

GOVERNMENT SERVICES

January 21, 2026

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Government Bid Protests in Nebraska

In a competitive procurement, agencies in Nebraska must follow certain rules and procedures designed to ensure fair competition in a competitive procurement process. If a procuring agency fails to adhere to competitive bidding and related principles, resulting in unfair competition in the bidding process, a disappointed bidder may challenge the award decision through a process commonly referred to as a bid protest. Summarized below are key features of Nebraska's competitive bidding and protest procedures.

A. Materiel Division

By statute, the Nebraska Department of Administrative Services (DAS) operates a Materiel Division ("Division") tasked with overseeing procurements by the State of Nebraska and its agencies. Neb. Rev. Stat. §§ 81-152, 153. The Division is required to implement rules and regulations governing procurements. Neb. Rev. Stat. § 81-153. The Division is comprised of seven branches with varying duties, powers and responsibilities, including the State Purchasing Bureau, responsible for purchases of personal property by all state agencies other than the University of Nebraska and Nebraska state colleges. Neb. Rev. Stat. § 81-152.

B. Procurement Methods

DAS is required to develop and enforce procedures as expected to provide acceptable internal control of the handling and processing of public funds. Neb. Rev. Stat. § 81-1101. However, the Division may allow the purchase of personal property without competitive bidding in emergencies or other defined circumstances, and to negotiate purchases and contracts when conditions exist making full competitive bidding processes difficult or impossible. Neb. Rev. Stat. § 81-153. Certain types of procurements are required by law to be conducted through a public competitive bidding process, but the State Purchasing Bureau otherwise determines the method of procurement to be utilized in the acquisition of goods or services. See 9 Neb. Admin. Code Ch. 1, § 002.

Nebraska law in addition permits some state agencies to conduct their own procurements, but such procurements must be conducted "in the manner prescribed by the [Materiel Division] procurement manual or a process approved by the Director of Administrative Services." Neb. Rev. Stat. § 73-807.

C. Bid Protests

Where a procuring agency fails to follow applicable laws or regulations during the solicitation process, a disappointed bidder generally may protest the agency's contract award decision. While Nebraska law does not contain a statutory procedure to protest an adverse procurement decision, many procuring agencies promulgate their own rules governing protests which typically mimic or incorporate by reference the protest procedures promulgated by the Materiel Division. Many state agencies will incorporate, in the specific Request for Proposal, specific protest rules that must be used by bidders seeking to challenge an award decision.

While the regulations applicable to a given Request for Proposal will be controlling, the general regulations and protest policies promulgated by the Division require protests of a contract award to be filed with the Materiel Administrator within 10 days of the posting of the intent to award. 9 Neb. Admin. Code Ch. 1, § 004.03. The protest must be submitted electronically and must contain the solicitation number, legal name of the protestor, point of contact for the protestor, the grounds for the protest, and a request for a meeting before the Materiel Administrator if the protestor seeks that opportunity. SBP Policy 23-07 § V(B).

If a meeting before the Administrator is also requested, the protestor, awardee(s) and the state agency may submit evidence in support of their positions. All supporting evidence and argument must be submitted five days after submission of the written protest, or at the conclusion of the meeting, whichever is later. The Administrator may consider all information it deems relevant and reviews the award decision *de novo*. The protestor must prove its allegations by a preponderance of the evidence for a protest to be sustained.

Upon filing a timely protest, the Division generally decides whether to sustain or overrule the protest within the later of 10 business days following receipt of the protest or five business days following the meeting, assuming no extension is needed. If the protest is sustained, the Administrator may implement an appropriate remedy, such as rebidding the solicitation or awarding the contract to another bidder.

D. Appeal

If the protestor disagrees with the Administrator's decision, it may "appeal" to the Director of Administrative Services ("Director"). The notice of appeal must be submitted electronically to the Director within 10 business days of the Administrator's decision. The appeal is limited to issues that were raised before the Materiel Administrator and must assign specific errors in the Administrator's decision and include argument on all errors assigned. SBP Policy 23-07 § V(D). The appellant also may request a meeting with the Director in their Notice of Appeal, where the protestor, awardee and agency may present argument, and which must be held within 10 business days after submission of the notice of appeal.

The Director will generally decide the Appeal within 10 business days of submission of a written appeal, or five business days following a meeting if one is requested, unless the issues are too complex, in which case the deadline may be extended up to 30 business days. The Director may affirm or reverse the Administrator's decision or may implement any remedy the Administrator was permitted to implement at the protest stage.

E. Debrief

Within 60 days of the Intent to Award, but after the protest period has expired, bidders may request a "debriefing" with the procuring agency. Upon a request for debrief, the procuring agency must meet with the bidder to discuss the solicitation or prepare a written explanation as to why the bidder did not receive the award. SBP Policy 23-07 § VIII.

F. Judicial Review

The DAS Policies and regulations do not provide for further agency review following the decision of the Director. Further, unlike many other states, Nebraska does not provide a statutory appeal procedure through the Nebraska Administrative Procedures Act ("APA"). The Nebraska APA only provides a right to judicial review if a person is aggrieved by a final decision in a contested case, and the SBP Protest Policy expressly provides that its protest procedures do not constitute a contested case. Neb. Rev. Stat. § 84-917(1); SBP Policy 23-07 § VII. In recent years, multiple bills have been introduced in the Nebraska Unicameral seeking to codify a right to appeal an adverse award decision by declaring such decisions to be "contested cases" under the APA, but those efforts have been unsuccessful.¹ See, e.g., LB21 (2018).²

¹ In fact, after several notable procurement failures—in which unqualified bidders secured awards through misrepresentations or intentional underbidding—the Legislature in 2021 formed a special committee to study the systemic failures leading to a particularly costly procurement failure. See LR 29 (2021) and St Francis Committee Report, available at https://www.nebraskalegislature.gov/pdf/reports/committee/health/lr29_2021.pdf. While that Report ultimately led to procurement reform legislation (see LB 461 (2024)), the legislation did not create a statutory right of appeal for disappointed bidders.

² See discussion of LB21 at <https://www.kutakrock.com/newspublications/publications/2019/11/ne-legislative-development-procurement-reform-bill>.

In seeking to challenge a contract award in state or federal court, a bidder must first establish its standing to do so. Because no standing is conferred by the Nebraska APA, a bidder must look to common law to establish standing to seek judicial review of a contract award. Even though no statutory right of appeal exists, bidders have nevertheless utilized common law and other theories of standing to obtain judicial review. For example, multiple bidders have relied upon taxpayer standing if the bidding entity is a Nebraska taxpayer, or if a Nebraska taxpayer is prepared to assert claims on its behalf. See, e.g., *Community Care Health Plan of Nebraska, Inc. v. Jackson* 317 Neb. 141, ___ NW2d ___ (2024). Similarly, certain bidders have attempted to rely upon statutory bases for jurisdiction, such as the Uniform Declaratory Judgment Act, but whether such statutes provide a basis for standing has not yet been finally determined. It is important to note, however, that the *Nebraska Supreme Court in Griffith v. Neb. Dep't of Corr. Servs.*, 304 Neb. 287, 291, 934 N.W.2d 169, 173 (2019), has held that procedural injuries are insufficient to establish standing without a demonstration of a cognizable “concrete” injury suffered by the bidder.

Because Nebraska law does not provide a statutory right of judicial appeal of an adverse award decision, bidders contemplating the need to seek judicial redress for an adverse award decision should evaluate these issues early in the procurement process.

G. Best Practices

In order for a protesting bidder to preserve its potential rights and remedies, it is important to strictly adhere to all protest-related deadlines, and to include all required information in their protest and appeals. If the bidder contemplates a protest based on the language of the RFP document, it should evaluate the RFP carefully, upon receipt of the RFP, to determine whether the protest should be asserted immediately, and prior to award. Disappointed bidders seeking to protest an award decision must be expedient, and navigating protest procedures and substantive issues can be complex. Bidders should be proactive in the procurement process, understand their rights, and seek legal counsel early in the process (even before any contract award) to ensure compliance with all procedural requirements, evaluate merits of any potential protest, and identify any agency- or procurement-specific rules.

Conclusion

Bid protests in Nebraska serve as an important mechanism to ensure fairness and accountability in the procurement of goods and services in the State. However, the process is technical, fast moving, complex and has certain limitations. Contractors should be proactive in monitoring procurement activities, understanding their rights, and seeking legal guidance early in the procurement process.

If you believe you have been treated unfairly or may have grounds to protest or challenge an award decision, or if you merely want a clear understanding of the process, your rights as a bidder, or to better understand how to navigate public contracting opportunities in Nebraska, feel free to contact [Thomas Kenny](#), [Ed Fox](#), [Rachel Carrigan](#), or visit our [Government Protest Bids, Protests and Claims practice group web page](#) to learn more.

