



## Law and Legislation Committee Report

915 I Street, 1<sup>st</sup> Floor

Sacramento, CA 95814

[www.cityofsacramento.org](http://www.cityofsacramento.org)

---

**File #:** 2016-01254

**Consent Item 03**

---

**Title: Ordinance Updating Bid Protest Procedures**

**Recommendation:** 1) Review an ordinance amending Article X of Chapter 3.60 of the Sacramento City Code, relating to bid protest procedures; and 2) pass a Motion forwarding the ordinance to City Council for approval.

**Location:** Citywide

**Contact:** Dan Sherry, Engineering & Water Resources Manager, (916) 808-1419; Ian Pietz, Project Manager (916) 808-1910, Department of Utilities

**Presenter:** None

**Department:** Department of Utilities

**Attachments:**

1-Description Analysis

2-Ordinance (Clean)

3-Ordinance (Redline)

## Description/Analysis

**Issue Detail:** Staff review of Article X of City Code Chapter 3.60, governing bid protests on City contracts, identified a need to update and revise these procedures to reflect current practices and better address several aspects of the bid protest process.

**Policy Considerations:** The proposed ordinance revisions are intended to improve the City's bid protest procedures. A summary of key changes is provided in the Background section of this report.

**Economic Impacts:** None.

**Environmental Considerations:** Ongoing administrative activities, including general policy and procedure making such as adoption of the proposed ordinance, do not constitute a "project" under the California Environmental Quality Act (CEQA) Guidelines Sections 15378(b)(2) and 15378(b)(5), and are not subject to CEQA pursuant to CEQA Guidelines Section 15060(c)(3).

**Sustainability:** Not applicable.

**Commission/Committee Action:** None.

**Rationale for Recommendation:** Adoption of the ordinance included in this report will amend the City Code to update and clarify some of the provisions relating to bid protests.

**Financial Considerations:** It is anticipated that these revisions will have minimal impacts on revenue and expenses for the affected departments.

**Local Business Enterprise (LBE):** Not applicable

**Background:** The proposed ordinance updates Article X of Chapter 3.60 of the Sacramento City Code, including the following revisions:

1. Adds language to clarify that the bid protest procedures do not apply to a contract that is not required to be competitively bid, unless specifically incorporated in the contract's solicitation documents.
2. Deletes the requirement that a copy of a bid protest be provided to the project manager, because the City Clerk sends one when a bid protest is received by the Clerk.

3. Adds language to clarify that, in accordance with current practice, staff can change its recommendation after investigating the bid protest, with the notice to bidders of a changed recommendation triggering a new bid protest opportunity.
4. Simplifies the hearing examiner appointment language to be consistent with the City's current practice for protests to be heard by independent hearing officers.
5. Qualifies the City's ability to collect additional hearing costs from the protesting bidder to apply only where hearing officer recommends denial of the protest.
6. Adds e-mail as a form of service if the e-mail delivery includes confirmation of receipt.

ORDINANCE NO.

Adopted by the Sacramento City Council

Date Adopted

AN ORDINANCE AMENDING ARTICLE X OF CHAPTER 3.60 OF THE SACRAMENTO CITY CODE, RELATING TO BID PROTEST PROCEDURES

BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:

SECTION 1.

Article X of Chapter 3.60 of the Sacramento City Code is amended to read as follows:

Article X Bid Protest Procedures

3.60.460 Application.

This article applies to:

- A. Contracts for public projects that are required to be competitively bid and awarded by the city council under the provisions of this chapter; and
- B. Any other contract awarded under this title only if the request for bids specifically provides that this article applies.

3.60.470 Definitions.

For the purpose of this article, the following definitions apply:

“Bid” means any bid or proposal submitted on a contract.

“Bid protest” means a protest filed by a bidder on a contract in accordance with the provisions of this chapter, which protest (1) claims that one or more bidders on the contract should be disqualified or rejected for any reason, or (2) contests a city staff recommendation to award the contract to a particular bidder, or (3) contests a city staff recommendation to disqualify or reject one or more bidders on the contract. Only a bidder on a contract, or the bidder’s authorized representative, may file a bid protest on the contract.

“Bidder” means any person or firm that submits a bid on a contract.

“Contract” means a contract to which this article applies under section 3.60.460.

“Protested bidder” means a bidder whom the bid protest claims should be disqualified or rejected.

“Protesting bidder” means a bidder, or the bidder’s authorized representative, who files a bid protest in accordance with the provisions of this chapter.

“Request for bids” means a written request, invitation, or solicitation for bids to perform a contract issued by the city.

#### 3.60.480 Form of bid protest.

Bid protests shall be in writing, shall provide the name, address, e-mail address, telephone number, and fax number of the protesting bidder, shall identify the contract to which the bid protest pertains, including the contract number and date that bids for the contract were received by the city, and shall identify the city department or division issuing the request for bids. The bid protest shall identify and explain the factual and legal grounds for the protest, and shall include and attach any written materials that the protesting bidder wishes to have considered in determining the protest. Bid protests shall be addressed to the City Clerk, 915 I Street, New City Hall, Sacramento, CA 95814. Any bid protest that does not comply with this section is invalid and shall not be considered.

#### 3.60.490 Submission of bid protest to city.

Within the time period specified in section 3.60.500, the bid protest shall be filed with the city clerk. Bid protests may be filed by personal delivery, by registered or certified mail (return receipt requested), or by fax. At the time a bid protest is filed, the protesting bidder shall also deposit with the city clerk a bid protest fee in an amount established by resolution of the city council. The fee shall be used to pay the costs of a hearing and hearing examiner as set forth in section 3.60.520.G. Any bid protest that is received by the city clerk after the time period specified in section 3.60.500, or that is not accompanied by the bid protest fee, is untimely and invalid, and shall not be considered.

#### 3.60.500 Time for filing a bid protest.

After bids for a contract are received and opened by city, city staff shall provide each bidder a written notice of the city staff’s recommendation for award of the contract. Any bid protest shall be received by the city clerk no later than five working days after the date that the written notice is received by the protesting bidder.

#### 3.60.510 Investigation by city.

- A. If a valid bid protest is timely filed, city staff shall provide a copy of the bid protest to the protested bidder, and shall investigate or cause to be

investigated the bid protest. The protesting bidder and any other bidder on the contract shall promptly provide any information requested by city staff as part of the investigation. City staff shall prepare a written response to the bid protest, which shall be provided to the protesting bidder and protested bidder, if any, and to the hearing examiner as provided in section 3.60.520.

- B. If, as a result of its investigation of the protest, city staff changes its recommendation for award of the contract, city staff shall provide each bidder a written notice of the city staff's revised recommendation, the bid protest shall be deemed withdrawn upon the protesting bidder's receipt of this notice, and the bid protest fee deposited by the protesting bidder shall be refunded. A bid protest in response to the revised recommendation for award of the contract may be filed in accordance with the provisions of this article, and must be received by the city clerk no later than five working days after the date the city's written notice of revised recommendation is received by the bidder protesting the revised recommendation.

3.60.520 Hearing of bid protest by a hearing examiner.

- A. A bid protest shall be heard by an independent hearing examiner furnished by an entity designated for this purpose by resolution or agreement of the city council.
- B. After the hearing examiner is selected, city staff shall set the date of the hearing, and shall mail the protesting bidder and the protested bidder, if any, a written notice that specifies the location, time, and date of the hearing, which shall be held no sooner than five days after the date of the notice of hearing. The hearing examiner may postpone the hearing at the request of city staff, the protesting bidder, or the protested bidder, if any, or upon the hearing examiner's own motion. If the protesting bidder fails to attend the hearing, the bid protest is deemed withdrawn and shall no longer be considered by the city.
- C. City staff shall provide the hearing examiner with copies of the request for bids, the bid protest, the response of the protested bidder, if any, the city staff response to the bid protest, and any other relevant materials or information in city staff's possession. Any written information that the protesting or protested bidders wish to have considered in determining the protest that has not already been submitted to city staff shall be provided to the hearing examiner and to city staff, and must be received by the hearing examiner and city staff at least two working days prior to the hearing to be considered.
- D. Evidence or argument at the hearing shall be received only from the city, the protesting bidder, and the protested bidder, if any, their witnesses, and

authorized representatives. The proceedings at the hearing shall be recorded. Any party may provide a certified shorthand reporter to maintain a record of the proceedings at the party's own expense. The hearing examiner may, upon request of either party, grant continuances for good cause shown, or upon his or her own motion. The hearing examiner shall administer the oath or affirmation. California Government Code section 11513 applies to hearings under this section, except that relevant hearsay evidence may be sufficient in itself to support a finding of fact, even if it would not be admissible over objection in a civil action, if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

- E. At the hearing, the protesting bidder bears the burden of showing the existence of all facts necessary to support the bid protest. The hearing examiner may take official notice, either before or after the close of the hearing, of any fact that may be judicially noticed by the courts of this state or which may appear in any of the official records or documents of the city.
- F. After the close of the hearing, the hearing examiner shall issue a written decision that includes findings of fact based on the record of facts and information presented to the hearing examiner, and also includes a recommended determination of the bid protest based on the findings of fact. The hearing examiner shall mail a copy of the decision to the city, the protesting bidder, and the protested bidder, if any.
- G. The city shall use the bid protest fee deposited by the protesting bidder pursuant to section 3.60.490 to pay costs incurred by the city for the hearing and hearing examiner. If these costs are less than the bid protest fee deposited by the protesting bidder, the city shall return any unexpended amounts to the protesting bidder. If these costs exceed the bid protest fee deposited by the protesting bidder, and the hearing examiner recommends denial of the bid protest, the city may invoice the protesting bidder for any additional unpaid costs, and the protesting bidder shall pay all costs due no later than 30 calendar days after the date of the invoice. Any protesting bidder that fails to pay an invoice within 30 days is barred from filing a bid protest on any subsequent city contract until the city receives payment of all costs due plus interest, at the rate of 10 % per annum, beginning 30 calendar days after the date of the invoice.

### 3.60.530 Consideration of bid protest by the city council.

If a valid bid protest is timely filed and is not withdrawn by the protesting bidder or by operation of the provisions of this article, the city council shall consider the protest at a public meeting after the hearing examiner's decision has been received by

all parties. The city council may hear the bid protest as part of the city council's consideration of the award of the contract to which the bid protest relates or may hear the bid protest as a separate item, provided that the city council shall decide the bid protest prior to awarding the contract, unless the city council exercises its discretion to reject all bids. The city council may take action on the bid protest at the meeting when the bid protest is considered or may continue the matter of the protest and contract award to a future date.

3.60.540 Conduct of the city council meeting.

- A. The scope of the bid protest considered by the city council is limited to the issues and evidence set forth in the bid protest. The city council may exercise its discretion to take any of the following actions prior to taking final action on the bid protest:
1. Adopt the findings of fact issued by the hearing examiner, without hearing factual evidence from any party; or
  2. Review the recording of the hearing, or a transcript of the hearing, prior to adopting or rejecting, in whole or in part, the findings of fact issued by the hearing examiner, without hearing factual evidence from any party; or
  3. In addition to or in lieu of reviewing the recording or transcript of the hearing, hear factual evidence from any party prior to adopting or rejecting, in whole or in part, the findings of fact issued by the hearing examiner.
- B. In addition to the foregoing actions, the city council may at any time exercise its discretion to reject all bids without adopting or rejecting the hearing examiner's findings of fact. The city council may take any action on the bid protest that is authorized by law, including adoption of the hearing examiner's recommended determination of the bid protest, adoption of a determination different from that recommended by the hearing examiner, or the rejection of all bids without deciding the bid protest. The decision of the city council on a bid protest is the city's final administrative action on the protest.

3.60.550 Providing written notice.

Whenever this article requires that written notice be provided by or to the city or the hearing examiner, the written notice shall be provided by registered or certified mail (return receipt requested), by fax, by personal delivery, by e-mail if the e-mail delivery includes confirmation of receipt, or by any other method that provides

reliable evidence of the date of receipt. Written notice provided by fax is deemed received on the date that it is transmitted and transmission is confirmed by the transmitting machine. Written notice provided by personal delivery is deemed received on the date of delivery. Written notice provided by e-mail is deemed received on the date of e-mail transmission if the sender receives e-mail confirmation of receipt.

**3.60.560 Information in request for bids.**

Every request for bids issued by the city for a contract shall indicate that any bid protest related to the contract must be filed and maintained in accordance with the provisions of this article.

**ORDINANCE NO.**

Adopted by the Sacramento City Council

Date Adopted

**AN ORDINANCE AMENDING ARTICLE X OF CHAPTER 3.60 OF THE SACRAMENTO CITY CODE, RELATING TO BID PROTEST PROCEDURES**

**BE IT ENACTED BY THE COUNCIL OF THE CITY OF SACRAMENTO:**

**SECTION 1.**

Article X of Chapter 3.60 of the Sacramento City Code is amended to read as follows:

**Article X Bid Protest Procedures**

**3.60.460 Application.**

This article ~~shall apply~~ to ~~bid protests relating to all~~:

A. ~~C~~ontracts for public projects that are required to be competitively bid and awarded by the city council under the provisions of this chapter; and

B. ~~This article shall not apply to any contract for a public project that may be awarded without city council authorization, or to any contract awarded under any other title of this code, unless specifically so provided in Any other contract awarded under this title only if the request for bids specifically provides that this article applies for such contract.~~

**3.60.470 Definitions.**

For the purpose of this article, the following definitions ~~shall~~ apply:

“Bid” means any bid or ~~proposal~~ submitted on a contract.

“Bid protest” means a protest filed by a bidder on a contract in accordance with the provisions of this chapter, which protest (1) claims that one or more bidders on the contract should be disqualified or rejected for any reason, or (2) contests a city staff recommendation to award the contract to a particular bidder, or (3) contests a city staff recommendation to disqualify or reject one or more bidders on the contract.

Only a bidder on a contract, or ~~the~~ bidder’s authorized representative, may file a bid protest on ~~the~~ contract.

“Bidder” means any person or firm that submits a bid on a contract.

“Contract” means ~~a contract to which this article applies under section 3.60.460. any contract for a public project that is required to be awarded by the city council under the provisions of this chapter.~~

~~“Project manager” means the city staff member identified as the project manager or city staff contact person in the city’s request for bids.~~

“Protested bidder” means a bidder whom the bid protest claims should be disqualified or rejected.

“Protesting bidder” means a bidder ~~on a contract~~, or ~~the~~ such bidder’s authorized representative, who files a bid protest ~~on the contract~~ in accordance with the provisions of this chapter.

“Request for bids” means a written request, ~~invitation~~, or solicitation for bids to perform a contract issued by ~~any department or division of~~ the city.

### **3.60.480 Form of bid protest.**

Bid protests shall be in writing, shall provide the name, address, ~~e-mail address~~, telephone ~~number~~, and ~~fax/teletypewriter~~ numbers of the protesting bidder, shall identify the contract to which the bid protest pertains, including the contract number and date that bids for ~~the~~ such contract were received by the city, and shall identify the city department or division issuing the request for bids. The bid protest shall identify and explain the factual and legal grounds for the protest, and shall include and attach any written materials that the protesting bidder wishes to have considered in determining the protest. Bid protests shall be addressed to the City Clerk, 915 I Street, ~~New City Hall Room 304~~, Sacramento, CA 95814. Any bid protest that ~~does not comply with this section is~~ ~~is not submitted as provided herein shall be~~ invalid and shall not be considered.

### **3.60.490 Submission of bid protest to city.**

Within the time period specified in ~~S~~section 3.60.500 ~~of this chapter~~, the bid protest shall be filed with the city clerk, ~~and one additional copy of the bid protest shall be filed with the project manager at the address indicated in the request for bids~~. Bid protests may be filed by personal delivery, by registered or certified mail (return receipt requested), or by ~~fax/teletypewriter~~. At the time a bid protest is filed, the protesting bidder shall also deposit with the city clerk a bid protest fee in an amount established by resolution of the city council, ~~which~~ ~~The~~ fee shall be used to pay the costs of a hearing and hearing examiner as set forth in ~~S~~section 3.60.520 ~~(G) of this chapter~~. Any bid protest that is received by the city clerk ~~and project manager~~ after the time

period specified in ~~Section 3.60.500 of this chapter~~, or that is not accompanied by the bid protest fee, ~~is~~ shall be untimely and invalid, and shall not be considered.

### **3.60.500 Time for filing a bid protest.**

After bids for a contract are received and opened by city, city staff shall provide each bidder a written notice of the city staff's ~~preliminary~~ recommendation for award of the contract. Any bid protest ~~related to the contract~~ shall be received by the city clerk ~~and project manager~~ no later than five working days after the date that ~~the~~ such written notice is received by the protesting bidder.

### **3.60.510 Investigation by city.**

A. If a valid bid protest is timely filed, city staff shall provide a copy of the bid protest to the protested bidder(s), and shall investigate or cause to be investigated the bid protest. The protesting bidder and any other bidder on the contract shall promptly provide any information requested by city staff as part of ~~the~~ such investigation. City staff shall prepare a written response to the bid protest, which shall be provided to the protesting bidder and protested bidder(s), if any, and to the hearing examiner as provided in ~~Section 3.60.520 of this chapter~~.

B. ~~If, as a result of its investigation of the protest, city staff changes its recommendation for award of the contract, city staff shall provide each bidder a written notice of the city staff's revised recommendation, the bid protest shall be deemed withdrawn upon the protesting bidder's receipt of this notice, and the bid protest fee deposited by the protesting bidder shall be refunded. A bid protest in response to the revised recommendation for award of the contract may be filed in accordance with the provisions of this article, and must be received by the city clerk no later than five working days after the date the city's written notice of revised recommendation is received by the bidder protesting the revised recommendation.~~

### **3.60.520 Hearing of bid protest by a hearing examiner.**

A. A bid protest shall be heard by an ~~independent~~ hearing examiner ~~from a panel of hearing examiners furnished by an entity~~ designated for this purpose by resolution ~~or agreement~~ of the city council. ~~Hearing examiners shall serve at the pleasure of the city council. A hearing examiner may not be a city employee at the time of the hearing.~~

B. After the hearing examiner is selected, city staff shall set the date of the hearing, and shall mail the protesting bidder and the protested bidder(s), if any, a written notice that specifies the location, time, and date of the hearing,

which shall be held no sooner than five days after the date of the notice of hearing. The hearing examiner may postpone the hearing at the request of city staff, the protesting bidder, or the protested bidder(s), if any, or upon the hearing examiner's own motion. If the protesting bidder fails to attend the hearing, the bid protest shall be deemed withdrawn and shall no longer be considered by the city.

- C. City staff shall provide the hearing examiner with copies of the request for bids, the bid protest, the response of the protested bidder(s), if any, the city staff response to the bid protest, and any other relevant materials or information in city staff's possession. Any written information that the protesting or protested bidders wish to have considered in determining the protest that has not already been submitted to city staff shall be provided to the hearing examiner and to city staff, and must be received by the hearing examiner and city staff at least two working days prior to the hearing in order to be considered.
- D. Evidence or argument at the hearing shall be received only from the city, the protesting bidder, and the protested bidder(s), if any, their witnesses, and authorized representatives. The proceedings at the hearing shall be recorded reported by a tape recorder. Any party may provide a certified shorthand reporter to maintain a record of the proceedings at the party's own expense. The hearing examiner may, upon request of either party, grant continuances for good cause shown, or upon his or her own motion. The hearing examiner shall administer the oath or affirmation. California Government Code Section 11513 shall apply to hearings under this section, except that relevant hearsay evidence may be sufficient in itself to support a finding of fact, even if it would not be admissible over objection in a civil action, if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.
- E. At the hearing, the protesting bidder shall bear the burden of showing the existence of all facts necessary to support the bid protest. The hearing examiner may take official notice, either before or after the close of the hearing, of any fact that which may be judicially noticed by the courts of this state or which may appear in any of the official records or documents of the city or any of its departments.
- F. After the close of the hearing, the hearing examiner shall issue a written decision that includes findings of fact based on the record of facts and information presented to the hearing examiner, and also includes a recommended determination of the bid protest based on the findings of fact.

The hearing examiner shall mail a copy of the decision to the city, the protesting bidder, and the protested bidder(s), if any.

- G. The city shall use the bid protest fee deposited by the protesting bidder pursuant to ~~Section 3.60.490 of this chapter~~ to pay all costs incurred by the city for the hearing and hearing examiner. If these costs are less than the bid protest fee deposited by the protesting bidder, the city shall return any unexpended amounts to the protesting bidder. If these costs exceed the bid protest fee deposited by the protesting bidder, and the hearing examiner recommends denial of the bid protest, the city may invoice the protesting bidder for any additional unpaid costs, and the protesting bidder shall pay all costs due no later than ~~thirty (30)~~ calendar days after the date of the invoice. Any protesting bidder that fails to pay an invoice within 30 days is as required herein shall be barred from filing a bid protest on any subsequent city contract until the city receives payment of all costs due plus interest, at the rate of ~~ten (10) percent %~~ per annum, beginning ~~thirty (30)~~ calendar days after the date of the invoice.

### **3.60.530 Consideration of bid protest by the city council.**

If a valid bid protest is timely filed and ~~is subsequently has~~ not ~~been~~ withdrawn by the protesting bidder or by operation of the provisions of this ~~article~~chapter, the city council shall consider the protest at a public meeting after the hearing examiner's decision has been received by all parties. The city council may hear the bid protest as part of the city council's consideration of the award of the contract to which the bid protest relates or may hear the bid protest as a separate item, provided that the city council shall decide the bid protest prior to awarding the contract, unless the city council exercises its discretion to reject all bids. The city council may take action on the bid protest at the meeting when the bid protest is considered or may continue the matter of the protest and contract award to a future date.

### **3.60.540 Conduct of the city council meeting.**

A. The scope of the bid protest considered by the city council ~~is shall be~~ limited to the issues and evidence set forth in the bid protest. The city council may exercise its discretion to take any of the following actions prior to taking final action on the bid protest:

A1. Adopt the findings of fact issued by the hearing examiner, without hearing factual evidence from any party; or

B2. Review the recording of the hearing, or a transcript of the hearing thereof, prior to adopting or rejecting, in whole or in part, the

findings of fact issued by the hearing examiner, without hearing factual evidence from any party; or

~~€3.~~ In addition to or in lieu of reviewing the recording or transcript of the hearing, ~~or a transcript thereof~~, hear factual evidence from any party prior to adopting or rejecting, in whole or in part, the findings of fact issued by the hearing examiner.

B. In addition to the foregoing actions, the city council may at any time exercise its discretion to reject all bids without adopting or rejecting the hearing examiner's findings of fact. The city council may take any action on the bid protest that is authorized by law, including adoption of the hearing examiner's recommended determination of the bid protest, adoption of a determination different from that recommended by the hearing examiner, or the rejection of all bids without deciding the bid protest. The decision of the city council on a bid protest ~~is shall be~~ the city's final administrative action on the protest.

### **3.60.550 Providing written notice.**

Whenever this article requires that written notice be provided by or to the city or the hearing examiner, the such written notice shall be provided by registered or certified mail (return receipt requested), by ~~fax~~teletype, by personal delivery, by e-mail if the e-mail delivery includes confirmation of receipt, or by any other method that provides reliable evidence of the date of receipt. Written notice provided by ~~fax~~ teletype shall be deemed received on the date that it is transmitted and transmission is confirmed by the transmitting machine. Written notice provided by personal delivery ~~is shall be~~ deemed received on the date of delivery. Written notice provided by e-mail is deemed received on the date of e-mail transmission if the sender receives e-mail confirmation of receipt.

### **3.60.560 Information in request for bids.**

Every request for bids issued by the city for a contract ~~subject to this article~~ shall indicate that any bid protest related to the contract ~~must shall~~ be filed and maintained in accordance with the provisions of this article, ~~and that a copy of this article may be obtained from the department or division issuing the request for bids or the city clerk.~~