



DEPARTMENT OF THE NAVY

NAVY EXCHANGE SERVICE COMMAND
3280 VIRGINIA BEACH BOULEVARD
VIRGINIA BEACH, VA 23452-5724

NEXCOMINST 4200.4A CH-1

JUN 29 2018

NEXCOM INSTRUCTION 4200.4A CHANGE TRANSMITTAL 1

From: Chief Executive Officer, Navy Exchange Service Command

Subj: PROCUREMENT PROTESTS AND APPEALS

Ref: (a) NEXCOMINST 4200.4A

Encl: (1) NEXCOMINST 42004.A CH-1

1. Purpose. To issue change transmittal 1 to reference (a) revising enclosure (1) to include the appropriate standard of review for procurement protests and appeals at paragraphs 2.e.(5), 3.a.(6), and 3.c.(5).

2. Action. Replace enclosure (1) of the 23 June 2017 instruction with enclosure (1) of this change transmittal.

A handwritten signature in black ink, appearing to read "R. J. Bianchi", is positioned above the printed name and title.

R. J. BIANCHI
Chief Executive Officer

Releasability:

This instruction is cleared for public release and is available electronically via <https://intranet.nexad.nexweb.us/>

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Procurement Protests and Appeals Procedures

1. General. The following are internal Navy Exchange Service Command (NEXCOM) guidelines for handling protests and appeals submitted by interested parties.

2. Protest Procedures

a. Satisfactory Settlement. The first step in resolving any concern or issue raised by an interested party is for the Initial Decision Official (IDO) to consider the matter and respond to the interested party accordingly. Many times, a concern or issue raised by an interested party may be resolved with a simple explanation of the reason for the IDO's action. Where the concern or issue raised by the interested party cannot be resolved through informal discussion between the IDO and the interested party, the interested party must file a written protest as provided in these procedures for the matter to be considered further. For resale merchandise and "Cost of Goods" contracts, the discussion may begin with the buyer before escalating to the IDO.

b. Protest Considerations

(1) Interested Parties. Only interested parties may file protests.

(2) Timeliness. The IDO will only consider timely protests filed by interested parties, whether submitted before or after award.

(a) Time Limit

1. Protests based on alleged improprieties in a solicitation that are apparent on the face of the solicitation must be filed in writing with the IDO before the closing date for receipt of proposals.

2. Protests as to the contents of an amendment to a solicitation must be filed in writing before the closing date of the amendment.

3. In all other cases, including protests after award, protests must be filed in writing not later than seven calendar days after the basis of protest is known or should have been known through the exercise of reasonable diligence by the protester.

(b) Determining Timeliness

1. An interested party's objections or comments to a solicitation do not become a protest within the meaning of these procedures unless and until the objections or comments are put in writing, are clearly identified as a protest, and are timely received by the IDO.

2. The date that the written protest is received by the IDO is the relevant date for determining whether the protest has been filed in a timely manner. Further, the calendar day expires at 4:00 p.m. local time at the location where the protest or other document is required to be filed.

(3) Notification. When the protest is not filed by an interested party or is not timely, the IDO will dismiss the protest without further consideration of its merits. The IDO will notify the

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protester in writing that the dismissal is the IDO's Final Decision. The notification must inform the protester of his/her right to appeal the Final Decision and include instructions for submitting an appeal.

c. Protest Contents and Format. To be considered, a protest must be timely, in writing, and clearly identified as a protest. While no particular form or format is required, a protester must furnish a complete written protest to the IDO including, at a minimum:

- (1) The name, address, email address and telephone number of the protester.
- (2) Sufficient details regarding the protest, including relevant documents, so that the IDO can make a thorough and well-reasoned decision on the matter.
- (3) Where necessary to resolve the protest, a copy of the offer or proposal submitted by the protester.
- (4) Copies of the specifications or portions of the solicitation relevant to the protest.
- (5) A statement indicating when the protester first became aware of the matter forming the basis of the protest.
- (6) Any other information or documents that the protester considers relevant to the resolution of the protest, including the specific relief requested by the protester.

d. Non-Disclosure Requests. The burden to show that information is procurement sensitive or otherwise protected from disclosure is on the interested party wishing to claim protection from disclosure.

- (1) To claim protection from disclosure, the information must be clearly marked by the protester.
- (2) The title or cover page must contain a restrictive legend stating that the material submitted contains information that is considered to be proprietary or procurement sensitive, asserting a privilege from release of the information outside the government, and identifying the privilege upon which the assertion is based.
- (3) Each page that contains any material claimed to be proprietary or procurement sensitive must contain a similar notification.

e. Processing Protests – General

(1) Conferring with Protester. A protest can often be resolved by a brief explanation of the IDO's rationale for decision. Upon receipt of a protest, the IDO may wish to contact the protester to explore the subject matter of the protest. This procedure does not contemplate an extensive discussion with the protester. Rather, any contact with the protester should be brief and to the point in an attempt to resolve the matter under protest.

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(2) Expeditious Handling. All protests will be handled expeditiously.

(3) Notifications and Comments

(a) The IDO will give a copy of the protest to all interested parties and cognizant NEXCOM personnel as soon as practicable and, where possible, within three working days after receipt of the protest by the IDO.

(b) The IDO may allow any party so notified to submit written comments regarding the protest for consideration by the Contracting Officer. The IDO will set the time limits for filing such comments when the commenting party is notified of the protest.

(c) The IDO will notify interested parties if contract award will be withheld pending settlement of the protest.

(d) If appropriate, the Contracting Officer should request that the offerors extend the time for acceptance of their respective offers to avoid the need for re-solicitation. Should the Contracting Officer be unable to obtain such extensions, consideration should be given to proceeding with award as allowed under these procedures.

(4) Handling Non-Disclosure Requests. Where the protest contains information marked by the protester as procurement sensitive or otherwise protected from disclosure, the IDO should take steps to safeguard the information pending further investigation into the matter. The IDO must redact any such information before sending a copy of the protest to other interested parties or, if not possible, send a summary of the grounds of protest in lieu of an actual copy of the protest. If interested parties other than the protestor submit documents marked as protected from disclosure, the IDO must also redact such information before sending to any other interested party.

(a) If the IDO determines the protest cannot be decided unless the other interested parties are made aware of the information claimed as being protected so that they may comment on it, the IDO should discuss the matter with any party claiming protection in order to resolve the situation. The IDO, however, retains the ultimate authority to determine whether the material is subject to protection under applicable law and regulation or may be released to other interested parties.

(b) Where a party claims that information is protected from disclosure but its submissions are not marked at all or are not clearly marked, the IDO will notify the party of the discrepancy and request the party contact the IDO to discuss the situation. If the party persists in the claim that the information is protected, the material must be returned to the party for marking with the appropriate restrictive legends.

(5) Standard of Review. If the IDO determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the IDO may direct appropriate remedial action in accordance with this instruction.

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(6) Legal Review. Per Reference (a), all protests of procurement actions and all appeals of decisions made in response to such protests must be referred to NEXCOM Office of Counsel (Code OC) and receive legal review prior to taking subsequent action. Code OC should be consulted throughout all phases of this process due to the risk of litigation.

f. Processing Protests Received Before Contract Award. When a protest is filed before contract award, award must not be made until the matter is resolved, unless the IDO determines, and documents such determination, that any one or more of the following conditions applies:

- (1) The items or services are urgently required;
- (2) Delivery or performance will be unduly delayed by failure to make award promptly; or
- (3) A delayed award is not in the best interest of NEXCOM.

The determination by the IDO to continue with contract award pending resolution of the protest does not provide independent grounds for protest or appeal under these procedures.

g. Processing Protests Received After Contract Award

(1) Upon receipt of a timely protest, the Contracting Officer must determine whether to suspend contract performance. Relevant factors to consider include:

- (a) whether the award will survive the protest;
- (b) whether suspension will result in failure to meet a requirement; and
- (c) how continued performance affects litigation risk.

(2) If contract performance is to be suspended or terminated, the Contracting Officer must promptly notify the contractor in writing and will provide appropriate instructions regarding the suspension or termination of performance.

h. Issuing the Final Decision of the IDO

(1) The Final Decision of the IDO must:

(a) Be in letter format and include the date of the Final Decision and reference to the solicitation or contract number.

(b) Include essential elements of the protest and a summary of any evidence or arguments submitted in support of the protester's position.

(c) Advise the protester or any party adversely affected by the Final Decision of the right to appeal the Final Decision of the IDO to the appropriate Intermediate Appellate Authority (IAA).

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(d) Include the following paragraph:

This is the Final Decision of the Initial Decision Official (IDO). If this Decision does not answer the subject protest to your satisfaction, the next level of review available is Mr./Ms. _____, Intermediate Appellate Authority (IAA), Navy Exchange Service Command (Attention: Code __), 3280 Virginia Beach Blvd., Virginia Beach VA 23452-5724. Your appeal is limited to the matters addressed in this Final Decision. If you elect to appeal this protest Decision, the appeal must:

- 1. Be in writing to the IAA and contain an original and two copies;*
- 2. Be received by the IAA within ten calendar days from the date of your receipt of the IDO's Final Decision forming the basis for the appeal;*
- 3. Clearly indicate that an appeal is intended;*
- 4. Reference the IDO's Final Decision, the solicitation and/or contract number, and the date that the IDO's Final Decision was first received; and*
- 5. Contain a full factual and legal explanation of why the IDO's Final Decision is wrong and should be overturned.*

(2) Notification of the Final Decision

(a) The Decision will be furnished directly to the protester after being signed by the IDO.

(b) If the Decision is mailed, it must be sent via first class mail, return receipt requested, and the date of the protester's receipt thereof recorded.

(c) If sent via email or facsimile, evidence of the receipt will be maintained and a hard copy must also be sent via first class mail, return receipt requested.

(d) For purposes of determining whether an appeal is timely, the earliest date that the IDO's Final Decision was received will control over any subsequent notification dates.

(3) Invalidated Award

(a) If an awarded contract is to be terminated as a result of the decision of the IDO, the Contracting Officer must seek a mutual agreement with the contractor to stop performance and to terminate the contract on a no-cost or no-liability to either party basis.

(b) Should this avenue not be available, a termination for convenience must be initiated.

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3. Appeal Procedures

a. Appeal of IDO's Final Decision. Should the interested party not be satisfied with the IDO's Final Decision, the interested party may appeal the Final Decision to the appropriate IAA, and then to the Final Appellate Authority (FAA) in accordance with these procedures.

(1) Restrictions. Only those matters raised in the original protest may be appealed. A protest may not raise new issues or grounds for protest not considered by the IDO. The IAA and the FAA will dismiss appeals raising new issues or asserting new grounds for protest.

(2) Timeliness. The appeal must be received by the IAA within 10 calendar days from date of receipt of the IDO's Final Decision notice. The IAA will not consider appeals that are not timely. Failure to file an appeal within the time limit will result in dismissal of the appeal without further consideration by the IAA.

(3) Contents of Appeals. A protester or interested party adversely affected by an IDO's Final Decision may appeal that Final Decision by filing a written appeal with the appropriate IAA. The appeal shall:

(a) Be in writing with an original and two copies.

(b) Be sent to the IAA identified in the IDO's Final Decision Letter, at the Navy Exchange Service Command, 3280 Virginia Beach Blvd., Virginia Beach VA 23452-5724.

(c) Clearly indicate that appeal of the IDO's Final Decision is intended.

(d) Reference the IDO's Final Decision, the solicitation and/or contract number, and the date the Final Decision was first received by the party filing the appeal.

(e) Contain a full factual and legal explanation of why the IDO's Final Decision is wrong.

(4) Receiving Appeals. Upon receipt of an appeal, the IAA will note the following information:

(a) Manner of delivery (mail, email, facsimile, hand-delivered, etc.);

(b) Date and time received (if received by mail, note postmark date); and

(c) The individual in receipt of the appeal.

(5) Processing Appeals. Upon receipt of the appeal and related documentation, the IAA will take responsibility for processing the appeal and will take steps to ensure that the IDO forwards relevant information for the IAA's consideration in the appeal decision.

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(6) Standard of Review. If the IAA determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the IAA may direct appropriate remedial action in accordance with this instruction.

b. Issuing the Final Decision of the IAA

(1) The Final Decision of the IAA must:

(a) Be in letter format and include the date of the IAA Final Decision, the date of the IDO's Final Decision and reference the solicitation or contract number.

(b) Include essential elements of the appeal and a summary of any evidence or arguments submitted in support of the protester's appeal.

(c) Advise the protester or any party adversely affected by the Final Decision of the right to appeal the Decision of the IAA to the FAA.

(d) Include the following paragraph:

This is the final decision of the Intermediate Appellate Authority (IAA). If this decision does not answer the subject appeal to your satisfaction, the next level of review available is the Chief Executive Officer, NEXCOM, Final Appellate Authority (FAA), Navy Exchange Service Command (Attention: COS (Code 00A)), 3280 Virginia Beach Blvd., Virginia Beach VA 23452-5724. Your appeal is limited to the matters addressed in this Final Decision. If you elect to appeal the IAA's final decision, the appeal must:

- 1. Be in writing to the FAA and contain an original and two copies;*
- 2. Be received by the FAA within 10 calendar days from the date of your receipt of the IAA's Final Decision forming the basis for the appeal;*
- 3. Clearly indicate that an appeal is intended;*
- 4. Reference the IAA's Final Decision, the IDO's Final Decision, the solicitation and/or contract number, and the date that the IAA's Final Decision was first received; and*
- 5. Contain a full factual and legal explanation of why the IAA's Final Decision is wrong and should be overturned.*

(2) Notification of the Final Decision

(a) The decision must be furnished directly to the protester after being signed by the IAA.

(b) If the decision is mailed, it must be sent via first class mail, return receipt requested, and the date of the protester's receipt thereof will be recorded.

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(c) If sent via email or facsimile transmission, evidence of the receipt will be maintained and a hard copy must also be sent via first class mail, return receipt requested.

(d) For purposes of determining whether an appeal is timely, the earliest date that the IDO's Final Decision was received will control over any subsequent notification dates.

(3) Invalidated Award

(a) If an awarded contract is to be terminated as a result of the decision of the IAA, the Contracting Officer for the contract must seek a mutual agreement with the contractor to stop performance and to terminate the contract on a no-cost or no-liability to either party basis.

(b) Should this avenue not be available, a termination for convenience must be initiated.

c. Appeal of IAA's Final Decision. Should the interested party not be satisfied with the IAA's Final Decision, the interested party may appeal the Final Decision to the appropriate FAA in accordance with the same procedures set forth in the above section "Appeal of IDO's Final Decision." The following adjustments apply:

(1) The appeal must be sent to the Chief Executive Officer, Navy Exchange Service Command (Attention: Chief of Staff (Code 00A)), 3280 Virginia Beach Blvd, Virginia Beach VA 23452-5724.

(2) The appeal must clearly indicate that appeal of the IAA's decision is intended.

(3) The appeal must reference the IAA's Final Decision, the IDO's Final Decision, the solicitation and/or contract number, and the date the IAA's Final Decision was first received by the party filing the appeal.

(4) Processing Appeals. Upon receipt of the appeal and related documentation, the FAA will take responsibility for processing the appeal and will take steps to ensure that the IAA forwards relevant information for the FAA's consideration in the appeal decision.

(5) Standard of Review. If the FAA determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the FAA may direct appropriate remedial action in accordance with this instruction.

d. Issuing Final Decision of FAA

(1) The Final Decision of the FAA must:

(a) Be in letter format and include the date of the IAA Final Decision, the date of the IDO's Final Decision and reference the solicitation or contract number.

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(b) Include essential elements of the appeal and a summary of any evidence or arguments submitted in support of the protester's appeal.

(2) Notification of the Final Decision

(a) The decision must be furnished directly to the protester after being signed by the FAA.

(b) If the decision is mailed, it must be sent via first class mail, return receipt requested, and the date of the protester's receipt thereof will be recorded.

(c) If sent via email or facsimile transmission, evidence of the receipt will be maintained and a hard copy must also be sent via first class mail, return receipt requested.

e. Finality of the FAA's Decision – No Further Appeals. The decision of the Chief Executive Officer (CEO), or the individual acting in his behalf pursuant to a delegation of authority, is final and may not be appealed under these procedures.

f. CEO's Delegation of FAA to Act on Appeals of IAA Decisions. The CEO has delegated the authority to act on appeals of IAA Decisions to the Chief Operating Officer (Code OD) in the event he or she is unavailable to act personally on such appeals.

4. Solicitation Provision. Contracting Officers must add the following provision to all solicitations:

Protests and Appeals

1. *Offerors are encouraged to resolve any complaints or issues they may have with the Contracting Officer in an informal manner. Where an offeror is not satisfied with the decision of the Contracting Officer, that offeror may file a formal written protest with the Initial Decision Official (IDO) (which is the following individual, depending on the contract):*

Non-resale Contracts – Code K Contracting Officer

Resale Merchandise Contracts – appropriate Divisional Merchandise Manager

District Europe - appropriate Divisional Merchandise Manager

District Hawaii - Procurement Manager

District Japan - District Merchandising/Operations Manager District Guam - Buyer

Code NS Cost of Goods Contracts - Director, Store Operations, Merchandising and Services.

2. *The IDO will issue a Final Decision on the protest. Any interested party who is dissatisfied with the IDO's final decision on the protest may file a written appeal with the appropriate Intermediate Appellate Authority (IAA).*

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3. If a Final Decision on a protest is appealed, the IAA will issue a Final Decision on the protest appeal. Any interested party who is dissatisfied with the IAA Final Decision on a protest appeal may file a written appeal with the Chief Executive Officer, Navy Exchange Service Command, the Final Appellate Authority (FAA).

4. The procedures for filing protests and appeals are set forth in NEXCOMINST 4200.4A and are also available on-line at:

<https://www.mynavyexchange.com/command/contractor_vendor/cv-index.html>

or by mail from the Contracting Officer upon request.