

18 - 554 DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES
BUREAU OF GENERAL SERVICES, DIVISION OF PURCHASES

CHAPTER 120 Rules for Appeal of Contract and Grant Awards

Summary: This chapter defines the procedures and criteria to be used in the appeal of contract or grant awards, outlines the appointment of an Appeal Committee, describes procedures to be used in hearing an appeal and how appellants will be notified of final agency action pursuant to 5 M.R.S.A. 1825-(C) (D) (E) (F) .

Section 1 DEFINITIONS

1. REQUEST FOR PROPOSAL: Means a document listing the scope of work, requirements of the State and all evaluation criteria for a service needed by the State. This document is also known by the initials "RFP".
2. STATE PURCHASES REVIEW COMMITTEE Means the committee established by Executive order which reviews agency documents and actions related to contracts for special services.
3. CONTRACT: Means the agreement between a vendor/provider and the State of Maine, describing the service to be performed, the terms and conditions agreed to by the parties, the cost of the service and how payment will be made.
4. GRANT: Means an agreement between a group, organization or other recipient and the State which describes terms and conditions and scope of performance or action which is expected of the recipient.
5. STAY OF AWARD: Means an order issued by the Director of the Bureau of General Services which halts action on a contract or grant pending an appeal hearing.
6. APPEAL COMMITTEE: Means a committee of three (3) people, two members are appointed by the Commissioner of Administrative & Financial Services and must not have direct or indirect personal, professional or financial conflict of interest in the appeal and cannot be employees of the department affected by the contract. The third member is the Director of the Bureau of General Services or his designee.
7. AGGRIEVED PERSON: Means any person who bids on a contract and who is adversely affected financially, professionally or personally by that contract award decision.

Section 2 APPEALS PROCEDURE

1. STAY: The Director of the Bureau of General Services must insure that aggrieved persons have an opportunity to appeal a contract award decision. An aggrieved person may request a stay of contract award within ten (10) calendar days of notification of contract award by the contracting agency.
 - A. Requests for stay of contract award must be written and addressed to the Director of the Bureau of General Services and must state clearly the specific nature of the grievance, demonstrate irreparable injury to the petitioner, a reasonable likelihood of success on the merits of the appeal, and no substantial harm to adverse parties or to the general public.
 - B. The Director of the Bureau of General Services shall notify the petitioner in writing of the decision regarding the issuance of a stay within seven (7) days of receipt of request.
 - C. Failure of the petitioner, to obtain a stay does not affect the petitioner's right to a hearing of appeal as provided by statute and within these rules.

2. APPEAL: An aggrieved person may request a hearing of award decision from the Director of the Bureau of General Services in writing within fifteen (15) days of notification of contract award. A written request for appeal hearing must contain at a minimum the specific nature of the grievance, including the Appeal Criteria as defined in Section 3 Paragraph B of this rule and must demonstrate the conditions that make the petitioner an aggrieved person. The Director of the Bureau of General Services shall grant an appeal hearing unless it is determined that:
 - A. The petitioner is not an aggrieved person
 - B. A prior request by the same petitioner relating to the same contract award has been granted
 - C. The request was made more than fifteen (15) days after notification of award; or
 - D. The request is capricious, frivolous or without merit

A hearing will not be granted if the contract award is not approved by the State Purchases Review Committee.

- (1) NOTIFICATION: The Director of the Bureau of General Services shall notify the petitioner in writing of the decision regarding a request for a hearing of appeal within fifteen (15) calendar days of receipt of the request. If a request for a

hearing is granted, notification must be made at least ten (10) calendar days before the hearing date. The notification must include the date and location of the hearing and the names of the Appeal Committee members.

- (2) In the event the request for hearing is denied, the notification shall constitute final agency action. The notification shall include an explanation of the petitioners right to judicial review of final agency action under 5 M.R.S.A. 11001 et. seq.

Section 3 APPEAL HEARINGS

1. APPEAL COMMITTEE: The Appeal Committee shall consist of three (3) people, two appointed by the Commissioner of Administrative & Financial Services. The third person is the Director of the Division of Purchases or other designee of the Director of the Bureau of General Services. This Committee shall appoint a person to serve as presiding officer over the hearing. This person may be one of the Committee members or any other person who has no direct or indirect personal, professional or financial conflict of interest in the appeal This person cannot be an employee of any department affected by the contract. The presiding officer, if not from the ranks of the Appeal Committee shall have no vote in the decision but may provide advice, information or research at the request of the Committee.

The presiding officer shall control all aspects of the hearing, rule on points of order, rule on all objections and may question witnesses.

A recording secretary shall be furnished by the Division of Purchases to record by audio tape or other media the hearing of appeal. This person shall be responsible for scheduling additional hearing days and locations at the request of the Appeal Committee.

2. APPEAL CRITERIA: The burden of proof within the hearing of appeal lies with the petitioner. The evidence presented must specifically address and be limited to one or more of the following:
 - A. Violation of law;
 - B. Irregularities creating fundamental unfairness; or
 - C. Arbitrary or capricious award

Evidence of any type that cannot be related to this criteria may be ruled inadmissible by the presiding officer.

In the event multiple appeal hearing requests are granted on a single contract award, the Director of the Bureau of General Services may assign the Appeal Committee to hear all petitioners within the same hearing as a combined appeal.

3. **PARTICIPANTS:** The petitioners may participate alone or be presented by Counsel or other agent. The State shall be represented by the contracting agency and/or its Counsel. Other parties of interest may petition to intervene. Such petition shall be presented in writing to the Director of the Division of Purchases who shall determine and allow or disallow participation in writing within seven (7) calendar days of receipt of the request to intervene. Copies of this notification shall be sent to all Appeal Committee members, the presiding officer, the Appellant and the contracting State agency.
4. **PRESENTATION OF EVIDENCE:** The petitioner must present evidence to substantiate the specific grievances stated in the appeal. Brief opening statements directed to the Appeal Committee may be made by the petitioner, the contracting State agency and any intervenors, in that order.
 - A. The petitioner shall present evidence first, using witnesses and exhibits who may be cross examined by the State and the intervenors. Re-direct questioning related to issues raised during cross examination only may, be done by the petitioner, followed by re-cross examination by the State and intervenors.
 - B. Witnesses may be called who can present factual information related directly to the appeal. All witnesses shall be sworn. To expedite the proceeding, testimony of any witness may be prefiled in written form. If used, pre-filed testimony must be made available to the State, the Appeal Committee, presiding officer and all intervenors on the preceding work day, a minimum of twenty-four (24) hours prior to the hearing. Every such witness shall be subject to cross examination.
 - C. **EXHIBITS:** Exhibits relating to any issue of fact in the proceeding may be presented. Documentary evidence may be incorporated into the record by reference when the materials so incorporated are made available for examination by the parties before being received in evidence.
 - (1) **COPIES:** petitioner must furnish copies of all documentary evidence to the presiding officer, Appeal Committee, contracting State agency and all intervenors. Any costs associated with this subparagraph are the responsibility of the petitioner and shall not be recovered by any judgment of the Committee.
5. **STATE/INTERVENOR EVIDENCE:** The contracting State agency and all intervenors shall have the opportunity to subject evidence relevant to the appeal

through witnesses and exhibits. The procedures for presenting this evidence are the same as those for the petitioner, substituting the words "contracting State agency" or "intervenor" for petitioner.

- A. The order of examination and cross examination when the State presents evidence is state, all intervenors, and the petitioner.
 - B. The order of the examination and cross examination when an intervenor presents evidence shall be remaining intervenors (if any), the State and the petitioner.
6. SUBPOENA OF WITNESSES: In the event a witness is not willing to voluntarily testify, the Appeal Committee, subject to the approval of the Attorney General, shall issue a subpoena to require attendance, testimony and the production of any evidence relating to any issue of fact in the proceeding.
- A. EXPENSES; Any expenses incurred by witnesses called by any party or intervenor shall be sole responsibility of the petitioner and shall not be recovered by any judgment of the Committee.
7. APPEAL COMMITTEE: The Appeal Committee may ask questions for clarification at any point throughout the direct and cross examinations. In addition, the Appeal Committee may ask questions after the direct and cross examination, may request additional witnesses, and may recall any witness for additional questioning.
8. RECORD: All evidence received or considered shall be part of the record. Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The presiding officer may exclude irrelevant or unduly repetitious evidence. No sworn written evidence shall be admitted unless the author is available for cross examination or subject to subpoena, except for good cause shown.

Section 4 APPEAL DECISIONS AND ACTIONS

1. APPEAL COMMITTEE DECISION: The Appeal Committee shall consider all evidence entered into the record and shall look for clear and convincing evidence that one or more of the standards set forth in Section 3, Subsection B, of these rules has been proven by the petitioner. The actions of the Committee are limited to one of the following:
- A. Validate the contract award decision under appeal
 - B. Invalidate the contract award decision under appeal.

A written decision and the reasons that support the decision must be submitted to the Director of the Bureau -of General Services within fifteen (15) calendar days following the final day of the hearing of appeal.

2. NOTIFICATION OF FINAL AGENCY ACTION: The Director of the Bureau of General Services shall notify the petitioner, the contracting State agency, and all intervenors of this decision within ten (10) calendar days of receipt from the Appeal Committee. Such notification shall include the decision, an explanation of the reasons for the decision and an explanation of the petitioners right to judicial review of final agency action.
 - A. This notification is considered final agency action.
 - B In the event the decision of the Appeal Committee is to invalidate the contract under these rules, the contract immediately becomes void and of no legal effect.

EFFECTIVE DATE: February 11, 1991

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EFFECTIVE DATE (ELECTRONIC CONVERSION): May 1, 1996

REVIEWED & CORRECTED: May 24, 1995