019-020 ITS Protest Procedure and Policy

ITS Protest Procedure and Policy

A. **Purpose of Policy -** The policies and procedures set forth herein and issued by the Department of Information Technology Services (hereinafter referred to as "ITS"), establish the guidelines relating to the filing, hearing, decision and appeal of protests by any actual or prospective participant in the procurement process who is aggrieved in connection with the solicitation or award of a contract.

B. **Definitions -** When used in reference to this policy:
   1. "Attorney General" means the individual assigned by the Attorney General of the State of Mississippi to provide legal assistance to ITS.
   2. "Award of Contract" means
      a. approval of the lowest and best proposal by the ITS Executive Director via
         i. written notification to proposers on ITS letterhead or
         ii. the execution of a CP-1 for the project, whichever of (i.) or (ii.) occurs first, OR
      b. the ITS Board's approval of same during an open session of the Board.
      c. ITS statute specifies whether (a) or (b) is applicable for a given project, depending on the total life-cycle cost of the contract.
   3. "Customer" means the procuring state agency, institution, or governmental entity.
   4. "Disclosure of Information" means the inadvertent or intentional divulgement of information in a vendor's proposal that is clearly marked "confidential" to any individual or group outside the proposal evaluation team, comprised of ITS and Customer staff who participate directly or indirectly in the assessment and scoring of the proposals.
   5. "General RFP" means a Request for Proposal issued by ITS to be used in satisfying routine recurring requests for acquisitions of information technology hardware, software, or services. Each proposal received in response to a General RFP is subject to technical and financial evaluation on a project by project basis, and awards may be made multiple times from each proposal. For procurements using a General RFP with multiple configuration alternatives, a Letter of Configuration is sent to suppliers with valid proposals to obtain the best system configuration and pricing.
   6. "Interested Party" means any party who has documented in writing to the Executive Director of ITS that he/she has a sufficient personal interest in the subject matter of the protest. If the contract has been awarded, as defined herein, the awarded vendor automatically becomes an Interested Party without having to provide this written documentation.
   7. "ITS Board" means the membership of the ITS Board as specified in Section 25-53-7 of the Mississippi Code of 1972.
   8. "Letter of Configuration" means a request to suppliers to provide a cost proposal for a specific configuration of equipment, software, and/or services required by a Customer for a particular project. A Letter of Configuration is sent to all suppliers who have a current valid proposal for the relevant General RFP and who have proposed products and/or services that most closely match the requirements for the specific project.
   9. "Official Release of the RFP" means the date the RFP was posted on the ITS Internet site, "www.its.ms.gov,"or the date the most recent clarification to the RFP was posted on the ITS Internet site, whichever date is later.
   10. "Post-Procurement Review" means a business meeting conducted by ITS staff at the request of any participant in the procurement process to exchange information on the procurement process and on the evaluation and scoring of the proposal submitted by the participant requesting the review.

participant requesting the review.

11. "Proposal Solicitation" means the process of advertising/requesting and receiving vendors' proposals submitted in response to an RFP or Letter of Configuration.
12. "Protestor" means any actual or prospective participant in the procurement process who is aggrieved in connection with the technology procurement and who files a protest.
13. "Request for Proposal" or "RFP" means a formal invitation from the State, advertised according to State Statute, asking suppliers to submit an offer as a solution to a problem or need that the State has identified.
14. "State" means ITS and/or the procuring state agency, institution, or governmental entity.
15. "Working Days" means Monday through Friday but excludes State-recognized holidays mandated by Mississippi Code Annotated, Section 3-3-7 (1972), other holidays identified in holiday proclamations published or distributed by the Mississippi Secretary of State, and any other day the offices of the state agencies are officially closed for business.

C. **Roles and Responsibilities During Protest**

1. Role of ITS
    a. ITS' enabling legislation requires that ITS ensure that information technology procurements for state government agencies and institutions follow all applicable state statutes. Therefore, ITS will provide as much guidance in a protest situation as wanted and needed by the Customer. ITS has the responsibility for all decisions related to procurement process and procedures, while all business decisions related to the procurement are the sole responsibility of the Customer.
    b. The specific responsibilities of ITS during the protest are listed below:
        i. All correspondence related to the protest will be mailed or delivered by ITS under the signature of either the ITS Executive Director or the chairperson of the ITS Board, whichever is appropriate. ITS will work with the Customer on the content of any correspondence. ITS is responsible for ensuring that all parties to the protest receive copies of any correspondence.
        ii. ITS will maintain the official protest file, including copies of all documents related to the protest.
        iii. ITS will work with all parties to schedule any protest conferences or meetings, including distributing official notification of all such conferences or meetings.
        iv. ITS will hire independent legal counsel at ITS' expense if ITS deems such independent counsel necessary and advisable in a given protest situation.
        v. ITS will administer, research, and respond to any public records requests received in conjunction with a protest, working with the Customer to locate and organize pertinent information. The individual or company making the public records request is responsible for any costs incurred in filling the request.
        vi. ITS will provide the official record of any conference related to the protest. This record may be either an audio tape, with or without transcription, or a court reporter's record, at the discretion of ITS. ITS will pay any expense incurred to produce this official record in the format selected by ITS.
        vii. Any time required from the ITS Executive Director, other ITS Directors, and/or ITS legal counsel in conjunction with a protest will be provided at no cost to the Customer. The participation of other ITS staff members in the protest, including the Technology Consultant(s) serving as project manager, will be billed to the Customer at the staff member's hourly billing rate.
2. Role of the Customer
    a. The Customer will work with ITS to research and organize any project information required for the protest or any associated public records request(s).
    b. The Customer can hire independent legal counsel at the Customer's expense if

the Customer deems such independent counsel necessary and advisable in a given protest situation.

c. The Customer is responsible for all costs incurred by the State during the protest other than the ITS internal costs outlined in Section 3a. above.
d. The Customer is responsible for all business decisions associated with the protest and with the underlying procurement.

3. Role of the Protestor
   a. The Protestor is responsible for responding promptly to any requests for information made by ITS related to the protest.
   b. The Protestor is responsible for filing all applicable bonds.
   c. The Protestor is responsible for working with ITS to schedule any conferences and/or meetings related to the protest in a timely manner.
   d. The Protestor is responsible for adhering to the schedules identified in this policy.
   e. If the Protestor needs or requires any record of a protest-related conference other than the official record produced at ITS' expense, the Protestor is responsible for producing that record at the Protestor's expense.
4. Role of the Interested Party
   a. The Interested Party is responsible for responding promptly to any requests for information made by ITS related to the protest.
   b. If the Interested Party needs or requires any record of a protest-related conference other than the official record produced at ITS' expense, the Interested Party is responsible for producing that record at the Interested Party's expense.

D. **Right to Protest -** Any actual or prospective participant in the procurement process who is aggrieved in connection with the solicitation or Award of a Contract and has posted the applicable protest bond as defined in Section 5, and who has, if the protest is of an Award of Contract, participated in a Post-Procurement Review with ITS staff, may file a protest.

E. **Protest Bond**
   1. As a condition precedent to filing a protest, the Protestor must provide a Protest Bond as herein described. The Protestor shall procure, submit to the State with its written protest, and maintain in effect at all times during the course of this protest or appeal thereof, a Protest Bond in the amount specified in the underlying RFP or Letter of Configuration, or in the default amount specified by the ITS Board when no such amount is specified in the RFP or Letter of Configuration. The default bond amount established by the ITS Board is $250,000 or the estimated total project cost, whichever is less. The estimated total project cost shall be determined by the state.
   2. The bond shall be accompanied by a duly authenticated or certified document evidencing that the person executing the bond is a licensed Mississippi agent for the bonding company. This certified document shall identify the name and address of the person or entity holding the Protest Bond, and shall identify a contact person to be notified in the event the state is required to take action against the bond. The Protest Bond shall not be released to the Protestor until the protest is finally resolved and the time for appealing said protest has expired or until the protest is finally resolved and the Protestor furnishes ITS with written notification that no appeal will be pursued.
   3. The Protest Bond shall be procured at the Protestor's expense and be payable to the State of Mississippi. Prior to approval of the Protest Bond, the State reserves the right to review the bond and require the Protestor to substitute an acceptable bond in such form as the State may reasonably require. The premiums on such bond shall be paid by the Protestor.
   4. The bond shall bind the surety to all of the terms and conditions of this protest policy. The State may claim against the Protest Bond as specified in Section 25-53-5 (n) of the Mississippi Code Annotated, as amended, in addition to all other rights and remedies the State may have at law or in equity.

F. **Subject of Protest**
   1. Protestors may file a protest during the following phases or events of the procurement process. Grounds for protest of each milestone are limited to specific criteria. Each written protest should specifically identify which of the following grounds is the reason for

the protest. Only protests at the following milestones and citing the following grounds shall be considered:

a. Milestone: Specification preparation;
    i. Specifications were unduly restrictive and failed to promote fair and open competition
b. Milestone: Proposal Solicitation
    i. State failed to follow procedures established in the RFP or Letter of Configuration, ITS procurement policy and procedures, or ITS governing law
c. Milestone: Disclosure of Information marked as confidential in the proposal
    i. State failed to follow procedures established in the RFP or Letter of Configuration, ITS procurement policy and procedures, or ITS governing law
d. Milestone: Award of Contract
    i. Errors were made in computing scores upon which an award was based
    ii. Bias, discrimination, or conflict of interest exists on the part of an evaluator
    iii. State failed to follow procedures established in the RFP or Letter of Configuration, ITS procurement policy and procedures, or ITS governing law
e. Milestone: Execution of the contract
    i. Scope and intent of the project as specified in the executed contract differ materially from the scope and intent of the RFP or Letter of Configuration

2. Disallowed Issues: Protests not based on the above criteria shall not be considered. Protests not based on procedural matters will not be considered. Protests will be rejected as without merit if they attack such issues as:
    a. An evaluator's professional judgment on the quality of a response; or
    b. The Customer's assessment of their agency's own needs or requirements.

G. **Authority to Resolve Protests:**
1. The Executive Director of ITS or his/her designee shall have the authority to settle and resolve a protest.

H. **Filing of Protest**
1. Time for Filing: Protests shall be made in writing and submitted in an envelope labeled "Protest" to the Executive Director of ITS by personal delivery or by certified United States Mail, postage prepaid, return receipt requested, or by overnight courier with signed receipt, according to the schedule outlined below:
    a. Specification preparation:
        i. within five (5) Working Days after the date of the Official Release of the RFP; or
        ii. within two (2) Working Days before the Letter of Configuration response is due.
    b. Proposal Solicitation: within five (5) Working Days after the Protestor knows or should have known of the failure to follow procedure, but in no event later than ten (10) Working Days after the Award of Contract.
    c. Disclosure of Information: within five (5) Working Days after the Protestor knows or should have known of the Disclosure of Information, but in no event later than five (5) Working Days after the execution of the contract.
    d. Award of Contract: within five (5) Working Days after the Award of Contract or within five (5) Working Days after the Post-Procurement Review, whichever occurs last, but in no event later than ten (10) Working Days after the Award of Contract.
    e. Execution of contract: within five (5) Working Days of the execution of the contract by the last signatory.
    f. If a protest is not filed within the time limits set forth herein, it will be considered waived. A protest is deemed filed when it is received by the Executive Director of

ITS and contains the items detailed in Section I below, including but not limited to a Protest Bond in the correct amount, as described in Section E above.

2. Limitations on Time for Filing: No protest will be entertained if filed more than five (5) Working Days after the execution of the contract by the last signatory.

I. **Content of Protest:** The written protest shall contain the following:

1. the name, mailing address, telephone number, and fax number of the Protestor;
2. appropriate identification of the procurement or contract protested;
3. a statement, in sufficient detail, of the facts upon which the protest is based, including the effective date of any alleged grievable action, and why such action is believed to be in error and any actions taken prior to the protest in an attempt to resolve the grievance;
4. supporting exhibits, evidence or documents to substantiate any claims. If such exhibits, evidence, or documents are not available within the filing time, Protestor should provide the expected date the information will be available. In no case will delay in the delivery of supporting documents be justification for extending the time for filing the protest;
5. a statement of the relief requested; and
6. the Protest Bond and accompanying certification, as described in Section E above.

- A protest that is incomplete, or not submitted within the prescribed time limits as described in Section H above, will be summarily dismissed.
- All correspondence related to a protest should be addressed to the ITS Executive Director. The outside of the envelope should be clearly marked "Protest" and should contain the name and RFP number or Letter of Configuration subject for the procurement that is the object of the protest.

Notification - Upon receipt of a written protest, the Executive Director of ITS shall submit a copy of the protest to the Attorney General, to the Customer involved in the procurement under protest, and to all other Interested Parties. The same parties will also receive copies of any other written documents generated during the protest proceedings without the requirement of a public records request being submitted.

Stay of Procurements - In the event of a timely protest, the State shall not proceed further with the proposal solicitation or Award of the Contract until the resolution of the protest, unless the Executive Director of ITS, after conferring with the director of the procuring state agency, institution, or governmental entity, makes a written determination that in order to protect the substantial interests of the State, it is necessary to go forward with the proposal solicitation or Award of the Contract.

Additional Information -- Time for Filing - Any additional information requested from the Protestor or Interested Parties by the Executive Director of ITS should be submitted within the reasonable time period established by the Executive Director in order to expedite consideration of the protest. Failure of any party to comply expeditiously with a request for information by the Executive Director of ITS may result in the protest being resolved without the additional information being considered.

Initial Review of Protest

1. When a protest is filed, the Executive Director of ITS shall perform a review of the protest. The review shall be based on the written protest material submitted by the Protestor and all other facts known to the Executive Director. The Executive Director shall determine as a result of the initial review if sufficient information has been submitted to render a decision. The Executive Director may either render a decision at that time based on the information in his/her possession or schedule a protest conference as specified in Section N below.
2. ITS may refuse to hear or consider, or may cease to consider, a protest on the grounds that the protest is trivial, frivolous, vexatious, or not made in good faith.

N. **Scheduling of Protest Conference -** When the Executive Director of ITS determines that a protest conference is required to acquire sufficient information to render a decision, the Executive Director shall, mutually with the Protestor, schedule a date, time, and place for the protest conference and send a notice of same to the Protestor, the Customer, and any Interested Party.

O. **Rescheduling of Protest Conference -** Continuances requested by any party to the protest shall

be granted within the discretion of the Executive Director of ITS only for good cause shown.

P. **Failure to Appear at Protest Conference -** If a Protestor, without good cause, fails to appear at the protest conference, such failure will be deemed a withdrawal of the protest and the Executive Director shall dismiss the protest and such dismissal shall be final and conclusive.

Q. **Conduct of Protest Conference**

1. The protest conference is a business meeting during which time the issues relevant to the specific procurement being protested are presented. ITS expects the issues to be presented from a business perspective by the protesting vendor's account representative directly overseeing this project. ITS will not allow the protest conference to evolve into an adversarial proceeding.
2. So as to encourage the amicable resolution of a protest, the protest conference is informal and no witnesses are examined. However, if there is anyone that a party believes could provide pertinent input, the party may have that person present to be interviewed, at the discretion of the ITS Executive Director, at the conclusion of the conference and before a decision is made.
3. The Protestor has the burden of proving that the protest merits the relief requested.
4. The Executive Director of ITS shall have the authority to maintain the decorum of the conference and shall take reasonable steps to do so when necessary, including clearing the conference room of any person who is disruptive.

R. **Decision of ITS Executive Director**

1. The Executive Director of ITS shall, within a reasonable time, prepare a written decision. The final determination shall either:
    a. Find the protest lacking in merit and uphold the State's action; or
    b. Find only technical or harmless errors in the State's acquisition process, determine the State to be in substantial compliance, and reject the protest; or
    c. Find merit in the protest and provide options which may include:
        i. Correct errors and re-evaluate all proposals; or
        ii. Reissue the RFP or Letter of Configuration; or
        iii. Make other findings and determine other courses of action as appropriate.
    d. Find that it is in the best interest of the State to reissue the RFP or Letter of Configuration, with no determination of fault or error.
2. A copy of such decision shall be sent by personal delivery sent by electronic means to the Protestor; any Interested Party, and the executive head of the procuring state agency, institution, or governmental entity, provided that a printed copy of the decision is sent to the Protestor by courier or other delivery option with signed receipt. The decision of the Executive Director of ITS shall be final and conclusive unless fraudulent or unless a timely request for a review by the ITS Board is filed.

S. **Effect of Judicial Proceedings -** ITS shall refuse to decide a protest if an action concerning the protest has been filed in court.

T. **Review by the ITS Board**

1. Right to Review - Any Protestor, Interested Party, or Customer aggrieved by the final decision of the Executive Director of ITS, may file a written request for review by the ITS Board.
2. Time for Filing
    a. Requests for review by the ITS Board shall be filed with the Board with copies of same being sent to the Executive Director of ITS, the Customer, and any Interested Party, by personal delivery or by certified United States Mail, postage prepaid, return receipt requested, or by overnight courier with signed receipt, within three (3) Working Days after receipt of the decision by the Executive Director of ITS.
    b. If a request for review by the ITS Board is not filed within the specified time limit, it will be considered waived and the decision of the Executive Director of ITS shall be final and conclusive.
3. Content of Review Request - The written request for review by the ITS Board shall contain, at minimum, the following:

a. the name and mailing address of the person filing the request for review;
b. a copy of the written protest originally filed;
c. copies of all documents which have been produced thus far in the protest proceeding;
d. copy of the decision of the Executive Director of ITS;
e. a statement, in sufficient detail, of the facts relied upon to substantiate a claim that the decision of the Executive Director of ITS is in error;
f. a statement of the relief requested; and
g. the Protest Bond and accompanying certification, as described in Section E above.

4. Initial Review by ITS Board - When a Request for Review is filed, the ITS Board shall perform an objective review of the request. The review shall be based on the written material submitted by the Protestor and all other facts known to the Board. The Board shall determine as a result of the initial review if sufficient information has been submitted to render a decision. The Board may either render a decision based upon the information in its possession or schedule a review conference as specified below.
5. Scheduling of Review Conference
    a. When the ITS Board determines that a conference is required to acquire sufficient information to render a decision, the ITS Board shall mutually with the Protestor schedule a date, time, and place for the review conference and send a notice of same to the Protestor, the Customer, and any Interested Party.
    b. Continuances requested by any party to the protest shall be granted within the discretion of the ITS Board only for good cause shown.
    c. If a Protestor, without good cause, fails to appear at the review conference, such failure will be deemed a withdrawal of the protest and the ITS Board shall dismiss the protest and such dismissal shall be final and conclusive.
6. Conduct of Review Conference
    a. The review conference is a business meeting during which time the issues relevant to the specific procurement being protested are presented. ITS expects the issues to be presented from a business perspective by the protesting vendor's account representative directly overseeing this project. ITS will not allow the review conference to evolve into an adversarial proceeding.
    b. So as to encourage the amicable resolution of a protest, the review conference is informal and no witnesses are examined. However, if there is anyone that a party believes could provide pertinent input, the party may have that person present to be interviewed, at the discretion of the ITS Board, at the conclusion of the conference and before a decision is made.
    c. The Protestor has the burden of proving that the protest merits the relief requested.
    d. The ITS Board shall have the authority to maintain the decorum of the conference and shall take reasonable steps to do so when necessary, including clearing the conference room of any person who is disruptive.
7. Decision on Review - The ITS Board shall issue a final written decision within a reasonable time after the final date for filing all documents to be considered on review. The final determination shall either:
    a. Uphold the Executive Director's decision; or
    b. Determine that the Executive Director's decision was in error and render a new decision which shall either:
        i. Find the protest lacking in merit and uphold the State's action; or
        ii. Find only technical or harmless errors in the State's acquisition process, determine the State to be in substantial compliance, and reject the protest; or
        iii. Find merit in the protest and provide options which may include:
            - Correct errors and re-evaluate all proposals; or
            - Reissue the RFP or Letter of Configuration; or
            - Make other findings and determine other courses of action as

appropriate; or

iv. Find that it is in the best interest of the State to reissue the RFP or Letter of Configuration, with no determination of fault or error.

- A copy of such decision shall be sent by personal delivery or sent by electronic means to the party filing the request for review; the Executive Director of ITS; the executive head of the procuring state agency, institution, or governmental entity; and any Interested Party, provided that a printed copy of the decision is sent to the party filing the request for review by courier or other delivery option with signed receipt. A determination of an issue or fact by a quorum of the ITS Board shall be final and conclusive unless arbitrary, capricious, fraudulent or clearly erroneous.

U. **Exhaustion of Remedies** - Except as may be authorized under federal law, no Protestor may file a petition for judicial review with a court of competent jurisdiction (that court being in Jackson, Hinds County, Mississippi), until a final written decision has been issued by the ITS Board. Protestor must notify ITS, within thirty (30) days of entry of ITS Board's final written decision, concerning Protestor's intent to file a petition for judicial review. ITS will return Protest Bond only on receipt of written notification from Protestor that Protestor will not file a petition for judicial review. Upon court's determination following any petition for review that the protest was filed without substantial basis or reasonable expectation to believe that the protest was meritorious, ITS will issue a payment demand against the Protest Bond to cover the expense or loss incurred by the State as a result of the protest.

V. **Amendment of Rules, Etc.**

1. The ITS Board may, from time to time, amend these rules or promulgate new rules.
2. If any one or more of these rules is found to be invalid by a court of competent jurisdiction, such finding shall not affect the validity of any other of these rules.