to FTA is likely to occur, FTA expects the recipient to inform the FTA Regional Administrator for the Region administering a regional project, or the FTA Associate Administrator for the program office administering a headquarters project directly. FTA also encourages the recipient to keep its FTA project manager informed about protests with which it is involved. In particular, the recipient should contact its project manager about any unusual activity.

If a protest is filed prior to award, all firms sent a copy of the bid documents or firms that have been issued a formal proposal number will be notified of the pending protest.