



DEPARTMENT OF THE NAVY

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

IN REPLY REFER TO:
NEXCOMINST 4200.4
K:TB
OCT 08 2008

NEXCOM INSTRUCTION 4200.4

From: Commander, Navy Exchange Service Command

Subj: PROCUREMENT PROTESTS AND APPEALS

Ref: (a) COMNEXCOM ltr Ser 09C/0041 of 22 Jun 95

(b) COMNEXCOM ltr Ser OC/187 of 06 Jun 07

Encl: (1) Procurement Protests and Appeals Procedures

1. Purpose. To prescribe policies and procedures for managing and responding to protests of procurement actions and appeals of decisions made in response to protests of such actions.
2. Cancellation. This instruction replaces reference (a) and recalls reference (b).
3. Scope. This instruction is applicable to all non-appropriated fund procurements of the Navy Exchange Service Command (NEXCOM) throughout the Navy Exchange System (NES).
4. Action. Addressees shall distribute this instruction to appropriate personnel, execute, and abide by enclosure (1) procedures.

A handwritten signature in blue ink, appearing to read "m. good".

MICHAEL P. GOOD
Executive Vice President
Chief Operating Officer

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NEXCOMINST 5218.1

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PROCUREMENT PROTESTS AND APPEALS PROCEDURES

1. GENERAL. The following are internal Navy Exchange Service Command (NEXCOM) / Navy Exchange System (NES) guidelines for handling protests and appeals submitted by private sector firms seeking to become NEXCOM/NES contractors.

2. DEFINITIONS

a. Appeal is a written request that the NEXCOM Intermediate Appellate Authority (IAA) review an Initial Decision Official's (IDO's) Final Decision on a protest or that the NEXCOM Final Appellate Authority (FAA) review an IAA's Decision.

b. Contract means a mutually binding written agreement between the Government and a non-Government entity that:

- (1) is between competent parties;
- (2) includes an offer and an acceptance;
- (3) includes valid consideration;
- (4) is for a lawful purpose;
- (5) clearly sets forth the terms of the agreement; and
- (6) is in a form as required by law.

It includes all types of commitments that obligate the NEXCOM/NES to an expenditure of funds. Contract includes (but is not limited to) acceptance; award and notice of award pertaining to an agreement or order, to include amendments; and all types and forms of job orders or task letters issued under basic ordering agreements; licenses, letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral modifications.

c. Contracting Officer is a NEXCOM or NES associate who has been delegated signatory authority to act on behalf of NEXCOM/NES to enter into, execute, administer, amend, modify, or terminate contracts, and to take other actions relating to a NEXCOM/NES contract, thereby committing or obligating NEXCOM/NES funds.

d. Contractor means any individual or other legal entity that:

(1) directly or indirectly (for example through an affiliate), submits offers for or is awarded, or reasonably may be expected to submit offers for or be awarded, a contract, or a subcontract; or

(2) conducts business, or reasonably may be expected to conduct business, as an agent or representative of another contractor; and

(3) includes the terms “vendor,” “seller,” “supplier,” “concessionaire,” and/or “licensee”.

e. Final Appellate Authority (FAA) is the Commander, NEXCOM (COMNEXCOM) or his or her designee.

f. Initial Decision Official (IDO) refers to the individual who makes the Final Decision on a protest.

(1) For Corporate Contract-related protests, the IDO is the Contracting Officer.

(2) For resale merchandise protests (except services resale merchandise protests), the IDO is the Divisional Merchandise Manager (DMM).

(3) For services resale merchandise protests, the IDO is the Director, Store Operations (NM).

g. Interested Party, for the purpose of filing a protest, is an actual or prospective offeror whose direct economic interest would be affected by the act or omission forming the basis for the protest or appeal. For the purpose of being allowed to provide comments on or otherwise participate in a protest, an "interested party" is the successful offeror or any other actual offerors who, in the sole discretion of the IDO appear to have a substantial prospect of receiving an award if the protest were granted.

h. Intermediate Appellate Authority (IAA) refers to the individual above the level of the IDO who reviews an appeal.

(1) For appeals of a Corporate Contract-related Final Decision (which includes decisions of Contracting Officers located in District or Store locations and involving non-resale contracts), the Appellate Authority is the Vice President of Corporate Contracts (Code K) or his or her designee.

(2) For appeals of any resale merchandise Final Decision (except services resale merchandise Final Decision), the Appellate Authority is the Senior Vice President Merchandising (Code M) or his or her designee.

(3) For appeals of any services resale merchandise Final Decision, the Appellate Authority is the Senior Vice President Operations (Code N) or his or her designee.

i. In Writing, Writing, or Written means any worded or numbered expression that can be read, reproduced, and later communicated, including electronically transmitted and stored information.

j. Navy Exchange Service Command (NEXCOM) means the headquarters of the Navy Exchange System (NES) providing management direction and oversight to the various NES components. All NES components are subordinate to, and are part of NEXCOM.

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k. Navy Exchange System (NES) means the retailing operation within the Department of the Navy providing products and services to authorized patrons as defined in Department of Defense Instruction 1330.21, the Armed Services Exchange Regulation. The following programs comprise the NES: Navy Exchanges (NEXs), Navy Lodges, Ships Stores Afloat, Military Sealift Command Exchanges, and the Uniform Program.

l. Offeror means a non-Government entity that has submitted an "Offer" or "Proposal".

m. Procurement Sensitive, as it relates to protests and appeals, means information or data provided by a commercial concern with a restriction on disclosure and use by the government.

n. Protest is a written objection by an interested party to a Request for Proposals or any other solicitation (including amendments or cancellations) to a proposed or actual award, or to termination of a contract or other act or omission of the Contracting Officer. To be considered, a protest must be filed in a timely manner, as defined in these procedures, and must be clearly identified by the interested party as a protest. Oral complaints and written complaints not clearly identified as protests are not considered to be protests within the meaning of these procedures.

o. Protester refers to the individual, partnership, firm, corporation, or other entity filing a protest.

p. Resale/Retail Item is an article, item of goods, or merchandise acquired for the purpose of reselling with little or no value added (i.e., not transformed other than by presenting in ways that attract the customer), and purchased solely for the purpose of being sold to authorized patrons of the NES.

q. Solicitation means an invitation to a non-government entity (such as a vendor) to offer items and/or services, quoting a price with the understanding that the offer may be accepted or refused as presented, or that further negotiations may be conducted.

3. PROTESTS

a. Satisfactory Settlement. The first step in resolving any concern or issue raised by an offeror is for the IDO to consider the matter and respond to the offeror accordingly. Many times, a concern or issue raised by an offeror may be resolved with a simple explanation of the reason for the IDO's action. Where the concern or issue raised by the offeror cannot be resolved through informal discussion between the IDO and the offeror, the offeror must file a written protest as provided in these procedures for the matter to be considered further.

(1) For resale merchandise-related matters, the discussion may begin with the buyer.

(2) For all other contracts-related matters, discussion must begin with the contracting officer who initiated the contract action.

b. Protest Consideration

(1) Only interested parties may file protests.

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

(3) The IDO shall notify the protester in writing of the Final Decision.

(4) When the protest is not timely filed, the IDO shall dismiss the protest because it is untimely, without the need for further consideration of the merits of the protest. When the party filing the protest is not an interested party, the IDO shall dismiss the protest without the need for further consideration of the merits of the protest. In either case the IDO shall issue a Final Decision stating that the protest is being dismissed and the reasons for the dismissal and advising the protester of these appeal procedures.

c. Appeal of IDO's Decision

(1) 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 COMNEXCOM in accordance with these procedures.

(2) Only those matters raised in the original protest may be appealed.

(3) A protester may not raise new issues or grounds for protest not considered by the IDO. The IAA and COMNEXCOM will dismiss appeals raising new issues or asserting new grounds for protest.

4. PROTESTS (TIMELINESS)

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 (7) 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) A 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.

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(2) For purposes of these procedures, 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" as it affects the time for filing a protest or other document called for in these procedures expires at 4:00 p.m. local time at the location where the protest or other document is required to be filed.

(3) Untimely protests will not be considered on the merits of the allegations made. Failure to file a protest within the time requirements of these procedures will result in dismissal of the protest by the IDO.

5. PROTESTS (CONTENTS AND FORMAT). To be considered, a protest must be timely filed, in writing, and clearly identified as a protest. While no particular form or format is required, a protester shall furnish a complete written protest to the IDO including, at a minimum:

- a. the name, address, e-mail address and telephone number of the protester;
- b. sufficient details regarding the protest, to include relevant documents, so that the IDO can make a thorough and well-reasoned decision on the matter;
- c. where necessary to resolve the protest, a copy of the offer or proposal submitted by the protester;
- d. copies of the specifications or portions of the solicitation relevant to the protest;
- e. a statement indicating when the protester first became aware of the matters forming the basis of the protest; and
- f. any other matters that the protester considers relevant to the resolution of the protest, including the specific relief requested by the protester.

6. PROCESSING PROTESTS (BEFORE AWARD)

a. Expeditious Handling

(1) All protests shall be handled expeditiously.

(2) The IDO shall provide a copy of the protest to the apparent successful offeror, to any interested party, and to cognizant NEXCOM and/or NES personnel who may be affected by the protest. The IDO may allow any notified party to submit written comments regarding the protest for consideration by the IDO. The IDO will set the time limits for filing such comments when the commenting party is notified of the protest.

(3) Where the protest contains information claimed by the protester to be procurement sensitive or otherwise protected from disclosure, the IDO shall redact any such information before sending a copy of the protest or, if not possible, send a summary of the grounds of protest in lieu of an actual copy of the protest.

b. Conferring with Protester

(1) Many times, a protest can be resolved by a brief explanation of the IDO's rationale for a decision.

(2) Upon receipt of a protest before contract award, 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.

c. Award Pending Protest. When a protest is filed before contract award, award shall not be made until the matter is resolved, unless the IDO determines, and documents that 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 prompt award will otherwise be in the best interest of NEXCOM/NES.

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.

7. PROCESSING PROTESTS (AFTER AWARD)

a. Expeditious Handling

(1) All protests shall be handled expeditiously.

(2) The IDO shall give a copy of the protest to the contractor, to any interested party, and to cognizant NEXCOM/NES personnel who may be affected by the protest. The IDO may allow any party so notified to submit written comments regarding the protest for consideration by the IDO. The IDO will set the time limits for filing such comments when the commenting party is notified of the protest.

(3) Where the protest contains information claimed by the protester to be procurement sensitive or otherwise protected from disclosure, the IDO shall redact any such information before sending a copy of the protest or, if not possible, send a summary of the grounds of protest and not an actual copy of the protest.

b. Suspension of Performance

(1) Contract performance need not be suspended or terminated, unless it appears likely the award may be invalidated and non-delivery or non-performance is not prejudicial to the interest of NEXCOM/NES.

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

8. NOTIFICATION TO INTERESTED PARTIES

a. All Cases. In any case, whether or not contract award or contract performance will be affected, interested parties, as well as cognizant NEXCOM/NES personnel, should be given a copy of the protest as soon as practicable and, where possible, within three (3) working days after receipt of the protest by the IDO. 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.

b. Award Withheld. When a protest against the making of an award is received and award will be withheld pending settlement of the protest, all interested parties shall be informed of the protest as soon as practicable after receipt of the protest. If appropriate, the offerors should be requested to extend the time for acceptance of their respective offers to avoid the need for resolicitation. Should the IDO be unable to obtain such extensions, consideration should be given to proceeding with award as allowed under these procedures.

c. Claims of Procurement Sensitive Information

(1) The burden to show that information is procurement sensitive or otherwise protected from disclosure is on the party making the claim for protection from disclosure.

(2) Where the protest or comments filed by an interested party contain information clearly marked as being procurement sensitive or otherwise protected from disclosure, the IDO should take steps to safeguard the information pending further investigation into the matter. For example, when notifying a party of a protest, the IDO shall redact any such information before sending a copy of the protest. Where this cannot be done effectively, the IDO shall summarize the grounds of the protest excluding the information claimed as protected.

d. Marking Protected Material

(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 which is considered to be proprietary or procurement sensitive, asserting a privilege from release of the information outside the government and identifying the privilege the assertion is based upon.

(3) Furthermore, each page that contains any material claimed to be proprietary or procurement sensitive must contain a similar notification as well.

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e. Returning Unmarked Material

(1) Where a party claims protection from disclosure but its submissions are not marked at all or are not clearly marked, the IDO shall notify the party submitting it to discuss the situation.

(2) If the submitter of the information persists in the claim that the information is protected, the material shall be returned to the submitter for marking with the appropriate restrictive legends.

f. IDO's Authority. As noted above, interested parties may submit comments regarding protests. If the IDO determines the protest cannot be decided unless the other 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 the parties 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 the other parties to the protest.

9. ISSUANCE OF FINAL DECISION BY INITIAL DECISION OFFICIAL (IDO)a. The Final Decision of IDO must:

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

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

(3) 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 IAA.

(4) 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 (2) copies;*
- 2. be received by the IAA within ten (10) 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;*

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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."*

b. Notification of Decision

(1) The Decision shall be furnished directly to the protester and shall be signed by the IDO.

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

(3) If sent via facsimile transmission, evidence of the receipt shall be maintained and a hard copy shall also be sent via first class mail, return receipt requested.

(4) For purposes of determining whether an appeal is timely, the earliest date that the IDO's Final Decision was received will be the control.

c. Invalidated Award

(1) If an actual award is to be terminated as a result of the Decision of the IDO, the Contracting Officer for the contract action shall 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.

(2) Should this avenue not be available, a termination for convenience shall be initiated.

10. APPEAL OF PROTEST DECISIONS OF INITIAL DECISION OFFICIAL (IDO)

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

(1) be in writing with an original and two copies;

(2) be sent to the Intermediate Appellate Authority (IAA), to the attention of the Code identified in the IDO's Final Decision Letter, addressed to the Navy Exchange Service Command, 3280 Virginia Beach Blvd., Virginia Beach VA 23452-5724;

(3) be received by the IAA within ten (10) calendar days from date of receipt of the IDO's Final Decision by the party filing the appeal;

(4) clearly indicate that appeal of the IDO's Final Decision is intended;

(5) reference the IDO's Final Decision, the solicitation and/or contract number, and the date that the Final Decision was first received by the party filing the appeal; and

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

b. Receiving Appeal. Upon receipt of an appeal, the IAA shall note the date and time received on the notification, and:

(1) if receipt is by mail, note the date of mailing (postmark date) on the notification;

(2) if receipt of an appeal by means other than mail, note the manner of delivery of the notification (i.e., hand delivered, facsimile, overnight courier, etc.); and

(3) regardless of how received, identify the individual making the entries.

c. Processing Appeal. 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.

d. Timeliness of Appeals

(1) The IAA will not consider appeals that are not filed within the time limits set forth in these procedures.

(2) Failure to file an appeal within the time requirements of these procedures will result in dismissal of the appeal without further consideration by the IAA.

11. ISSUANCE OF DECISION OF INTERMEDIATE APPEAL AUTHORITY (IAA)

a. The Final Decision of IAA must:

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

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

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

(4) 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 Commander, 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 (2) copies;

2. *be received by the FAA within ten (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."*

b. Notification of Decision

(1) The decision shall be furnished directly to the protester and shall be signed by the FAA.

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

(3) If sent via facsimile transmission, evidence of the receipt shall be maintained and a hard copy shall also be sent via first class mail, return receipt requested.

(4) For purposes of determining whether an appeal is timely, the earliest date that the IDO's Final Decision was received will control.

c. Invalidated Award

(1) If an actual award is to be terminated as a result of the Decision of the IAA, the Contracting Officer for the contract action shall 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.

(2) Should this avenue not be available, a termination for convenience shall be initiated.

12. APPEALS OF IAA DECISIONS TO THE FINAL APPELLATE AUTHORITY (FAA)

a. Contents of Appeal. A protester or interested party adversely affected may appeal a decision of the IAA by filing a written appeal with COMNEXCOM, the FAA. The appeal shall:

(1) be in writing with an original and two copies;

(2) be sent to the Commander, Navy Exchange Service Command (Attention: COS (Code 00A)), 3280 Virginia Beach Blvd.; Virginia Beach VA 23452-5724;

(3) be received by COMNEXCOM within ten (10) calendar days from date of receipt of the IAA's Final Decision by the party filing the appeal;

(4) clearly indicate that appeal of the IAA's decision is intended;

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(5) 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 by the party filing the appeal; and

(6) contain a full factual and legal explanation of why the IAA's Final Decision is wrong.

b. Receiving Appeal. Upon receipt of an appeal, the NEXCOM (COS) shall note the date and time received on the notification, and:

(1) if receipt is by mail, note the date of mailing (postmark date) on the notification;

(2) if receipt of an appeal by means other than mail, note the manner of delivery of the notification (i.e., hand delivered, facsimile, overnight courier, etc.);

(3) regardless of how received, identify the individual making the entries.

c. Processing Appeal. Upon receipt of the appeal and related documentation, the FAA (COMNEXCOM) 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.

d. Timeliness of Appeals

(1) The FAA will not determine appeals that are not filed within the time limits set forth in these procedures.

(2) Failure to file an appeal within the time requirements of these procedures will result in dismissal of the appeal without further consideration by the FAA.

e. Commander's Delegation of FAA to Act on Appeals of IAA Decisions. COMNEXCOM delegates the authority to act on appeals of IAA Decisions to the Executive Vice President - Chief Operating Officer (Code OD) in the event COMNEXCOM is unavailable to act personally on such appeals.

13. FINALITY OF COMMANDER'S DECISION – NO FURTHER APPEALS. The decision of the Commander, or the individual acting in his behalf pursuant to a delegation of authority, is final and may not be appealed under these procedures.

14. NOTIFICATION OF PROTEST PROCEDURES – PROTESTS AND APPEALS (PRE-AWARD) CLAUSE. Contracting Officers shall add the following clause to all solicitations:

“PROTESTS AND APPEALS (PRE-AWARD)

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 Contracting Officer for non-resale contract actions; the appropriate

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Divisional Merchandise Manager (DMM) for resale merchandise-related actions; and the Director, Store Operations (NM) for services resale merchandise-related actions).

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).

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

4. The procedures for filing protests and appeals are set forth in the NEXCOM Instruction 4200.4 series and are also available on-line at <www.navy-nex.com/command/contractor_vendor/PUBS/pdf/protest&appeals.pdf> or by mail from the Contracting Officer upon request."