

**FLORIDA BOARD OF GOVERNORS  
NOTICE OF PROPOSED AMENDED REGULATION**

**DATE:** February 1, 2021

**REGULATION NUMBER AND TITLE:** 18.002, Protest Procedures for Protests Related to a University's Contract Procurement Process

**SUMMARY:** This proposed regulation amendment reflects feedback recently received from ICOP (Inter-institutional Committee on Procurement). Due to the dynamics of teleworking caused by the COVID-19 pandemic, there have been challenges receiving notice to protest sent via U.S. mail in a timely manner. This regulation is being amended to allow the universities to have the ability to accept notice of protests via email, in addition to U.S. mail or courier, to the issuing office. This regulation amendment will ensure the timely submission of protests.

**FULL TEXT OF THE REGULATION IS INCLUDED WITH THIS NOTICE.**

**AUTHORITY TO PROPOSE REGULATION(S):** Section 7(d), Art. IX, Fla. Const.; BOG Regulation Development Procedure dated March 23, 2006.

**THE BOARD OF GOVERNORS' OFFICIAL INITIATING THE PROPOSED REGULATION:** Tim Jones, Vice Chancellor, Finance/Administration and CFO

**COMMENTS REGARDING THE PROPOSED REGULATION SHOULD BE SUBMITTED WITHIN 14 DAYS OF THE DATE OF THIS NOTICE TO THE CONTACT PERSON IDENTIFIED BELOW.** The comments must identify the regulation on which you are commenting:

General Counsel, Board of Governors, State University System, 325 W. Gaines Street, Suite 1614, Tallahassee, Florida 32399, (850) 245-0466 (phone), (850) 245-9685 (fax), or [generalcounsel@flbog.edu](mailto:generalcounsel@flbog.edu).

## 18.002 Notice and Protest Procedures for Protests Related to a University's Contract Procurement Process.

- (1) Purpose. The procedures set forth in this Regulation shall apply to protests that arise from all university contract procurement processes for the purchase of goods, services, leases and for construction-related competitive solicitations, and shall be the exclusive set of procedures applicable to all such protests.
- (2) Definitions.
  - (a) Adversely affected - where the university decision or intended decision will cause immediate injury in fact to the Protestor and the injury is of the type that the pertinent law or regulation is designed to protect.
  - (b) Days - calendar days.
  - (c) Decision or intended decision - the Specifications; the rejection of a response or all responses to a competitive solicitation; the intent to award a contract pursuant to a competitive solicitation as indicated by a posted written notice; a sponsored research exemption; or a determination that a specified procurement can be made only from a sole source.
  - (d) Electronic posting - posting on the university's designated website.
  - (e) Filing - when filing documents or written materials with:
    1. The Issuing Office, the filing is the delivery ~~of the original~~ of the document or written materials ~~at~~ with the Issuing Office. Filing the Notice of Intent to Protest may be done by U.S. mail, courier, or email to the issuing office. Filing the ~~Notice of Intent to Protest or the~~ Formal Protest via email or facsimile is not permitted. The time allowed for filing any documents or written material is not extended by the mailing of such; and must be received in the issuing office by the time prescribed.
    2. The President, the President's Designee or the Presiding Officer, filing is the delivery of the documents or written material to the President, President's Designee or Presiding Officer via email or in person at a hearing.
  - (f) Formal Protest - the formal written complaint that complies with the requirements of Section (6) of this regulation.
  - (g) Issuing Office - the office that issued the solicitation, or if a solicitation has not been issued, the office that made the decision or intended decision that is being protested.
  - (h) Legal holidays - those days designated as holidays in Section 110.117, Florida Statutes, and those days - other than Saturdays and Sundays - when the university is officially closed.
  - (i) Notice of Intent to Protest - a short and plain written statement that complies with the requirements of Section (5) of this regulation.
  - (j) Potential Protestor - any actual or prospective bidder or offeror, person, or firm with standing to protest the decision or intended decision.
  - (k) President - means the presiding president of the university.
  - (l) President's Designee - the person selected by the President to perform a specific delegated function on behalf of the President under this regulation.

- (m) President/President's Designee – means the presiding president of the university; however, if the presiding president appoints a designee, shall mean the presiding president's designee only.
- (n) Presiding Officer - the Quasi-Judicial Officer or the University Official handling the protest proceeding.
- (o) Protest proceeding - either a summary proceeding involving a University Official or a quasi-judicial hearing involving a Quasi-Judicial Officer.
- (p) Protestor - any actual or prospective qualified bidder or offeror, or person or firm that is adversely affected and has standing who timely files a Notice of Intent to Protest and also timely files a Formal Protest.
- (q) Quasi-Judicial Officer - the designated presiding official (may be an Administrative Law Judge or a qualified attorney with a minimum of five years' experience practicing law) in a protest proceeding where there are disputed issues of material fact.
- (r) Serve/Service – sending a copy of the information to the parties via email communication at the email addresses of record.
- (s) Specification – the contents of the competitive solicitation or any addenda thereto; the approval of a sole source procurement; or other solicitation documents as permitted by applicable law or regulation.
- (t) Timely Filed – actual receipt of documentation or written material by the Issuing Office, the President, the President's Designee, or the Presiding Officer on or before the deadline.
- (u) University Official – the person appointed by the President to conduct a summary proceeding.

(3) Notice of Decision or Intended Decision. The university shall provide a notice of decision or intended decision by electronic posting. The notice shall contain the following statement: "Failure to timely file a protest or failure to timely deliver the required bond or other security in accordance with the Board of Governors' Regulations 18.002 and 18.003 shall constitute a waiver of protest proceedings."

(4) Initiating a Protest. If a Potential Protestor desires to protest a decision or intended decision of a university, the Potential Protestor must timely file a Notice of Intent to Protest, a Formal Protest, and the required Solicitation Protest Bond prescribed by Board of Governors Regulation 18.003 with the Issuing Office.

(5) Notice of Intent to Protest.

(a) Timely Filing of a Notice of Intent to Protest.

1. Protesting a Specification. If the Potential Protestor is protesting a Specification, the Potential Protestor must timely file a Notice of Intent to Protest with the Issuing Office within 72 hours of the university's electronic posting of the Specification that is being protested. A Potential Protestor's failure to timely file a Notice of Intent to Protest within 72 hours of the

posting of the Specification shall constitute a waiver of the right to protest proceedings related to that Specification;

2. **Protesting any Other Decisions or Intended Decisions.** If a Potential Protestor is protesting any decision or intended decision other than a Specification, the Potential Protestor must timely file a Notice of Intent to Protest such decision or intended decision with the Issuing Office within 72 hours of the university's posting of the notice of decision or intended decision that is being protested. A Potential Protestor's failure to timely file a Notice of Intent to Protest within 72 hours of the university's posting of the notice of decision or intended decision being protested shall constitute a waiver of the right to protest proceedings related to that decision or intended decision.

a. **Filing Period for the Notice of Intent to Protest.** The 72-hour period for filing the Notice of Intent to Protest regarding any decision or intended decision begins upon the electronic posting of the decision or intended decision. If the end of the 72-hour period falls on a Saturday, Sunday, or legal holiday, the deadline for filing the Notice of Intent to Protest shall be the next business day. A Notice of Intent to Protest may not be filed before the 72-hour period begins.

b. **Content of the Notice of Intent to Protest.** The Notice of Intent to Protest must be addressed to the Issuing Office; must identify the Potential Protestor and must provide the Protestor's/Protestor's counsel or representative's address, phone number and email address; must state the name and address of the university whose action is being protested; must identify the solicitation by number and title, or if the intended protest is not related to a competitive solicitation, must provide other language that will enable the university to identify the decision or intended decision being protested; and must state that the Potential Protestor intends to protest the decision or intended decision.

(6) **Formal Protest and Solicitation Protest Bond.**

(a) **Timely Filing of a Formal Protest and Solicitation Protest Bond.** The Potential Protestor must timely file a Formal Protest with the Issuing Office within ten (10) days after the date the Notice of Intent to Protest was filed. In addition, the Potential Protestor must timely file the required Solicitation Protest Bond with the Issuing Office within ten (10) days after the date the Notice of Intent to Protest was filed. The failure of the Potential Protestor to timely file the Formal Protest or to timely file the Solicitation Protest Bond shall constitute a waiver of the Potential Protestor's right to protest proceedings and/or the denial and dismissal of the Potential Protestor's protest.

(b) **Content of the Formal Protest.** The Formal Protest must state with particularity the facts and law upon which the protest is based. Only actual or prospective bidders or offerors who would be adversely affected by the

university's proposed action have standing to protest the award or intent to award a contract through competitive solicitation. The Formal Protest must contain the following:

1. The name of the Protestor and the address, telephone number and email address of the Protestor/Protestor's counsel or representative. The email address provided will be the email address used by the Issuing Office, the President, the President's Designee, the Presiding Officer, and the other parties for serving the Protestor with notice, documents and other materials related to the protest;
2. The identification of the university and competitive solicitation involved, if no competitive solicitation is involved, identification of the action being protested;
3. A statement of when and how the Protestor received notice of the decision or intended decision that is being protested;
4. A concise statement of the facts, including the specific facts the Protestor contends warrant reversal or modification of the university's decision or intended decision;
5. A statement of all disputed issues of material fact, or if there are none, the Formal Protest must indicate so;
6. A statement of the specific regulations or laws that the Protestor contends require reversal or modification of the decision or intended decision, including an explanation of how the alleged facts relate to the specific regulations or statutes;
7. A statement of all information establishing that the Protestor is an interested party for the purpose of filing a protest, and how the Protestor would be adversely affected by the university's proposed action;
8. A statement of the relief sought by the Protestor, stating precisely the action the Protestor wishes the University to take with respect to the protest; and
9. A copy of any documents or materials referenced or incorporated into the Formal Protest.

(7) Impact on Procurement Process.

- (a) Upon receipt of the Formal Protest by the Issuing Office, the Issuing Office will stop the solicitation or contract award process until the subject of the protest is resolved, unless the President sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety or welfare.
- (b) The President/President's Designee may, in response to a Protest, terminate the contract procurement process, terminate the solicitation process, and/or reject all bids. If any such action is taken, the Protest shall be automatically

dismissed, and the university may, if desired, reinstate the contract procurement process.

(8) University's Response to a Formal Protest. The university will file a notice with the Issuing Office of the name, phone number and email address for the attorney representing the university in the protest; the email address provided will be the email address used by the Issuing Office, the President, the President's Designee, the Presiding Officer, and the other parties for serving the university with notice, and documents and material related to the protest. The university may also file a written response to the Formal Protest with the Issuing Office within seven (7) days after the date the Formal Protest is filed.

(9) Right of Counsel. A party participating in the protest or appearing in a protest proceeding has the right, at the party's own expense, to be represented by counsel or by a qualified representative.

(10) Resolution by Mutual Agreement.

- (a) Informal Discussions. Following the timely filing of a Formal Protest and Solicitation Protest Bond, the university may hold informal discussions with the Protestor to resolve the protest by mutual agreement. Such discussions, if made available, will take place within seven (7) days, of the filing of the Formal Protest. The President/President's Designee has the authority to settle or resolve protests.
- (b) Time Topped. If informal discussions are scheduled, the time requirements related to this regulation are tolled for the period of time from the date the Formal Protest is filed until the date the last informal discussion is scheduled for or held.
- (c) Settlement Agreement. Unless prevented by law, if the parties reach a mutual agreement and a term in the settlement agreement conflicts with this regulation, the term in the settlement agreement will control.
- (d) Failure of Parties to Resolve by Mutual Agreement. If informal discussions are not held, or the informal discussions do not result in a mutual agreement between the parties, the protest shall proceed to either a summary proceeding or a quasi-judicial hearing, as appropriate.

(11) Determination of Appropriate Proceeding. When there is no resolution by mutual agreement, the President/President's Designee shall appoint a University Official, and the Initiating Office will forward all material filed by the parties to the University Official. The University Official will review the material filed by the parties that would be admissible in evidence to determine whether there are any disputed issues of material fact. If the protest contains no disputed issues of material fact, a summary proceeding is appropriate. If the protest contains disputed issues of material fact, a quasi-judicial hearing is appropriate.

(12) Summary Proceeding. If the protest contains no disputed issues of material fact, the University Official shall conduct a summary proceeding. The summary proceeding will be conducted within thirty (30) days after the date the Formal Protest was filed.

- (a) Notice of Proceeding. The University Official shall serve written notice on all parties, such notice will allow the parties at least seven (7) days from the date of the notice to file with the University Official any documents, memoranda of law, or other written material (collectively referred to as "written material") in support of or in opposition to the university's action or refusal to act and to serve the other parties with a copy of the same. At the end of the seven (7) days, the University Official shall then serve a second notice to the parties stating that the parties have seven (7) days to file with the University Official and to serve the other parties with their written responses to the written material filed by the other parties.
- (b) Informal Hearing. The University Official may, in the University Official's sole discretion, schedule an informal hearing on the matter for the purpose of taking oral evidence or argument. If the University Official schedules an informal hearing, the University Official shall serve the parties with written notice at least fourteen (14) days prior to the hearing, setting forth the place, date, and time of the hearing.
- (c) University Official's Recommended Order.
  1. The University Official will issue a Recommended Order to the President on whether the university's proposed action is contrary to the applicable statutes, regulations, or policies governing the university, or to the Specifications. The University Official's Recommended Order shall take into consideration only those documents and written materials filed by the parties, and if an informal hearing is held, information obtained as a result of the informal hearing;
  2. The University Official's recommended order shall be issued to the President within fifty (50) days after date the Formal Protest was filed. The University Official shall serve copies of the Recommended Order, along with the date the Recommended Order was issued, to the parties immediately after issuing the Recommended Order to the President;
  3. The University Official shall also submit the recording of the informal hearing, if one was held, and all documents and written material filed in the matter to the President when issuing the Recommended Order.
- (d) Exceptions to the University Official's Recommended Order. The parties may file written exceptions to the Recommended Order. The Parties must file any exceptions to the Recommended Order with the President within seven (7) days after the date the Recommended Order was issued.
- (e) The Final Order. The President shall enter a Final Order within twenty-one (21) days after the date the Recommended Order was issued. In deciding whether to follow or depart from the University Official's Recommended Order, the President may consider the written materials and exceptions filed

- by the parties, and the recording of the informal hearing, if any. The President's Final Order is the final decision of the University.
- (f) Point of Entry. Judicial review of the university's final decision shall be in accordance with Florida Rule of Appellate Procedure 9.190(b)(3), applicable to review of quasi-judicial decisions of an administrative body not subject to the Administrative Procedure Act. A request for review may be made by filing a petition for certiorari review with the appropriate circuit court within thirty (30) days after the date of the university's final decision. Failure to seek timely review shall constitute a waiver of the right to appeal the university's final decision.

(13) Quasi-Judicial Hearing. If the Formal Protest contains issues of material fact, the President/President's Designee shall refer the Formal Protest to a Quasi-Judicial Officer for a quasi-judicial hearing. The hearing shall be conducted within forty (40) days after the date the Formal Protest was filed.

- (a) Appointment of Quasi-Judicial Officer. Within seven (7) days after the date the Formal Petition was filed, the President/President's Designee shall appoint a Quasi-Judicial Officer or forward a request for hearing and such other documents, laws and regulations as may be required by the Florida Department of Administrative Hearings to the Department, and for assignment of an Administrative Law Judge to conduct a quasi-judicial hearing ("hearing").
- (b) Notice of Hearing.
  1. Within seven (7) days after being appointed, the Quasi-Judicial Officer shall issue a Notice of Hearing, stating the time, date and location for the parties to present evidence and argument on the issues under consideration. The Quasi-Judicial Officer shall set a time and place for all hearings and shall serve written notice on all the parties;
  2. The Quasi-Judicial Officer shall give no less than 14 days' notice of the hearing on the merits of the protest, unless otherwise agreed by the parties.
- (c) University Statement of Actions. Within seven (7) days after the appointment of the Quasi-Judicial Officer, the university shall file a written statement to the Quasi-Judicial Officer stating the actions (proposed actions, actions already taken, or refusal to take action are referred to as "actions") of the university, and a summary of the factual, legal, and policy grounds for such actions. The university shall immediately serve a copy of the Statement of Actions on the other parties.
- (d) Protestor's Response to University Statement of Actions. Within seven (7) days after the university provides the University Statement of Actions to the Quasi-Judicial Officer, the Protestor may file a written response to such statement with the Quasi-Judicial Officer. The Protestor shall immediately



- serve a copy of the Protestor's Response to the University's Statement of Actions on the other parties.
- (e) Discovery. After the assignment of the Quasi-Judicial Officer, the parties may obtain discovery through the means and manner provided in the Florida Rules of Civil Procedure 1.280 through 1.400. The Quasi-Judicial Officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay.
    1. Each party must serve a list of evidence to the other parties at least seven (7) days prior to the first day of the hearing, along with a general description of how the party intends to use the evidence in the hearing;
    2. Each party must file a witness list with the Quasi-Judicial Officer and serve the same on the other parties at least seven (7) days prior to the first day of the hearing. The parties must include a general description of how the party intends to use each witness in the hearing with the witness list.
  - (f) De Novo Proceeding. The Quasi-Judicial Officer shall conduct a de novo proceeding to determine whether the university's decision or intended decision is contrary to the statutes, regulations, or policies governing the university, or contrary to the Specifications. The standard of proof for the proceedings shall be whether the proposed university action was clearly erroneous, contrary to competition, arbitrary, or capricious. However, if the protest is regarding the university's decision to reject all responses to a competitive solicitation, the standard of review shall be whether the university's intended action is illegal, arbitrary, dishonest or fraudulent.
  - (g) Burden of Persuasion. The burden of proof rests with the party protesting the university action.
  - (h) Conduct of Hearing. All parties shall have an opportunity to: present evidence; to respond to all issues involved; to conduct cross-examination and submit rebuttal evidence; and to submit proposed findings of fact and proposed orders.
    1. The hearing shall be conducted in conformity with the Florida Rules of Civil Procedure and the Florida Rules of Evidence applicable to civil proceedings unless specifically contradicted by this regulation or otherwise agreed by the parties;
    2. Each party shall have a minimum of fifteen (15) minutes to argue its position. The Protestor shall present its argument first and have the opportunity for rebuttal. At the Quasi-Judicial Officer's discretion, the university may have the opportunity for surrebuttal;
    3. The Quasi-Judicial Officer has the right to question each party and any witnesses.
  - (i) Recommended Order. The Quasi-Judicial Officer may request that the parties submit proposed findings of fact, conclusions of law, orders and memoranda on the issues within a time designated by the Quasi-Judicial Officer. No later

- than thirty (30) days after receipt of the hearing transcript, the Quasi-Judicial Officer shall issue a written Recommended Order to the President, and serve a copy on each of the parties.
- (j) Preliminary Order and Exceptions to the Preliminary Order. Within fourteen (14) days after the date the Recommended Order was issued, the President shall issue a Preliminary Order and serve the parties with a notice of such order. If the Protestor takes exception to the Preliminary Order, the Protestor must timely file its written exceptions with the President within fourteen (14) days after the date the Preliminary Order was issued. The Preliminary Order shall provide, "This Preliminary Order is the Final Order unless the Protestor files written exceptions to the Preliminary Order with the President no later than 14 days after the date this Preliminary Order is issued."
  - (k) Final Order.
    - 1. If no written exceptions are timely filed, the Preliminary Order is the Final Order;
    - 2. If the Protestor timely files written exceptions, then within fourteen (14) days after the end of the 14 day period for filing exceptions to the Preliminary Order, the President will review the Preliminary Order and the timely filed exceptions and will render a Final Order;
    - 3. The President's Final Order is the final decision of the University.
  - (l) Point of Entry. Judicial review of the University's final decision shall be in accordance with Florida Rules of Appellate Procedure Rule 9.190(b)(3), applicable to review of quasi-judicial decisions of an administrative body not subject to the Administrative Procedure Act. A request for review may be made by filing a petition for certiorari review with the appropriate circuit court within thirty (30) days after the university's final decision. Failure to seek timely review shall constitute a waiver of the right to appeal the university's final decision.

(14) Computation of Time. In computing any period of time under this regulation or by order of a Presiding Officer, the day of the act from which the period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday or legal holiday. When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. Notwithstanding the above, this Section does not apply when computing the time period for filing the Notice of Intent to Protest as it is computed in accordance with Section (5)(b) of this regulation.

(15) Conflict. Following appointment of the University Official or the Quasi-Judicial Officer as the Presiding Officer of a protest proceeding, the attorney representing the university in the protest will not serve as legal advisor to the Presiding Officer until the

protest proceedings are over (to include the period of time in which the final decision of the university can be appealed).

(16) **Intervenors.** Persons other than the original parties to a pending proceeding whose substantial interest will be affected by the proceeding and who desire to become parties may petition the Presiding Officer for leave to intervene. Except for good cause shown, petitions for leave to intervene must be filed with the Presiding Officer no later than 20 days after the date the Formal Protest was filed. The petition shall include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to a Board of Governors' or university's rule or regulation, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. The petition shall also include the email address of the intervenor/intervenor's counsel or representative; the email address provided will be the email address used by the President, the President's Designee, the Presiding Officer, and the other parties for serving the intervenor with notice, documents and materials related to the protest. If time permits, the parties may, within seven (7) days after service of the intervenor's petition, file a response in opposition to the petition with the Presiding Officer and serve the same on the other parties. The Presiding Officer may impose terms and conditions on the intervenor to limit prejudice to other parties.

(17) **Presiding Officer Orders.** The Presiding Officer may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the protest.

(18) **Motions.** All requests for relief shall be by motion. All motions shall be in writing unless made on the record during a hearing and shall fully state the action requested and the grounds relied upon. The moving party shall file the motion with the Presiding Officer and serve a copy on the other parties. When time allows, the other parties may, within seven (7) days after service of a written motion, file a response in opposition and serve the same on the other parties. Written motions will normally be disposed of after the response period has expired based on the motion, together with any supporting or opposing memoranda. The Presiding Officer shall conduct proceedings and enter such orders as are deemed necessary to dispose of issues raised by the motion. Motions, other than a motion to dismiss, shall include a statement that the movant has conferred with the other parties of record and shall state whether any party has an objection to the motion. Motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request.

(19) **Evidence.** In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to

negotiate procurement, no submissions made after the university announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered.

(20) Extensions or Continuances. The Presiding Officer may extend the time period for holding the hearing. The Presiding Officer may also grant a continuance of a hearing for good cause shown. Except in cases of emergency, requests for continuance must be made at least seven (7) days prior to the date noticed for the hearing.

(21) Records. The university shall accurately and completely preserve all testimony and evidence in the proceeding, and upon the request of any party shall provide a copy of the testimony. The university may charge the cost of duplication to the requesting party. Proceedings shall be recorded by a certified court reporter or by recording instruments.

Any party to a hearing may, at its own expense, provide a certified court reporter if the university does not. The Presiding Officer may provide a certified court reporter. At a hearing reported by a court reporter, any party who wishes a transcript of the testimony shall order the same at its own expense. If a court reporter records the proceedings, the recordation shall become the official transcript.

(22) Costs and Attorney Fees. If the Quasi-Judicial Officer determines that the non-prevailing party has participated in the hearing for an improper purpose, the Quasi-Judicial Officer may award attorney's fees and costs to the prevailing party, as appropriate. If the Quasi-Judicial Officer awards the university attorney's fees and/or costs, upon Protestor's payment of such costs, the university shall return the solicitation protest bond to the Protestor. "Improper purpose" means participation in the protest proceeding primarily to harass, cause unnecessary delay, frivolous purpose; needlessly increasing the costs of litigation, licensing, or securing the approval of an activity; or filing a meritless protest.

Authority: Section 7(d), Art. IX, Fla. Const., History – New 3-27-08, Amended 9-12-13.