



September 03, 2020

TO: LOCSD Board of Directors

FROM: Ron Munds, General Manager

SUBJECT: **Agenda Item 6G – 09/03/2020 Board Meeting**
Adopt Rules Governing Bid Protests and Other Challenges to Awards of Construction Contracts

DESCRIPTION

Currently, the District does not have rules for governing bid protest or challenges to awards of construction contracts. With the District moving forward with the implementation of its capital project plan, the General Manager and District's Legal Counsel are proposing such rules in the event a protest/challenge is submitted in the future.

STAFF RECOMMENDATION

This item will be approved along with the Consent Calendar unless it is pulled by a Director for separate consideration. If so, Staff recommends that the Board adopt the following motion:

Motion: I move that the Board adopt Resolution 2020-21 adopting Rules Governing Bid Protests and Other Challenges to Awards of Construction Contracts.

DISCUSSION

When public bidding is required, bid protests should be anticipated. Not every District bid will draw a protest, but in the event one is filed, it is best to be prepared to minimize the liability to the District and impacts to staff time. At best, bid protests can require some extra staff and legal time. At worst, they can result in litigation, project delay, and even loss of project funding. The objective of the rules is to provide clear procedures and requirements to bidders so to manage bid protests and minimizing their impact when they do arise.

The proposed rules authorize the General Manager to determine if any bid is responsive and whether any bidder is a responsible bidder as defined by the rules. The rules include clear definitions for the basis of a protest and the required form and information that is needs to be submitted. Lastly, the rules lay out procedure which will be followed from the time a protest is submitted to the final determination made by the General Manager whose decision is final.

FINANCIAL IMPACT

There is no financial impact with the adoption of the bid protest rules. The policy will provide transparent direction to the General Manager and potential bid protestors on the rules and procedures for bid protests and other challenges to the award of construction contracts.

Attachment – Resolution 2020-21
Exhibit A

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Charles L. Cesena

Vice President
Christine M. Womack

Directors
Matthew D. Fourcroy
Vicki L. Milledge
Marshall E. Ochylski

General Manager
Ron Munds

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DATE: September 3, 2020
AGENDA ITEM: 6G
() Approved
() Denied
() Continued

RESOLUTION NO: 2020 - 21

**A RESOLUTION OF THE LOS OSOS COMMUNITY SERVICES DISTRICT
ADOPTING RULES GOVERNING BID PROTESTS AND OTHER CHALLENGES TO AWARDS OF
CONSTRUCTION CONTRACTS**

WHEREAS, the Los Osos Community Services District (“District”) seeks formal and informal bids for facility and infrastructure construction contracts throughout its jurisdiction from time to time; and

WHEREAS, it is desirable to establish a uniform procedure for processing bid protests and other challenges to the award of construction contracts; and

WHEREAS, the attached “Rules Governing Bid Protests and Other Challenges to Awards of Construction Contracts” will establish such a uniform procedure.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the Los Osos Community Services District that:

1. The attached “Rules Governing Bid Protests and Other Challenges to Awards of Construction Contracts” is hereby adopted and the General Manager is hereby delegated all of the powers, authority and duties needed to comply with the requirements and guidelines as set forth in the rules.
2. The District General Manager shall reference said rules in future bid documents for construction contracts and once adopted, the rules shall apply to all pending as well as future construction projects subject to bid.
3. The District General Manager shall have authority to make non-substantive revisions to the rules as needed to conform to specific projects, however, the rules shall remain in substantial conformance with the rules as adopted herein.
4. The District General Manager shall maintain a record of the processing of bid protests should they occur.

On the motion of Director _____, seconded by Director _____,
and on the following roll call vote, to wit:

Ayes: _____
Noes: _____
Abstain: _____
Absent: _____

The foregoing resolution is hereby passed, approved, and adopted by the Board of Directors of the Los Osos Community Services District this 3rd day of September, 2020.

Charles L. Cesena
President, Board of Directors
Los Osos Community Services District

ATTEST:

APPROVED AS TO FORM:

Ron Munds
General Manager and Secretary to the Board

Jeffrey A. Minnery
District Legal Counsel

LOS OSOS COMMUNITY SERVICES DISTRICT

Rules Governing Bid Protests and Other Challenges to Awards of Construction Contracts

The requirements set forth in these “Rules Governing Bid Protests and Other Challenges to Awards of Construction Contracts” (“Rules”) are mandatory and are a Bidder’s sole and exclusive remedy in the event a Bidder desires to challenge, protest or contest the award of any Construction Contract. A Bidder’s failure to comply with these requirements shall constitute a waiver of any right to challenge, protest or contest the award of a Construction Contract in any subsequent proceeding, including but not limited to, the filing of a court action.

A Bidder may not rely upon another Bidder’s compliance with the requirements of these Rules. Any Bidder that does not independently comply with the requirements set forth herein shall be deemed to have waived any right to challenge, protest or contest the award of a Construction Contract.

Nothing in these Rules affects the right of the District to reject all bids at any time prior to the award of a Construction Contract.

1.1 Definitions

- 1.1.1 Bidder – The contractor submitting a bid in response to a District solicitation for bids on a Construction Contract.
- 1.1.2 Protestor – A Bidder who files a Protest in accordance with the provisions of these Rules.
- 1.1.3 Board – Board of Directors of the Los Osos Community Services District (hereinafter, also “District”)
- 1.1.4 Construction Contract - Any Construction Contract which is formally or informally advertised for bids in which the District will be a party.
- 1.1.5 Protest – Any challenge, objection, or protest to the award of a Construction Contract to any Bidder.
- 1.1.6 Response – Any response to a Protest that is filed by an Interested Party in accordance with the provisions of these Rules.
- 1.1.7 General Manager – The person designated by the Board to assume the powers, duties, and responsibilities conferred under these Rules.

- 1.1.8 Initial Determination – A written notice by the General Manager that notifies a Bidder of the reasons why the General Manager believes that a bid is nonresponsive, or that a Bidder is not a responsible Bidder.
- 1.1.9 Interested Parties – For the purpose of these Rules, Interested Parties are defined as:
 - 1.1.9.1 The District.
 - 1.1.9.2 Any Bidder that filed a Protest or whose bid is the subject of an Initial Determination.
 - 1.1.9.3 Any Bidder whose eligibility for having the Construction Contract awarded to it as a responsible Bidder with the lowest responsive bid would be affected by the outcome of a Protest or Initial Determination.

1.2 General Manager's Independent Authority to Determine Bid Responsiveness and Bidder Responsibility.

- 1.2.1 Regardless of whether a Protest is submitted under these Rules, the General Manager is authorized to determine whether any bid is a responsive bid and whether any Bidder is a responsible Bidder. In the event the General Manager issues an Initial Determination, the General Manager shall provide the Interested Parties with written notice of the Initial Determination at least five (5) business days before the General Manager renders a final decision addressing the grounds stated in the Initial Determination. A final decision of the General Manager under this section 1.2 shall be the final decision of the District with no provision for reconsideration or appeal to the Board.
- 1.2.2 The General Manager need not issue an Initial Determination in order to make a final decision on whether a bid is a responsive bid or a Bidder is a responsible Bidder. A final decision can also be issued by the General Manager through the processing of a Protest pursuant to the procedures set forth in these Rules.
- 1.2.3 The General Manager reserves the right to amend or withdraw an Initial Determination at any time before the General Manager renders a final decision addressing the grounds stated in the Initial Determination. When an Initial Determination is withdrawn, it shall have the same effect as if the Initial Determination had never been made.

1.3 Basis for Protest

- 1.3.1 Grounds for Protest – The grounds for a Protest may include any grounds a Protestor may have for contesting or challenging the award of a Construction Contract to any Bidder, including but not limited to the following grounds:

- 1.3.1.1 A Protestor objects to a Construction Contract being awarded to another Bidder on the grounds that the other Bidder's bid is nonresponsive.
- 1.3.1.2 A Protestor objects to a Construction Contract being awarded to another Bidder on the grounds that the other Bidder is not a responsible Bidder.
- 1.3.1.3 A Protestor objects to a Construction Contract being awarded to the Protestor on the grounds that the Protestor made a mistake in its bid that entitles the Protestor to be relieved of its bid under Public Contract Code section 5100 et seq.
- 1.3.1.4 A Protestor objects to a General Manager's Initial Determination issued under section 1.2.1 above.
- 1.3.2 Required Form of Protest – All Protests shall be made in writing, containing the information listed below, and shall be filed with the General Manager. Protests shall contain the following information:
 - 1.3.2.1 The name, address, telephone, facsimile numbers, and email address of the Protestor.
 - 1.3.2.2 The signature of the Protestor or its representative.
 - 1.3.2.3 The bid, solicitation, and/or contract number.
 - 1.3.2.4 The Protest must contain a complete statement of all grounds for the Protest and must refer to the specific portion of the bid documents that are the basis of the Protest. The Protest must set forth all supporting facts and documentation. If Protestor believes there are some facts relevant to its Protest that Protestor cannot adequately present in writing, Protestor must describe such facts in its Protest under the heading "Facts Requiring Oral Presentation", and state therein the reasons why the Bid Protestor believes it cannot adequately present those facts through documentation.
 - 1.3.2.5 All information establishing that the Protestor is a Bidder for the purpose of filing a Protest.
 - 1.3.2.6 The form of relief requested.

1.4 Protest Requirements and Procedure

- 1.4.1 Standing to Protest - Protests shall be filed only by a Bidder.
- 1.4.2 Time for Filing a Protest
 - 1.4.2.1 Except as provided in sections 1.4.2.2 and 1.4.2.3 below, all Protests must be submitted in writing to the General Manager before 5 p.m. PST of the sixth (6) business day following the date upon which the bids on the Construction Contract were opened.
 - 1.4.2.2 When a Protestor objects to a Construction Contract being awarded to the Protestor on the grounds that the Protestor made a mistake in its bid that entitles the Protestor to be relieved of its bid under Public Contract Code section 5100 et seq, the Protest must be submitted in writing to the General Manager before 5 p.m. PST of the fifth (5) business day following the date upon

which the bids on the Construction Contract were opened pursuant to Public Contract Code section 5103.

- 1.4.2.3 When the Protestor objects to an Initial Determination made by the General Manager under section 1.2.1 above, the Protest must be submitted in writing to the General Manager before 5 p.m. PST of the fifth (5) business day following the date upon which the Initial Determination was first delivered to Protestor (either electronically or otherwise).
- 1.4.3 Written Responses of Interested Parties - If any Interested Party desires to respond to the Protest, the Response must be submitted in writing to the General Manager within five (5) business days of the date the Protest was first delivered to the Interested Party (either electronically or otherwise). If an Interested Party believes there are some facts relevant to its Response that the Interested Party cannot adequately present in writing, the Interested Party must describe such facts in its Response under the heading "Facts Requiring Oral Presentation", and state therein the reasons why the Interested Party believes it cannot adequately present those facts through documentation.
- 1.4.4 Proof of Transmittal - All Protests, Responses, and replies shall include documentation evidencing that all Interested Parties were concurrently sent a complete copy of the respective Protest, Response, or reply in a manner that would provide all Interested Parties with a complete copy of the respective Protest, Response, or reply no later than one (1) business day after it was sent to the General Manager. The means of transmission chosen must also provide the sending party a means of verifying the date and time the copy was received by each Interested Party. Transmission by email may be an acceptable means of transmittal.
- 1.4.5 No Ex Parte or Unilateral Communications on the Merits of a Protest – No Bidder shall have any written communications regarding the merits of a Protest with the General Manager that are not concurrently sent to all of the other Interested Parties. No Bidder shall have any oral communications regarding the merits of a Protest with the General Manager other than during an oral presentation properly noticed by the General Manager under these Rules.
- 1.4.6 Suspension of Process for Proposed Rejection of all Bids – At any time during the processing of a Protest, the General Manager may elect to indefinitely suspend any further processing of the Protest by providing written notice to all Interested Parties that the General Manager intends to recommend to the Board that all bids be rejected. All time deadlines provided in these Rules shall be tolled during any such suspension period. If the Board decides to not reject all bids, or if the General Manager otherwise decides to lift the suspension, the requirements of these Rules shall be reactivated upon the General Manager providing all Interested Parties with written notice thereof.

1.5 Summary Dismissal of Protest

The General Manager may summarily dismiss a Protest, or specific Protest allegations, at any time that the General Manager determines that the Protest is untimely, frivolous, or without merit; is not submitted in the required form of Protest, as set forth above in section 1.3.2., "Required Form of Protest;" or is submitted by a non-Bidder. In such cases, a notice of summary dismissal will be furnished to the Interested Parties. Such a summary dismissal shall be the final decision of the District with no provision for reconsideration or appeal to the Board.

1.6 Decision by the General Manager Based on Written Submissions Only

In reaching a decision on the merits of a Protest, the General Manager may consider relevant documentation submitted by the Protestor and any other Interested Party. If the General Manager wishes to have additional information submitted that was not included in the Protest or in any documentation from other Interested Parties, the General Manager may make a request specifying the information sought and time for submittal. Submissions of additional information that have not been specifically requested by the General Manager may not be considered at the General Manager's sole discretion. If the General Manager does not provide an opportunity for an oral presentation under section 1.7 below, the General Manager will issue a written decision without any oral presentation. The General Manager's decision shall be the final decision of the District with no provision for reconsideration or appeal to the Board.

1.7 Decision by the General Manager Following Oral Presentation

1.7.1 The General Manager may, at his or her discretion, elect to provide an opportunity for the Protestor and other Interested Parties to make an oral presentation to the General Manager regarding the Protest. In such event, oral presentations shall be conducted in accordance with the following procedure:

1.7.1.1 Notice of Oral Presentation – The General Manager will set a date, time, and place for an oral presentation. Written notice will be sent to Interested Parties not less than five (5) business days in advance of the oral presentation unless it is agreeable to all parties that an earlier date be established. Continuances may be granted by the General Manager for good cause.

1.7.1.2 Guidelines for Oral Presentation – Oral presentations are informal in nature and shall be made by the Protestor or its authorized representative. Technical rules of evidence shall not apply. The General Manager will determine how the oral presentations will be conducted and may set time limits for the presentation. The General Manager may question Interested Parties or provide an opportunity for Interested Parties to make an oral presentation. The General Manager may request additional documentation or information prior to, during, or after the oral presentation. Unless

requested by the General Manager, additional documentation or information may not be accepted.

1.7.1.3 Record of Oral Presentation – Any Interested Party may request, and in the General Manager's sole discretion, the General Manager may allow recording of the presentation. If the General Manager allows the presentation to be recorded, the Interested Party requesting that the presentation be recorded must pay the cost of recording, including the costs to make and distribute copies of the recording to the General Manager and other Interested Parties. There shall be no cost to the District.

1.7.1.4 Decisions – The General Manager will issue a written decision within 30 calendar days of the oral presentation; however, the time for issuing the written decision may be extended by the General Manager. A copy of the decision will be furnished to the Interested Parties. The decision shall be the final decision of the District with no provision for reconsideration or appeal to the Board.

1.8 Effect on Contracts

The failure of a District employee to comply with the provisions stated in these Rules shall in no way affect the validity of any Construction Contract entered into by the District.

1.9 General Manager Decisions on Protests Seeking Relief from a Bidder's Mistake under Public Contract Code Section 5103.

When a Protestor objects to a Construction Contract being awarded to the Bid Protestor on the grounds that the Protestor made a mistake in its bid that entitles the Protestor to be relieved of its bid under Public Contract Code section 5100 et seq, a final decision of the General Manager that relieves the Protestor of its bid on the grounds of mistake must be approved by the Board before it can become a final decision of the District. Any other final decision of the General Manager regarding a Protestor's request to be relieved of its bid on the grounds of mistake under Public Contract Code section 5100 et seq, shall be the final decision of the District with no provision for reconsideration or appeal to the Board.