

# Protests

## Challenging Agency Solicitations and Awards



# What is a Protest?

A protest is the statutorily-authorized and prescribed way to challenge:

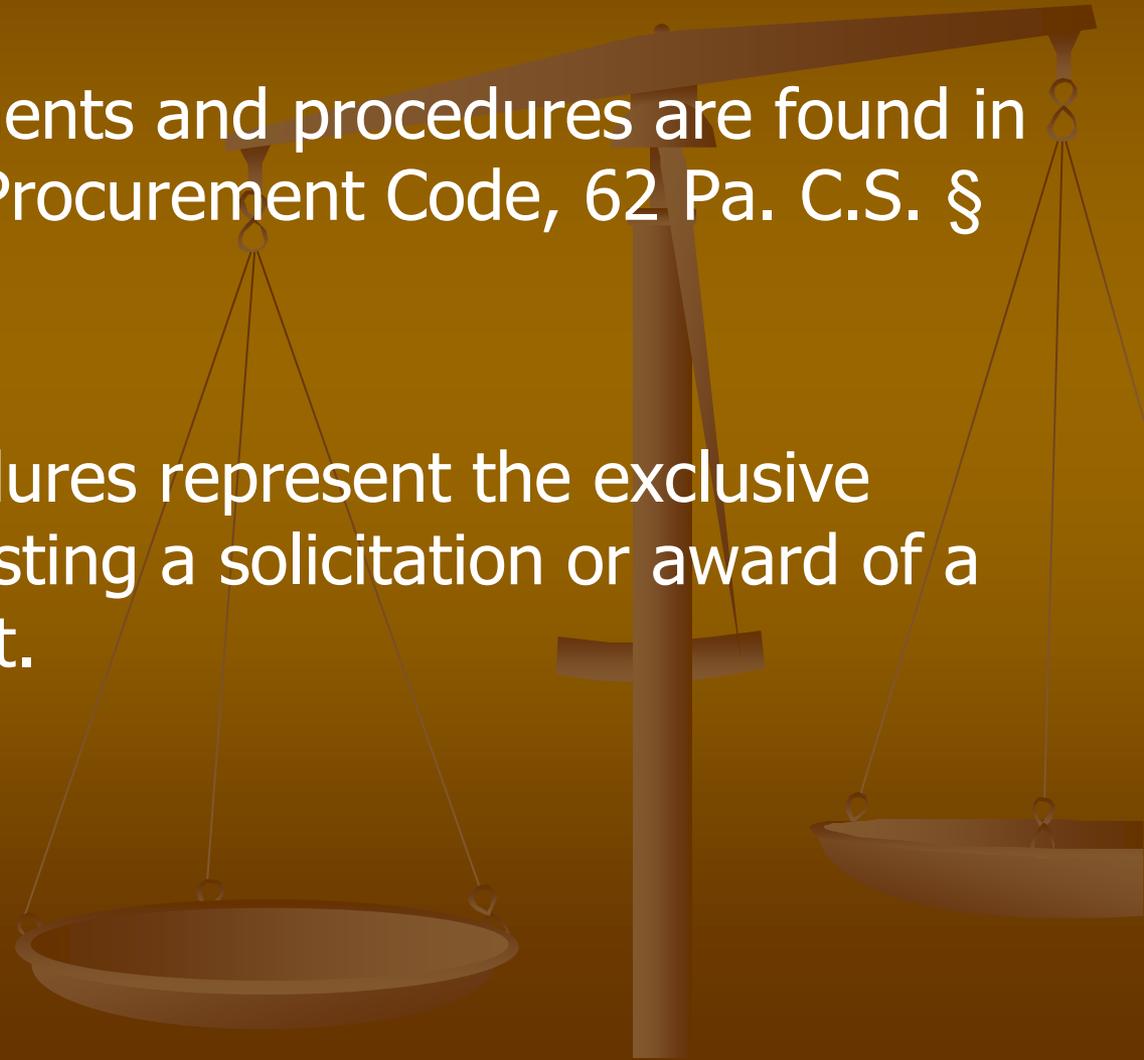
- 1) the solicitation for the procurement of a material, service, or construction, or
- 2) the award of a procurement contract.



# Statutory Authority

The protest requirements and procedures are found in the Commonwealth Procurement Code, 62 Pa. C.S. § 1711.1.

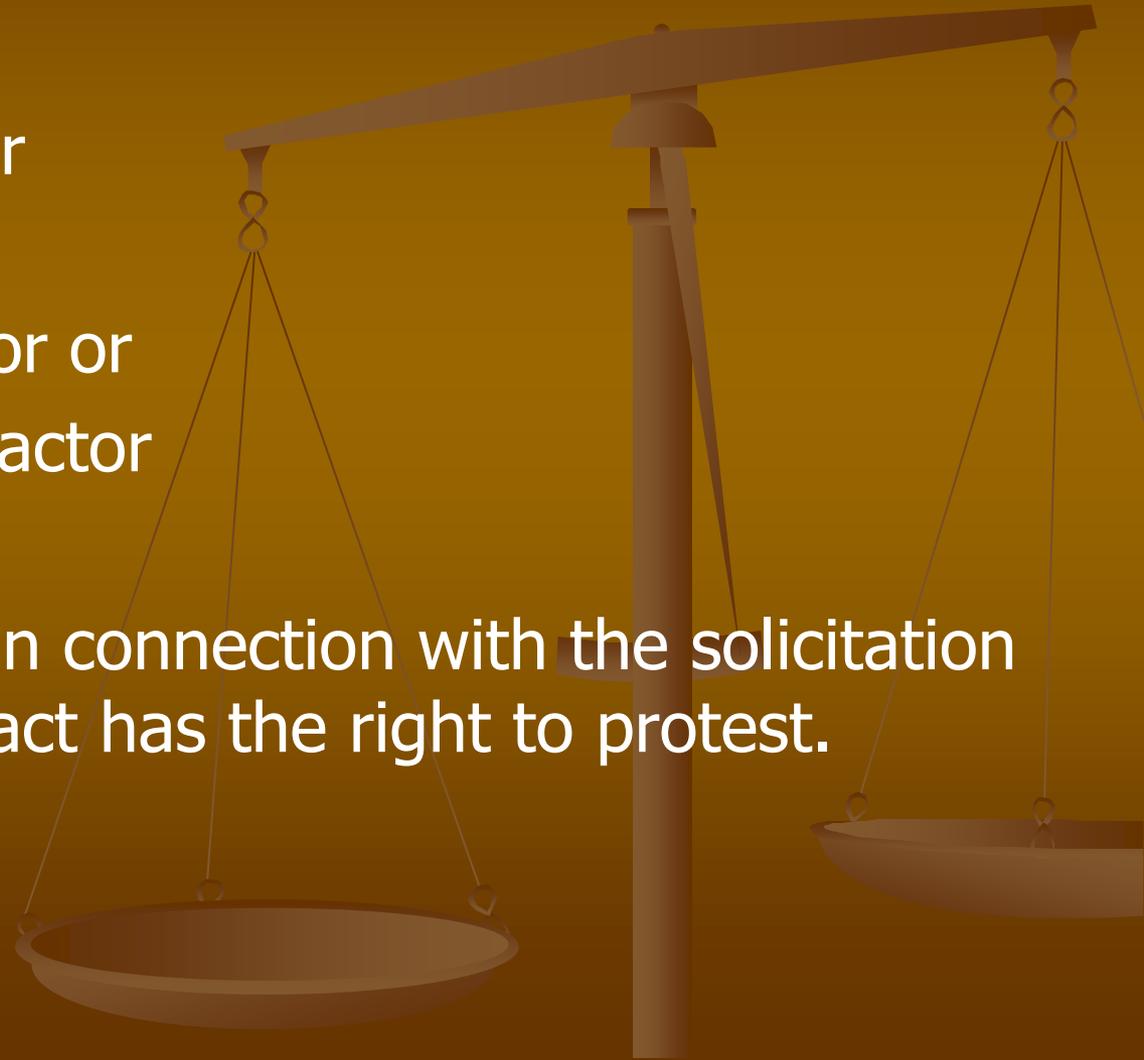
These protest procedures represent the exclusive mechanism for protesting a solicitation or award of a procurement contract.



# Who can file a protest?

- A Bidder
- A Prospective Bidder
- An Offeror
- A Prospective Offeror or
- A Prospective Contractor

...that is *aggrieved* in connection with the solicitation or award of a contract has the right to protest.



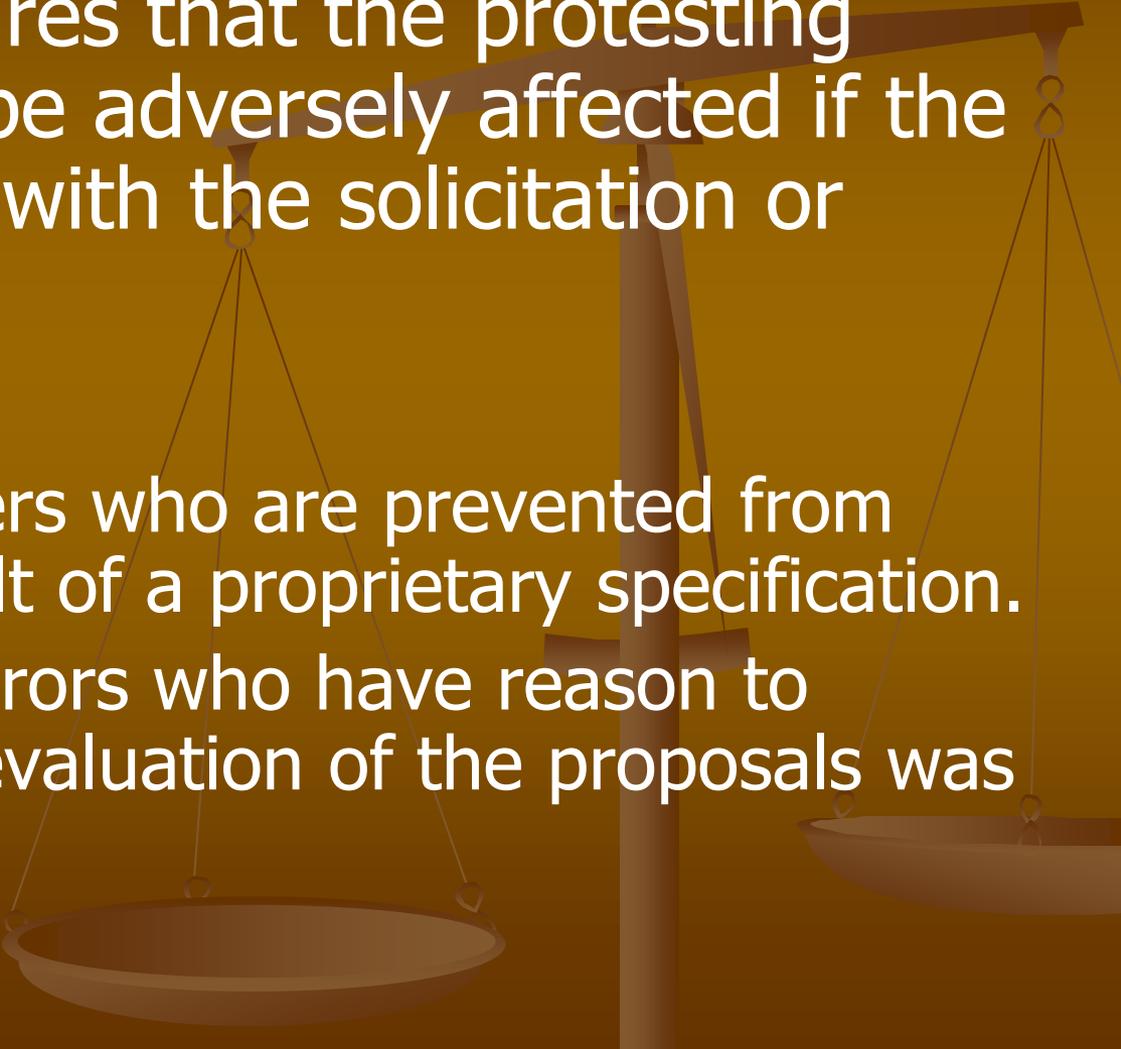
# Who can file a protest? – Exception

NO ONE can protest:

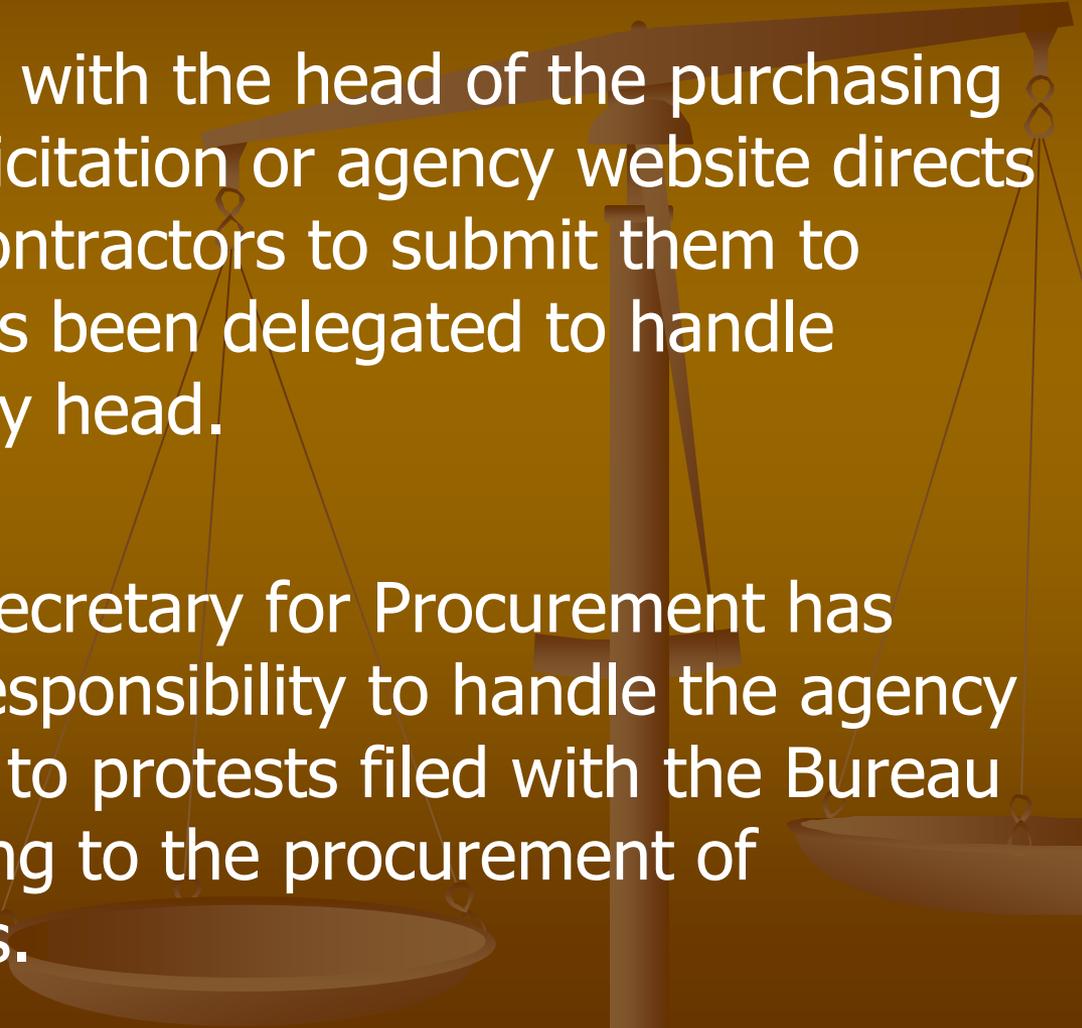
- 1) The cancellation of an invitation for bids (IFBs) prior to bid opening
- 2) The cancellation of a request for proposals (RFPs) prior to proposal receipt date
- 3) The rejection of all bids
- 4) The rejection of all proposals

Reminder: The reasons for the cancellation of an IFB or RFP or the rejection of all bids/proposals must be included in the contract file and they are a matter of public record.

# What Does It Mean to be Aggrieved?

- “Aggrieved” requires that the protesting party has or will be adversely affected if the agency proceeds with the solicitation or award.
  - Examples:
    - Prospective bidders who are prevented from bidding as a result of a proprietary specification.
    - Unsuccessful offerors who have reason to believe that the evaluation of the proposals was improper.
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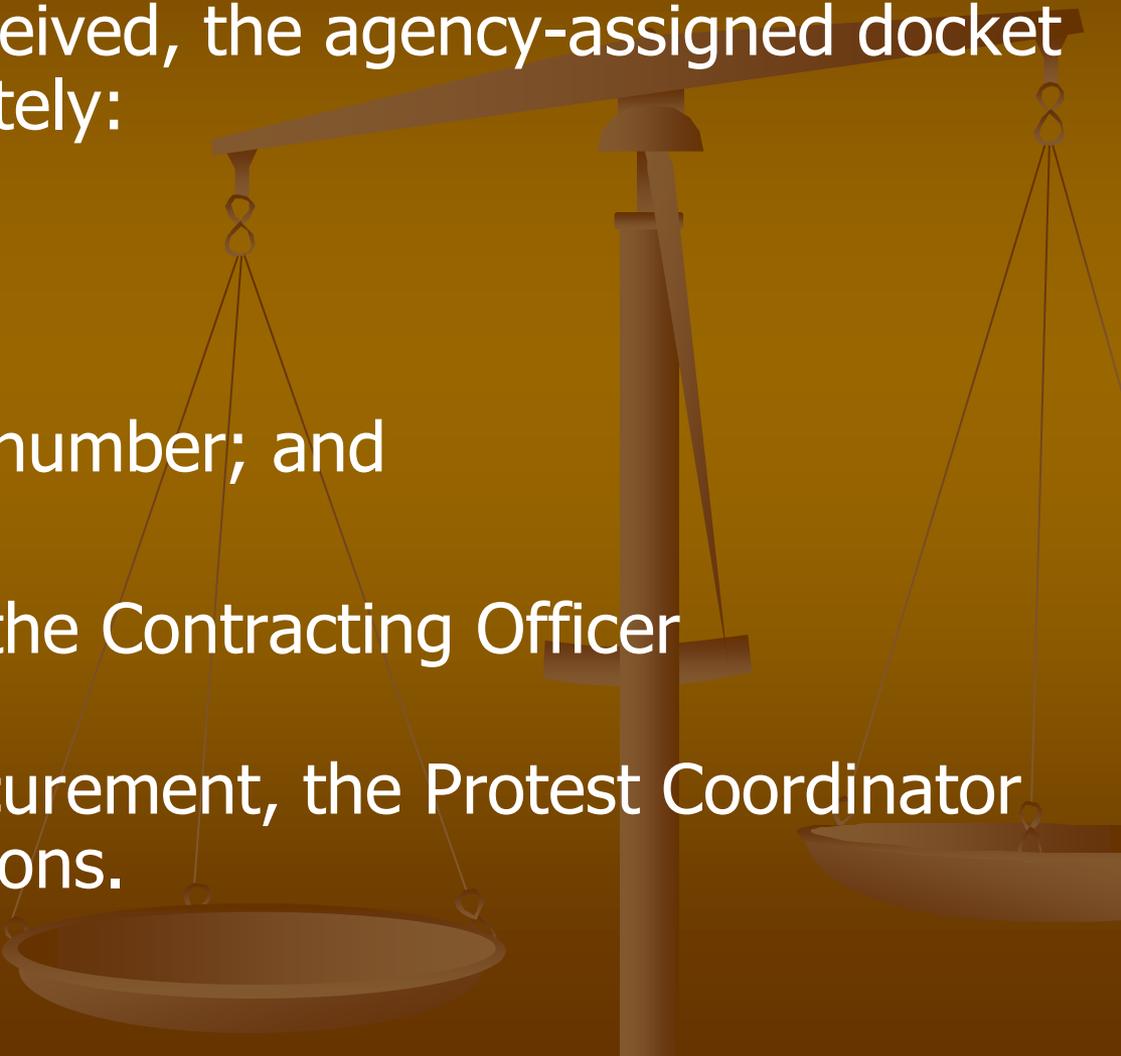
# Filing the Protest



Protests must be filed with the head of the purchasing agency unless the solicitation or agency website directs bidders, offerors or contractors to submit them to another office that has been delegated to handle protests by the agency head.

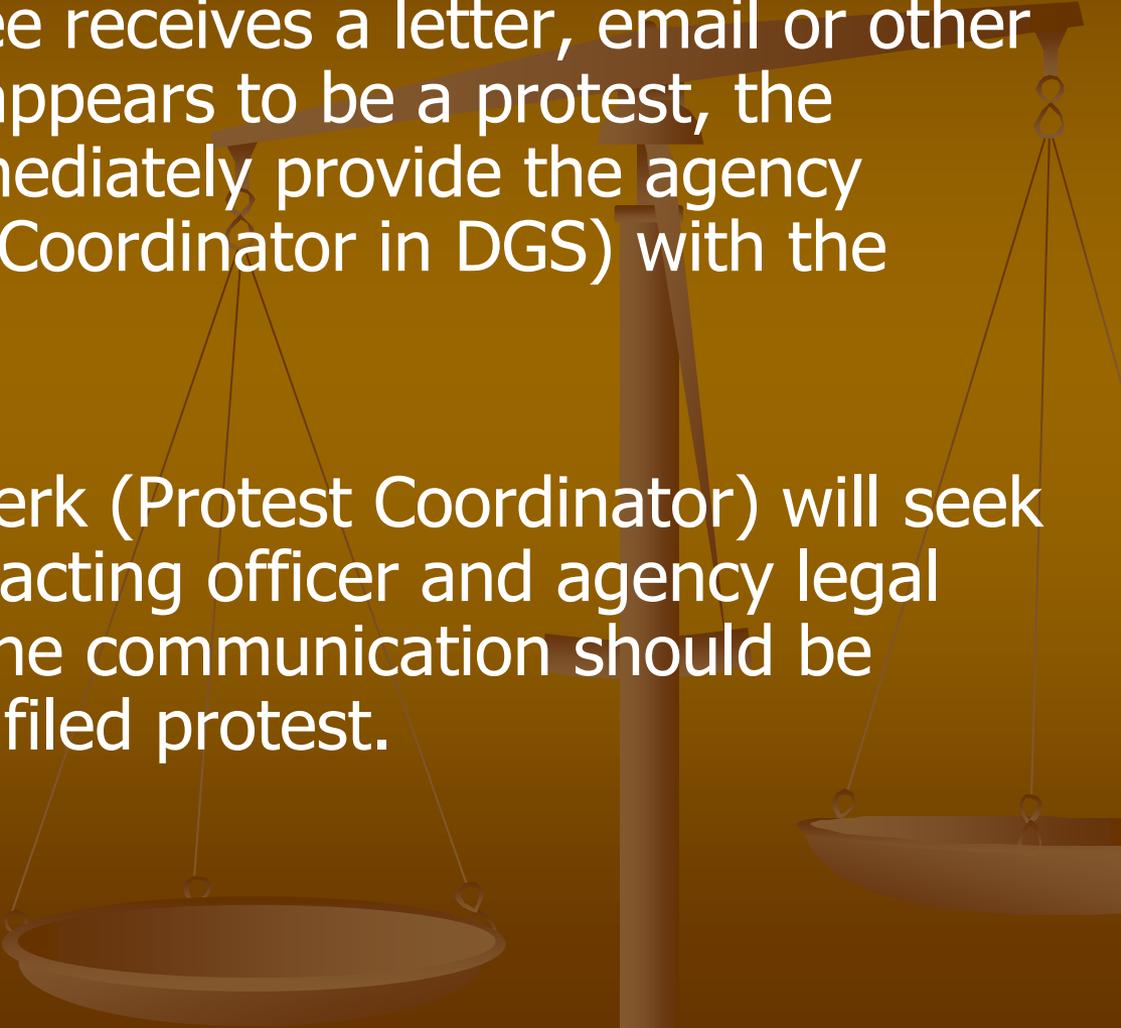
In DGS, the Deputy Secretary for Procurement has been delegated the responsibility to handle the agency head duties in regard to protests filed with the Bureau of Procurement relating to the procurement of materials and services.

# Filing a Protest



- When a protest is received, the agency-assigned docket clerk should immediately:
  - Log in the protest;
  - Assign it a docket number; and
  - Provide a copy to the Contracting Officer
- In the Bureau of Procurement, the Protest Coordinator performs these functions.

# Filing a Protest

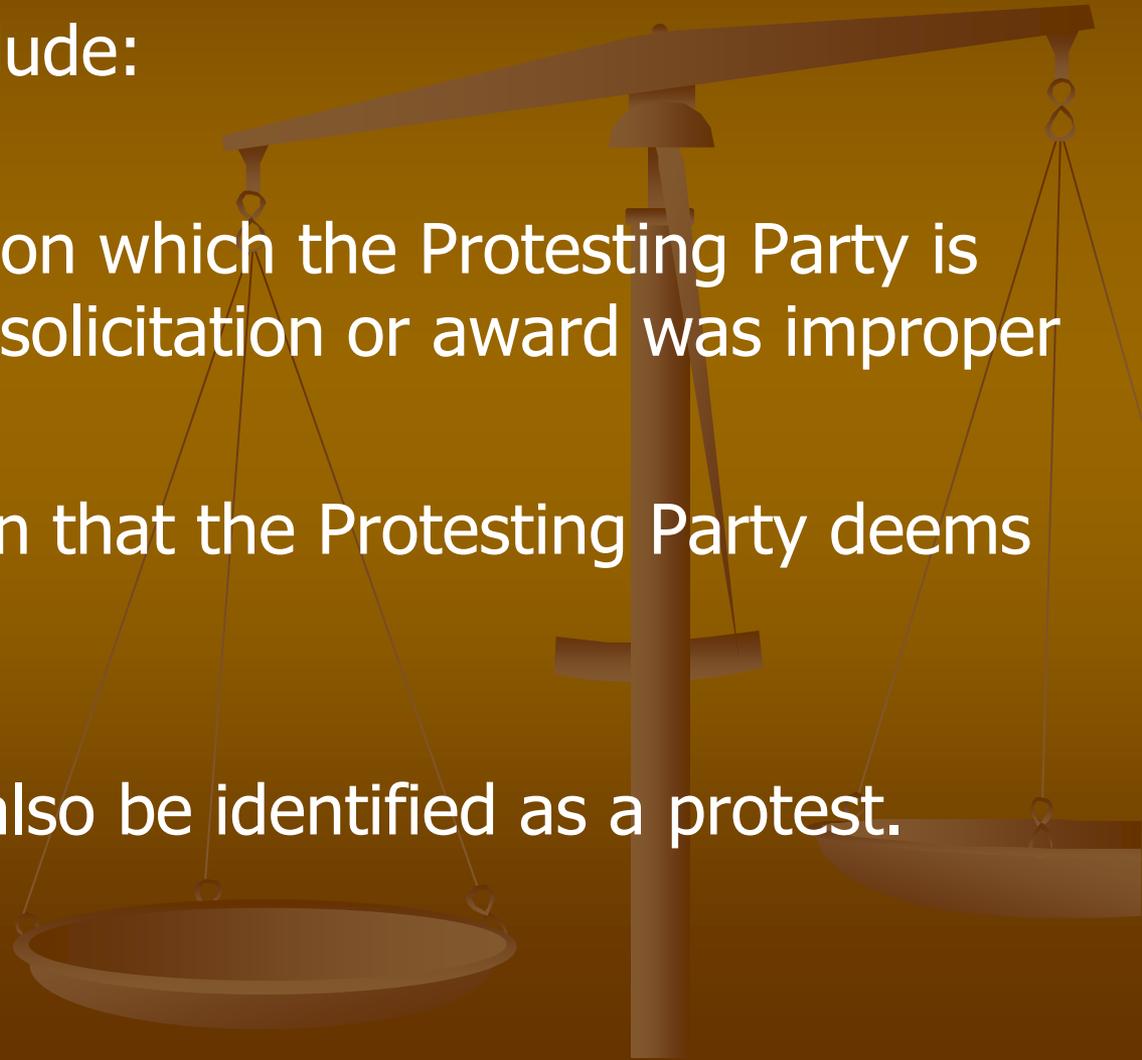


- If an agency employee receives a letter, email or other communication that appears to be a protest, the employee should immediately provide the agency docket clerk (Protest Coordinator in DGS) with the communication.
- The agency docket clerk (Protest Coordinator) will seek advise from the contracting officer and agency legal counsel on whether the communication should be treated as a properly filed protest.

# What must be included in the protest?

- The protest must include:
  - All the grounds upon which the Protesting Party is asserting that the solicitation or award was improper
  - Any documentation that the Protesting Party deems relevant.

The protest *should* also be identified as a protest.



# When must a protest be filed?

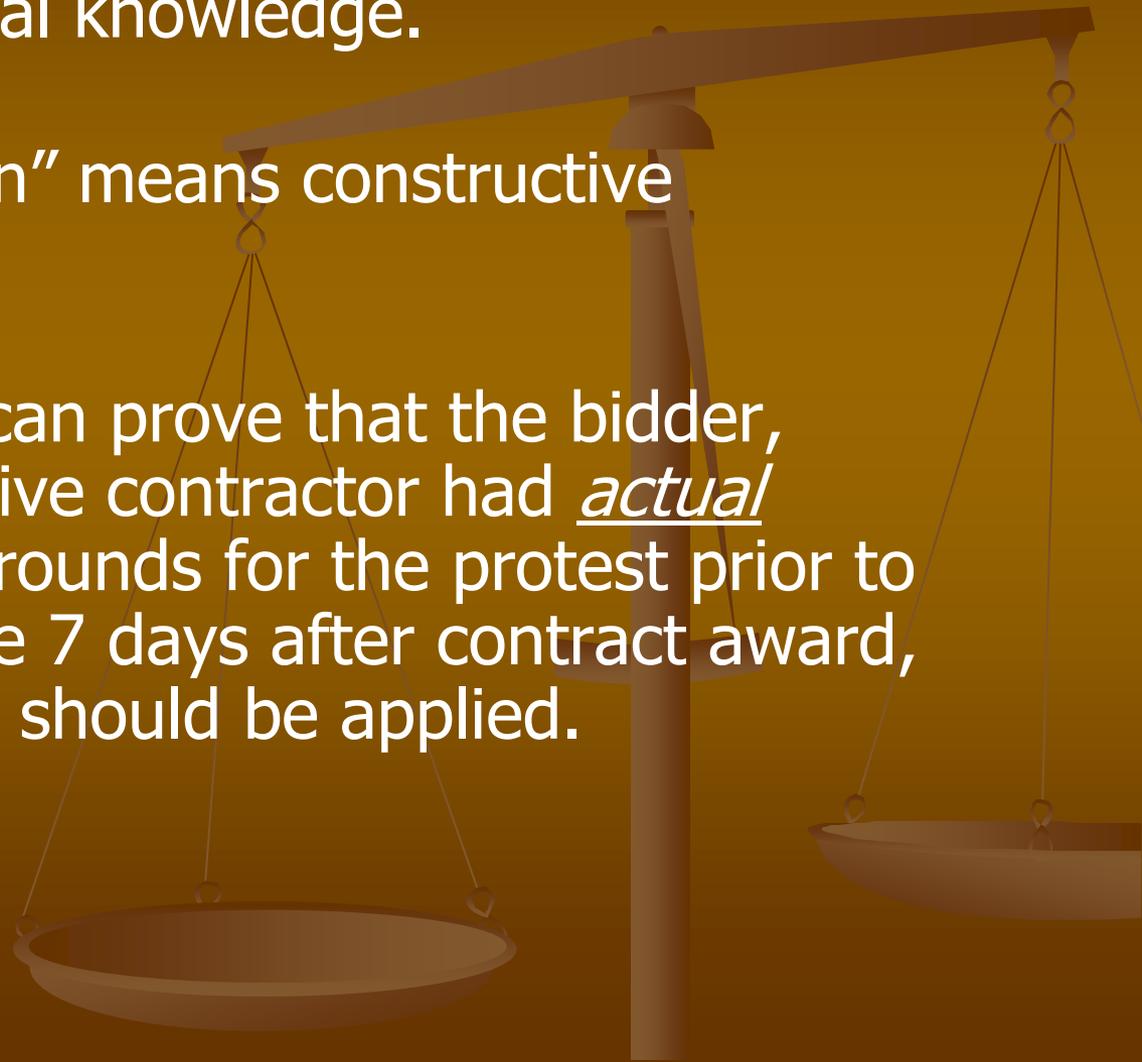
- When the Protesting Party is a bidder or offeror or a prospective contractor,...

...the written protest must be filed with the head of the purchasing agency within seven (7) days after the Protesting Party knew or should have known of the facts giving rise to the protest.

**EXCEPT:** In no event, may a protest be filed *later than 7 calendar days* after the contract was awarded.

# When must a protest be filed?

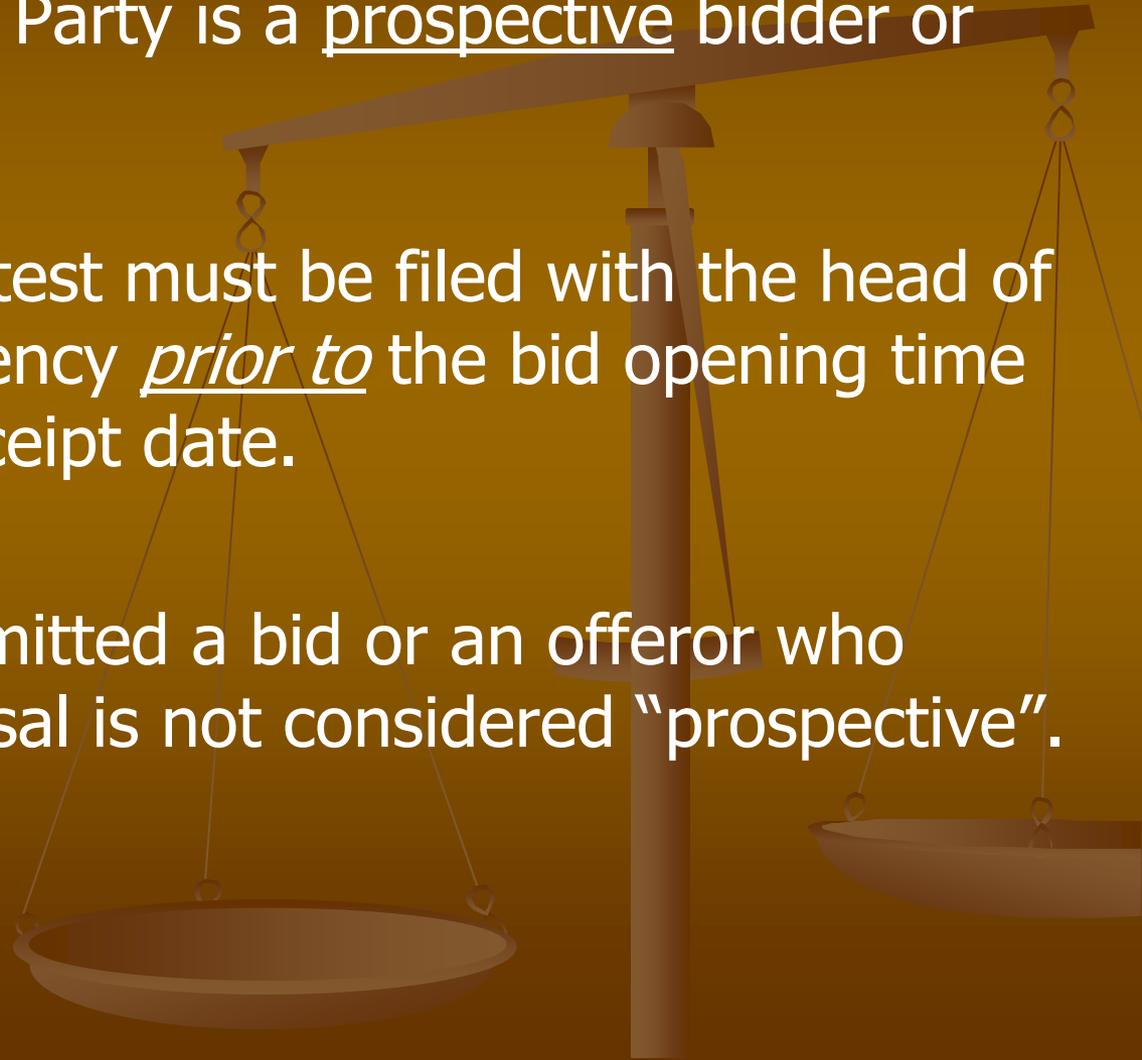
- “Knew” means actual knowledge.
- “Should have known” means constructive knowledge.
- Unless the agency can prove that the bidder, offeror, or prospective contractor had actual knowledge of the grounds for the protest prior to the expiration of the 7 days after contract award, the 7 day time limit should be applied.



# When must a protest be filed?

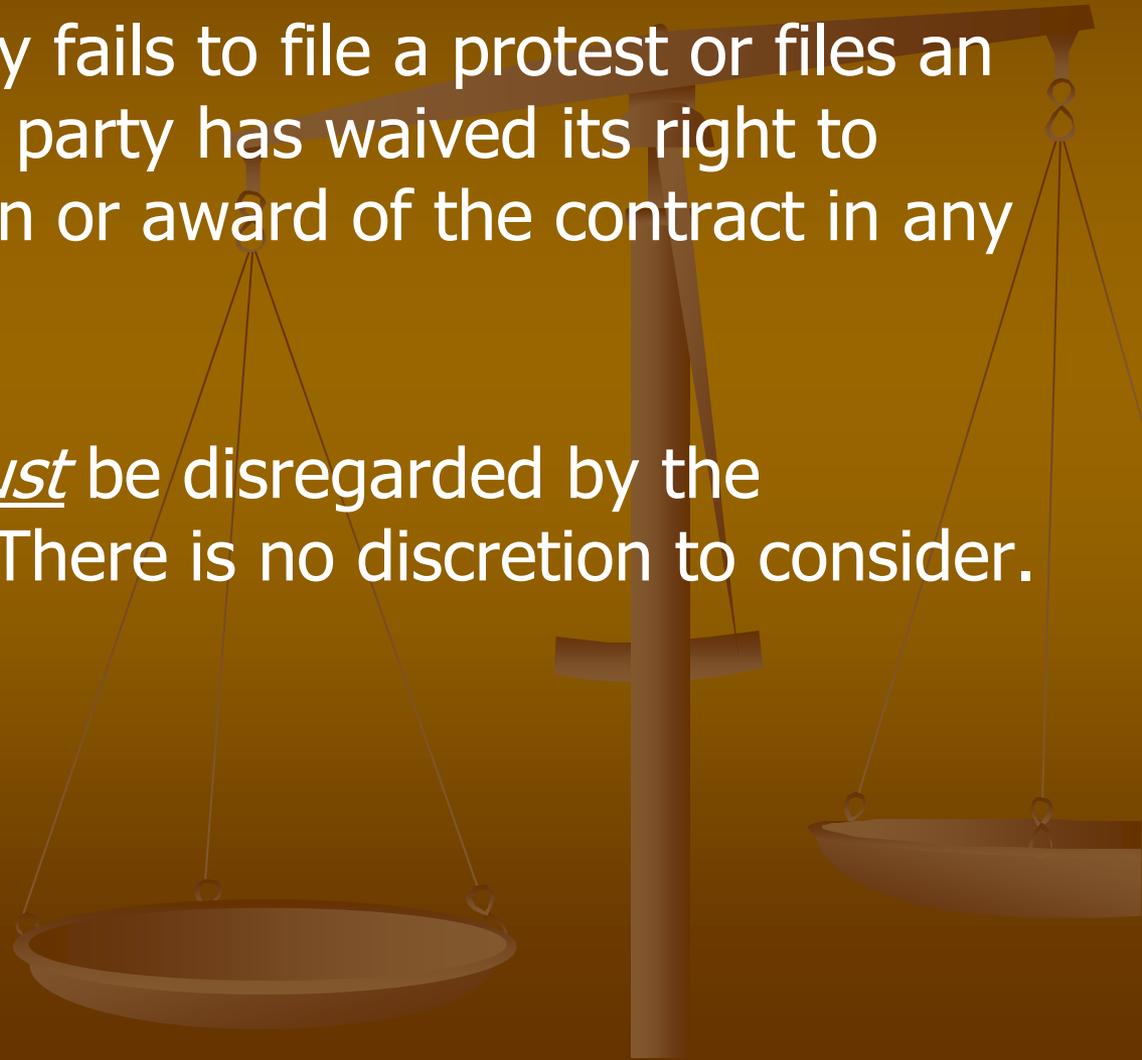
- When the Protesting Party is a prospective bidder or prospective offeror,  
...the written protest must be filed with the head of the purchasing agency prior to the bid opening time or the proposal receipt date.

A bidder who submitted a bid or an offeror who submitted a proposal is not considered “prospective”.



# Untimely Protests

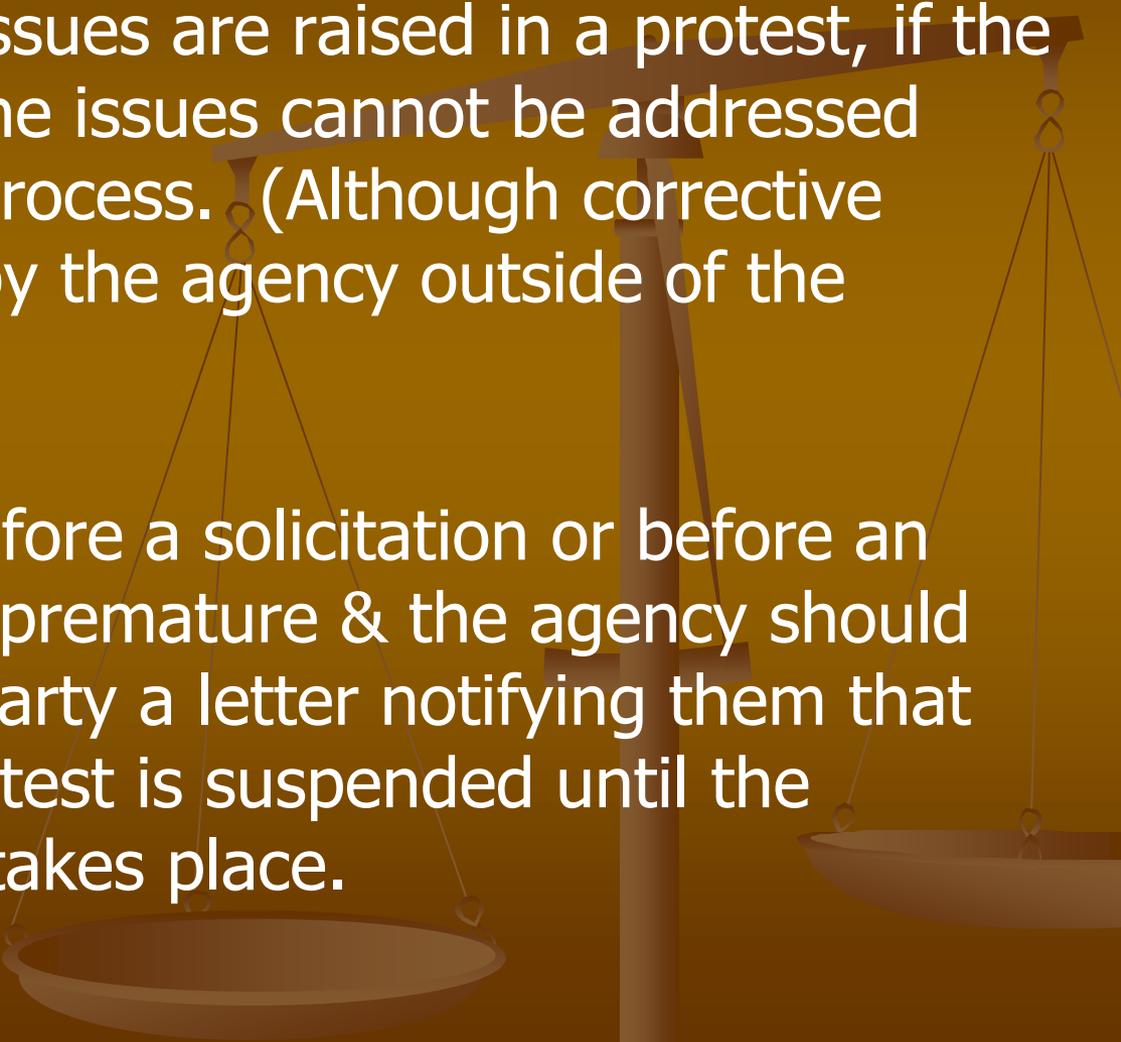
- If the Protesting Party fails to file a protest or files an untimely protest, the party has waived its right to protest the solicitation or award of the contract in any forum.
- Untimely protests must be disregarded by the purchasing agency. There is no discretion to consider.



# Initial Protest Review – Determination of Timeliness

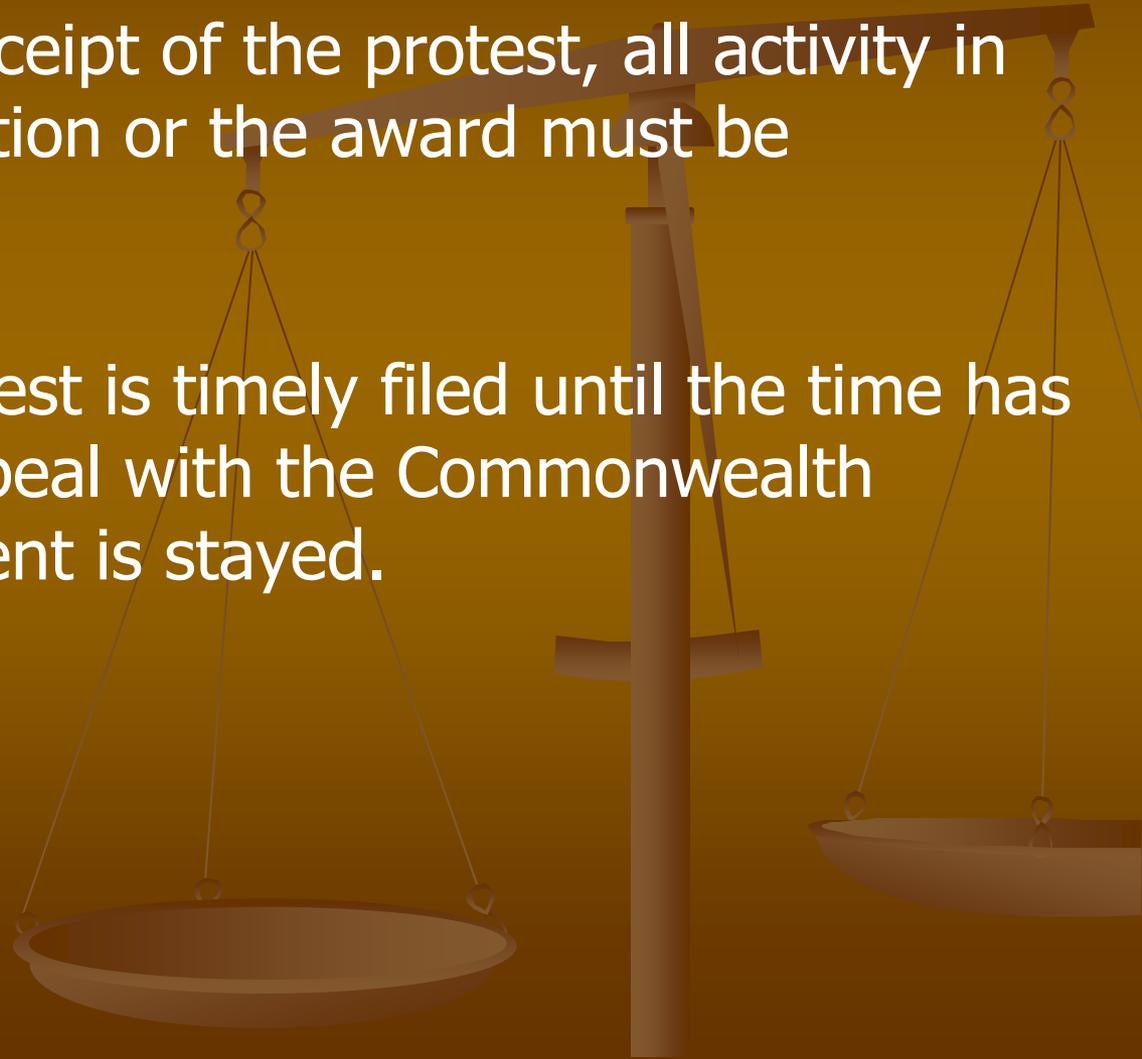
- The agency (Commodity Director in DGS) must first determine when the Protesting Party knew, or should have known, of the facts giving rise to the protest.
- The date of the award shall be the date the fully-executed contract or purchase order is posted to the DGS Web site.
- If the protest is untimely, the agency (Commodity Director in DGS) recommends to the agency head (Deputy Secretary of Procurement in DGS) that the protest be dismissed. If the agency head agrees, written notification is sent to the Protesting Party that the protest is untimely & cannot be considered.

# Initial Protest Review – Determination of Timeliness

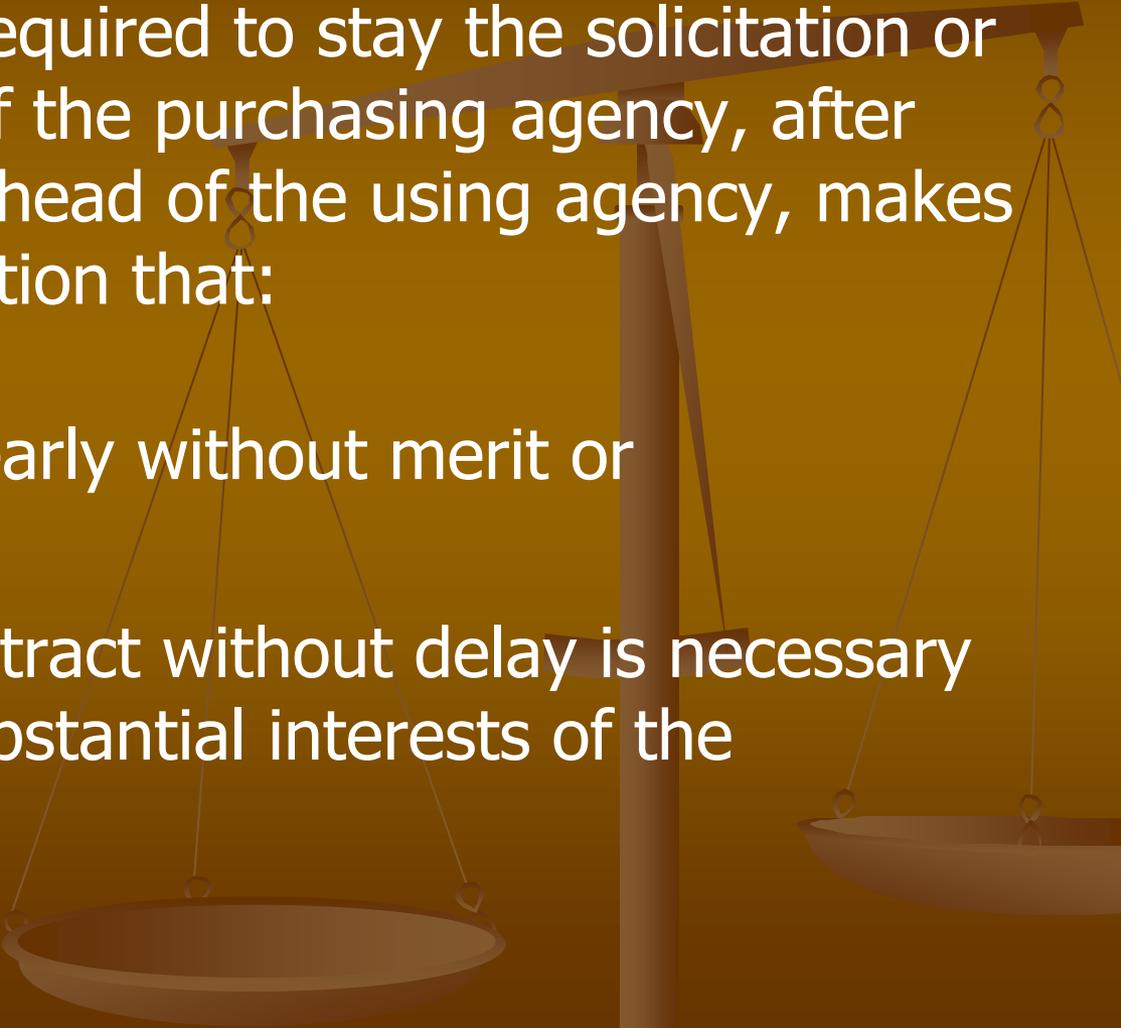
- Even when genuine issues are raised in a protest, if the protest is untimely, the issues cannot be addressed through the protest process. (Although corrective action can be taken by the agency outside of the protest process.)
  - If a protest is filed before a solicitation or before an award, the protest is premature & the agency should send the Protesting Party a letter notifying them that any action on the protest is suspended until the solicitation or award takes place.
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# Stay of the Procurement

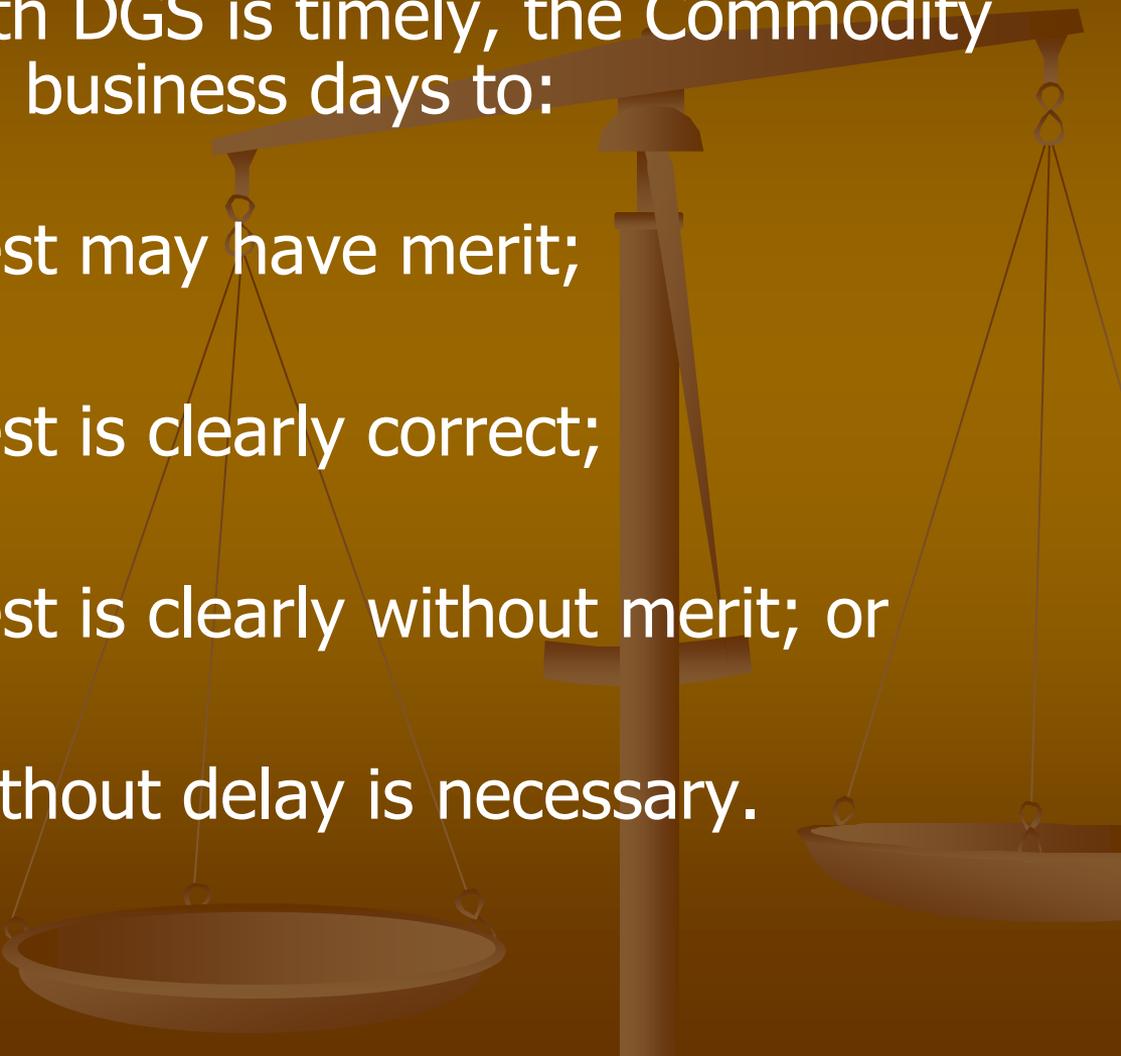
- Immediately upon receipt of the protest, all activity in regard to the solicitation or the award must be suspended.
- From the time a protest is timely filed until the time has elapsed to file an appeal with the Commonwealth Court, the procurement is stayed.



# Stay of the Procurement Exceptions

- The agency is not required to stay the solicitation or award if the head of the purchasing agency, after consulting with the head of the using agency, makes a written determination that:
    - The protest is clearly without merit or
    - Award of the contract without delay is necessary to protect the substantial interests of the Commonwealth.
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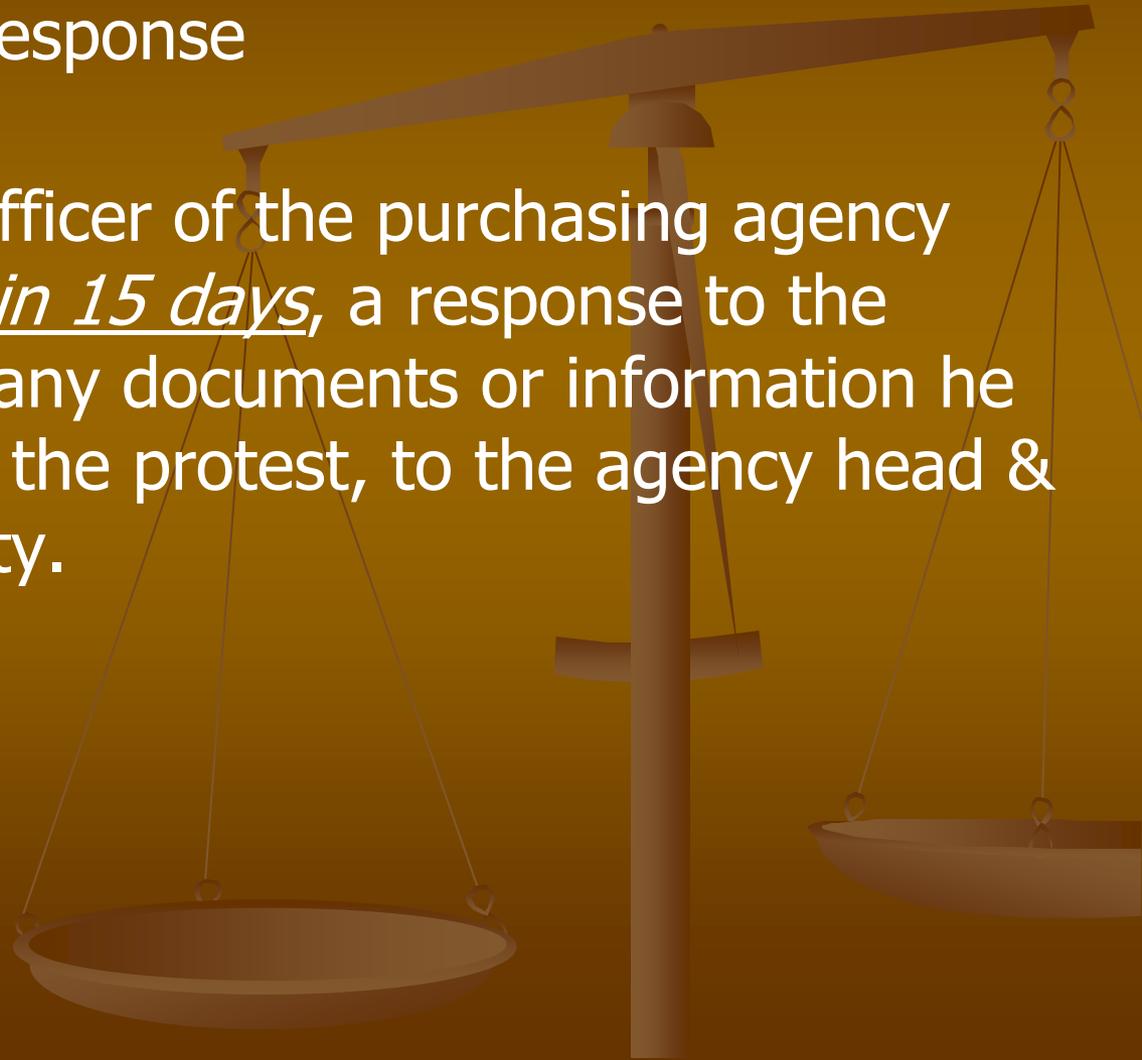
# Initial Determination – Staying the Procurement

- If the protest filed with DGS is timely, the Commodity Director in DGS has 3 business days to:
    - Find that the protest may have merit;
    - Find that the protest is clearly correct;
    - Find that the protest is clearly without merit; or
    - Find that award without delay is necessary.
- 

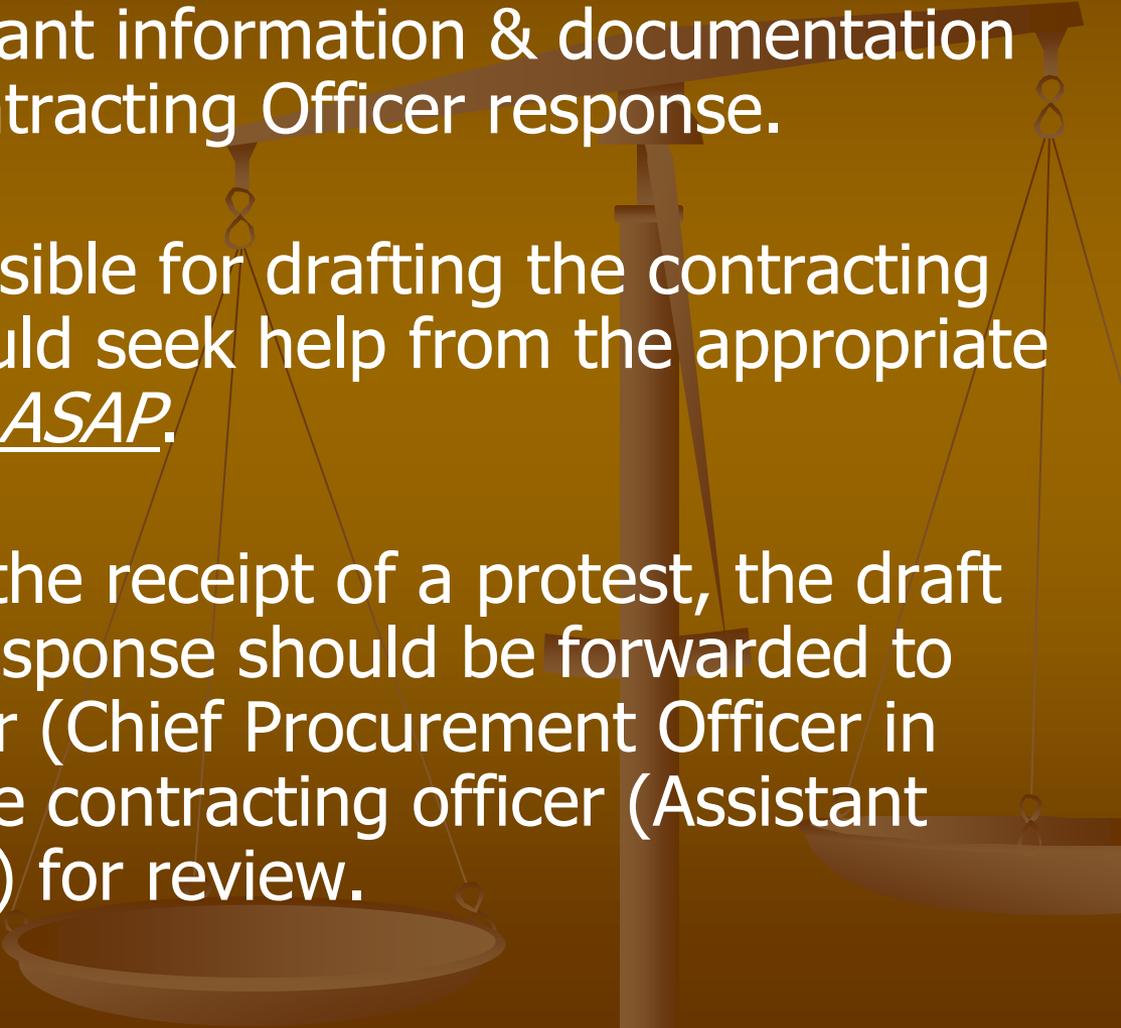
# Contracting Officer Response to the Protest

- Contracting Officer Response

The Contracting Officer of the purchasing agency must submit, *within 15 days*, a response to the protest, including any documents or information he deems relevant to the protest, to the agency head & the Protesting Party.

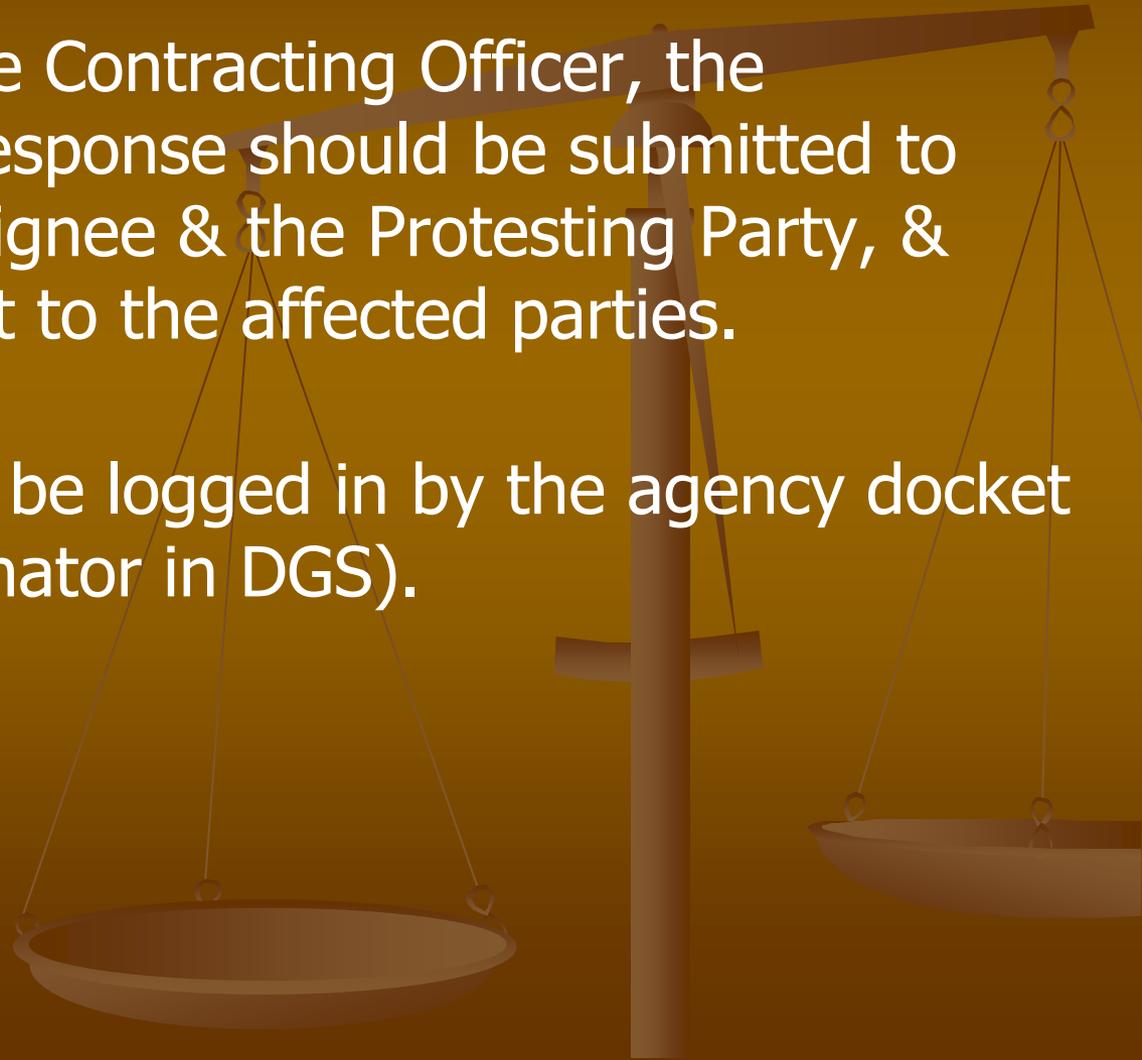


# Preparing the Contracting Officer Response

- The agency (Commodity Director in DGS) reviews the protest and any relevant information & documentation and prepares the Contracting Officer response.
  - The individual responsible for drafting the contracting officer response, should seek help from the appropriate agency legal counsel ASAP.
  - Within 12 days after the receipt of a protest, the draft Contracting Officer response should be forwarded to the contracting officer (Chief Procurement Officer in DGS) & counsel to the contracting officer (Assistant Chief Counsel in DGS) for review.
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# Contracting Officer Response

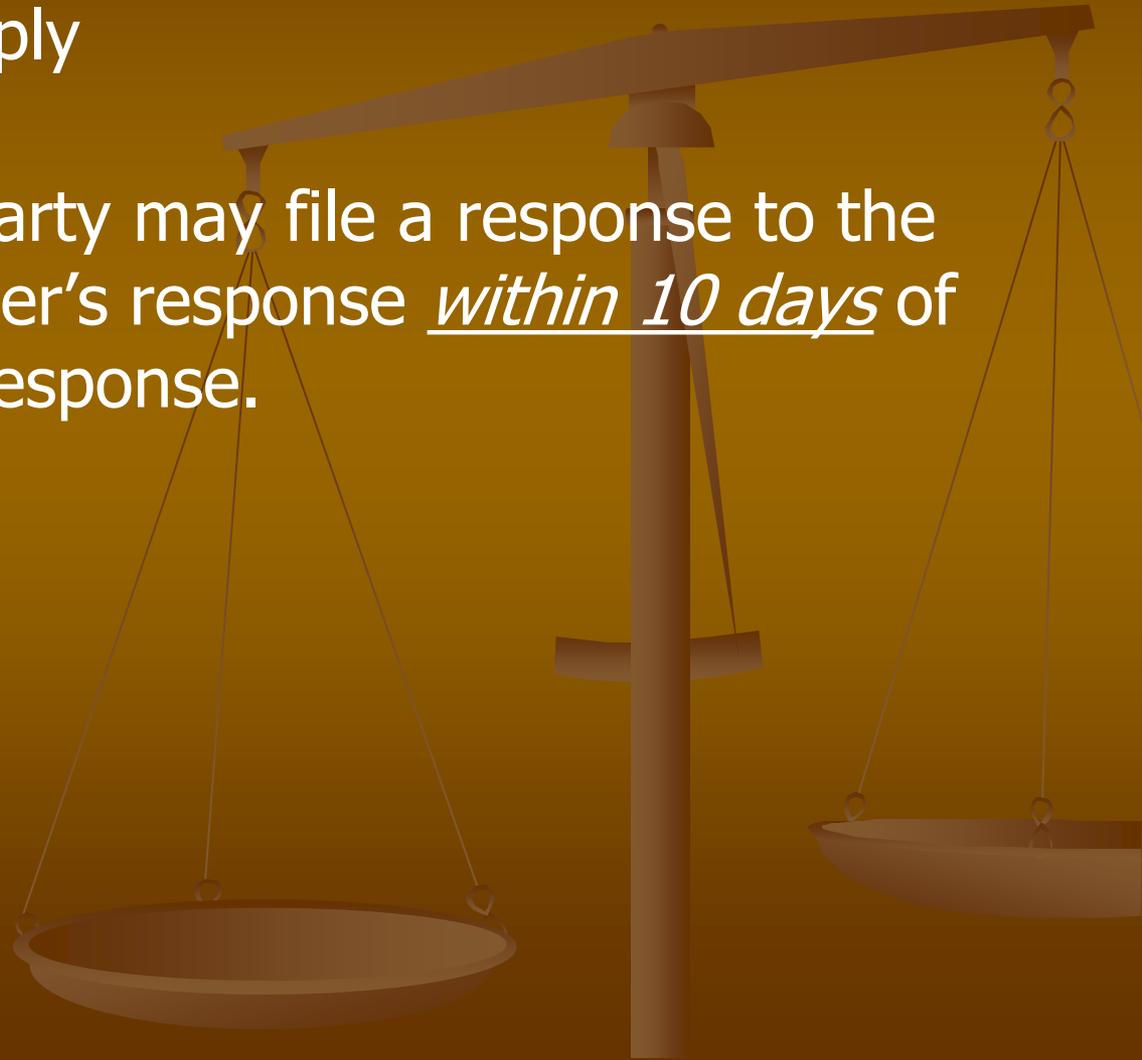
- After signature by the Contracting Officer, the Contracting Officer response should be submitted to the agency head designee & the Protesting Party, & copies should be sent to the affected parties.
- The response should be logged in by the agency docket clerk (Protest Coordinator in DGS).



# Response & Reply to the Protest

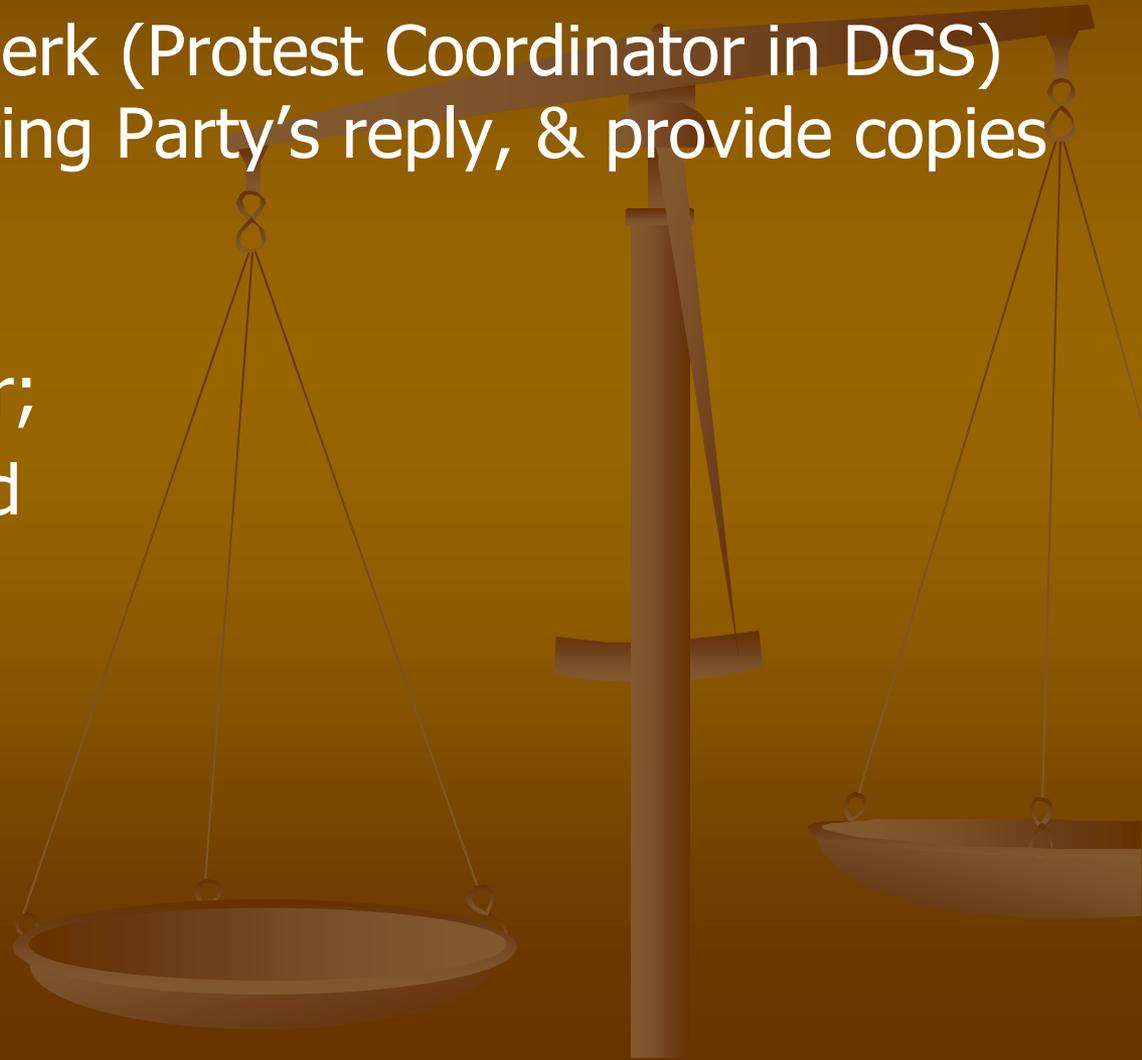
- Protesting Party Reply

The Protesting Party may file a response to the Contracting Officer's response within 10 days of the date of the response.

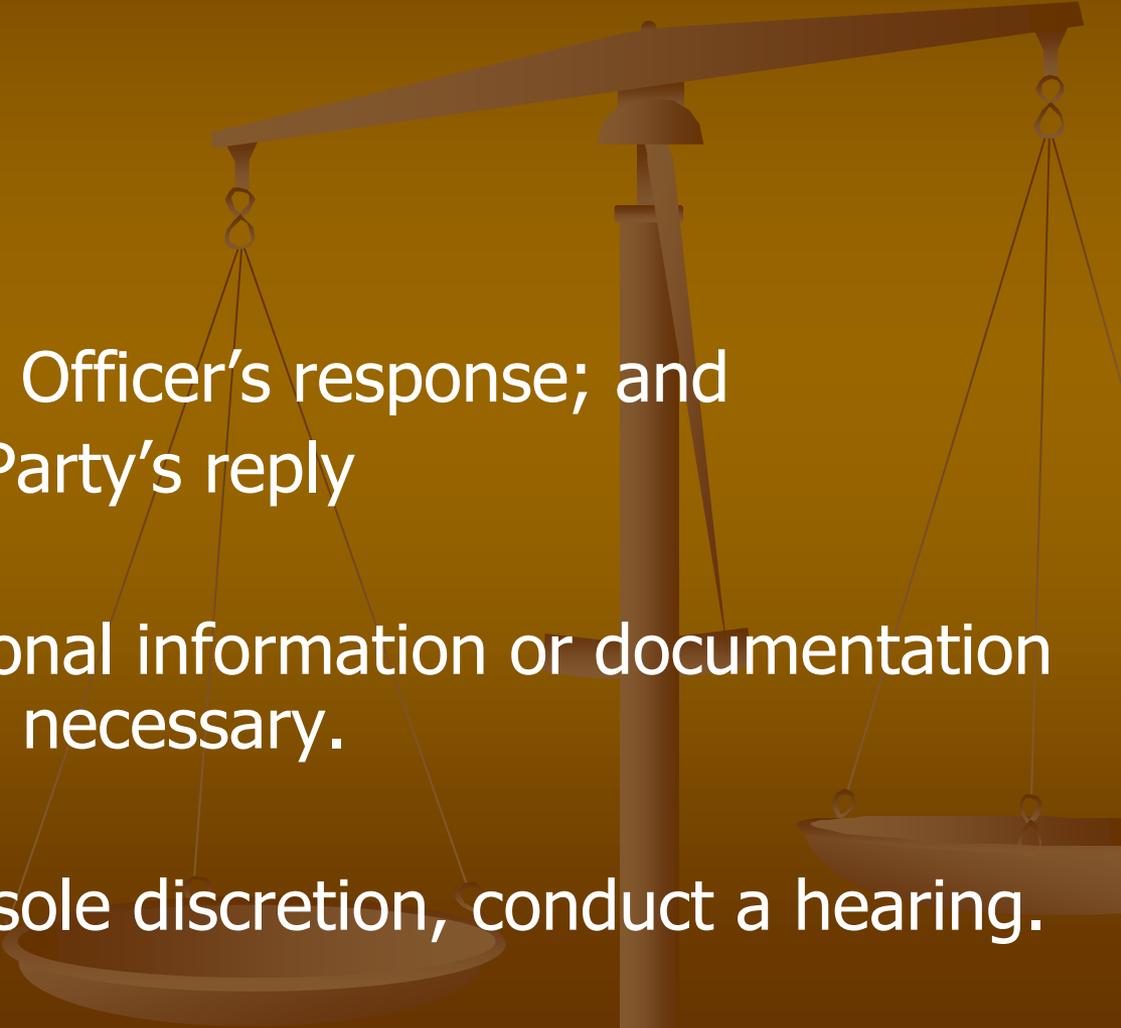


# Protesting Party's Reply

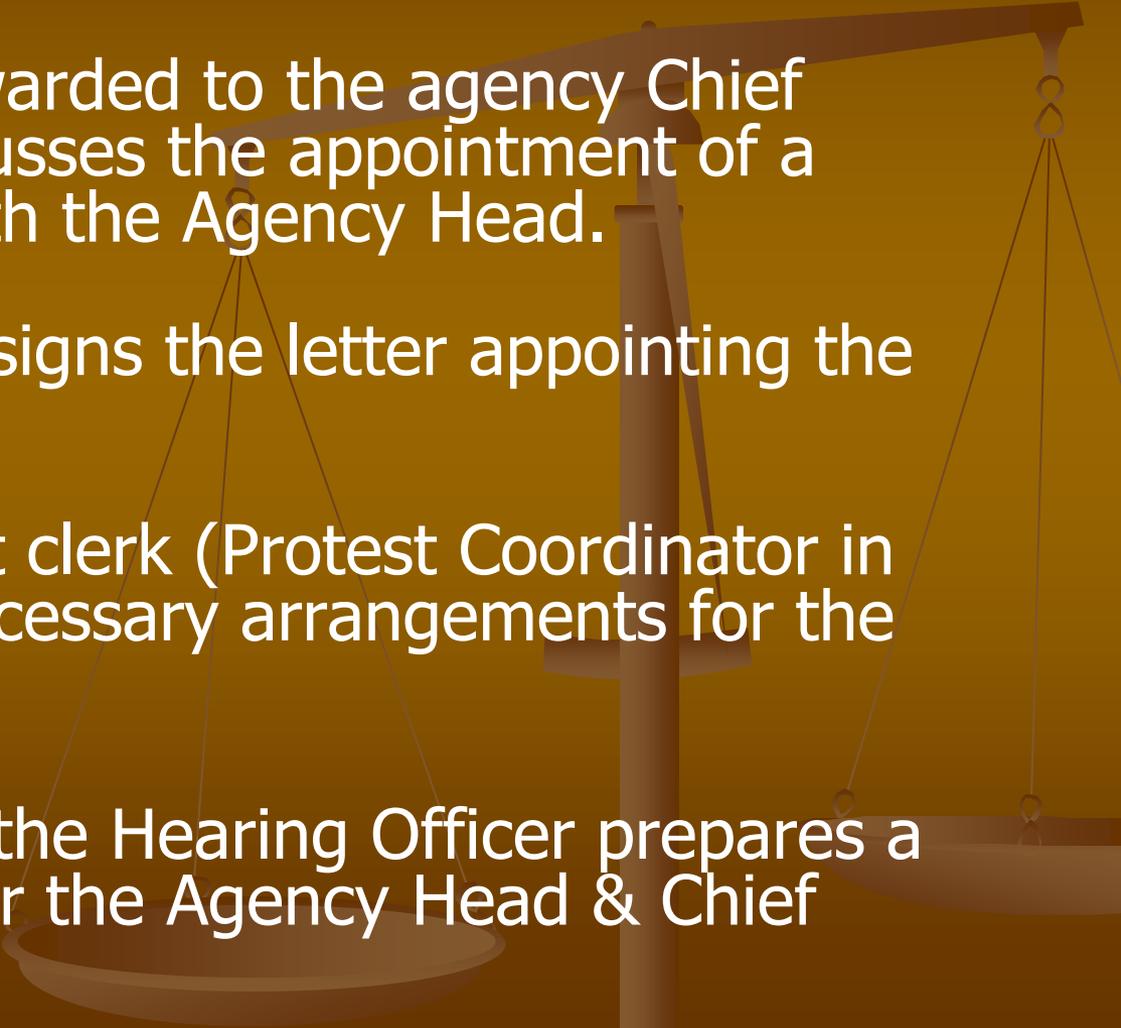
- The agency docket clerk (Protest Coordinator in DGS) will log in the Protesting Party's reply, & provide copies to:
  - Contracting Officer;
  - Legal Counsel; and
  - Affected Parties



# Evaluation of the Protest

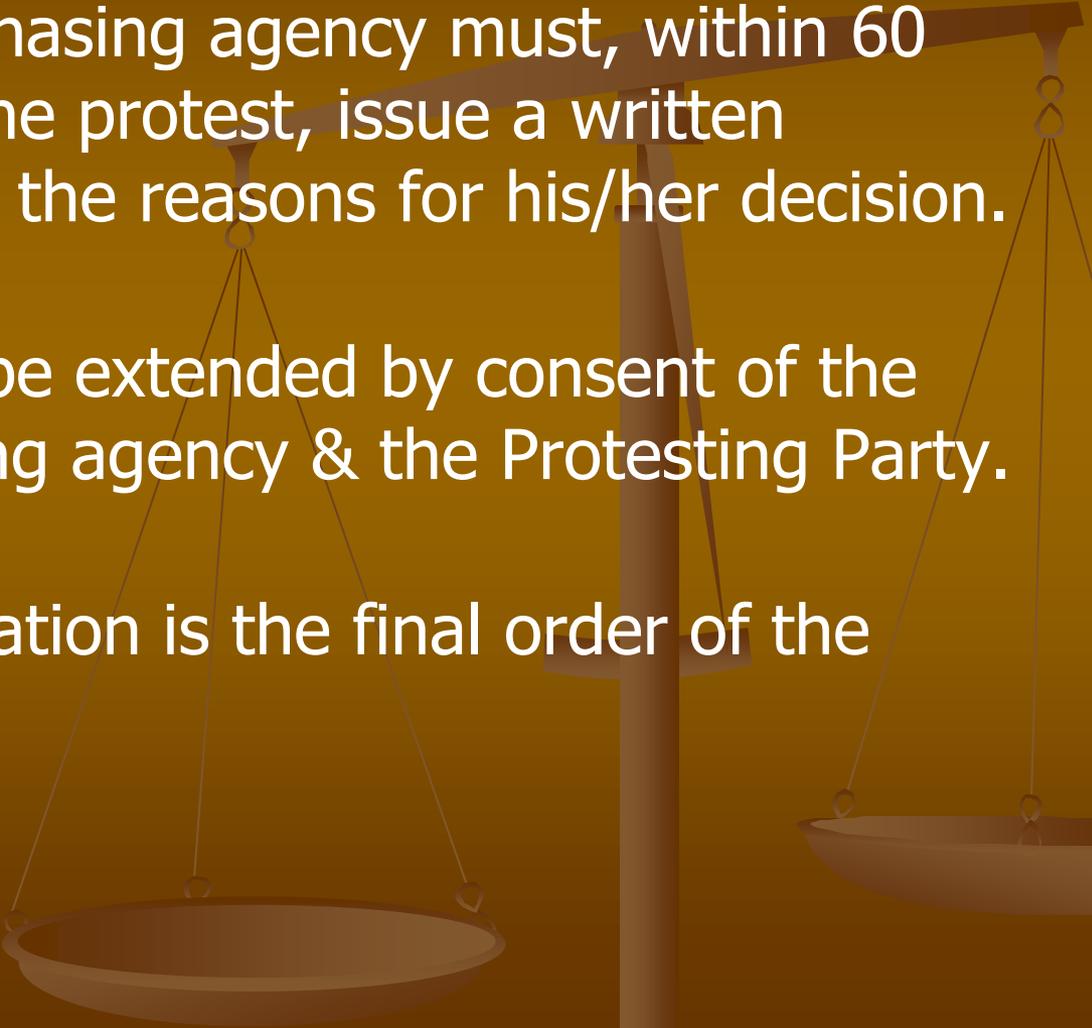
- The head of the purchasing agency:
    - Will review:
      - The protest;
      - The Contracting Officer's response; and
      - The Protesting Party's reply
    - Can request additional information or documentation that he/she deems necessary.
    - May, at his or her sole discretion, conduct a hearing.
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# Hearing Procedures



- When a hearing is required in DGS:
  - The protest is forwarded to the agency Chief Counsel, who discusses the appointment of a Hearing Officer with the Agency Head.
  - The Agency Head signs the letter appointing the Hearing Officer.
  - The agency docket clerk (Protest Coordinator in DGS) makes all necessary arrangements for the hearing.
  - After the hearing, the Hearing Officer prepares a proposed report for the Agency Head & Chief Counsel to review.

# Written Determination



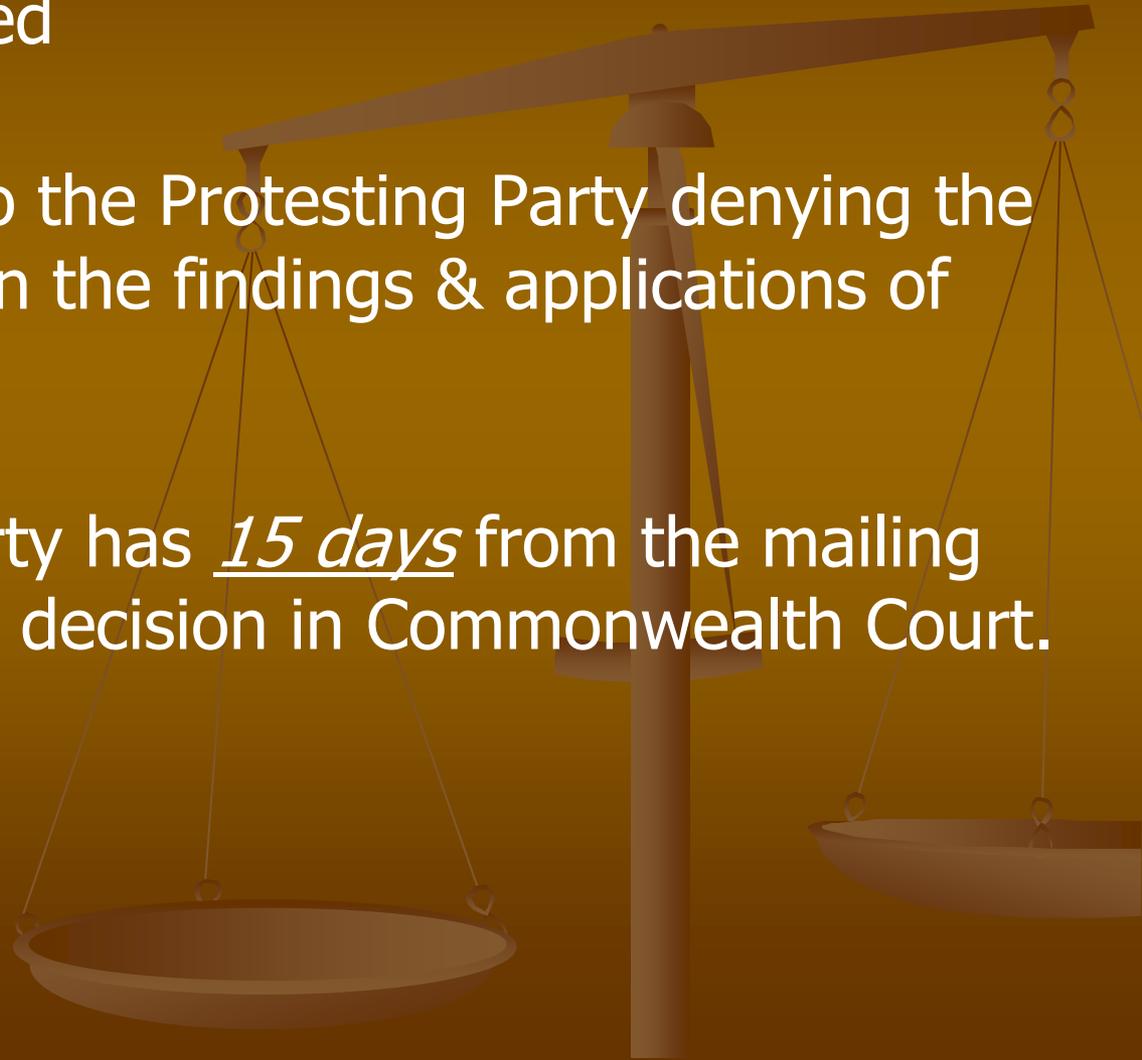
- The head of the purchasing agency must, within 60 days of the filing of the protest, issue a written determination stating the reasons for his/her decision.
- The time period can be extended by consent of the head of the purchasing agency & the Protesting Party.
- The written determination is the final order of the purchasing agency.

# Written Determination

- If the protest is denied

...a letter is sent to the Protesting Party denying the protest based upon the findings & applications of law.

- The Protesting Party has 15 days from the mailing date to appeal the decision in Commonwealth Court.



# Written Determination

- If the protest is denied (continued)

...the solicitation/award/continued contractor performance must be stayed for an additional 15 days beginning on the mailing date of the written decision denying the protest, unless the protest is clearly without merit or award without delay is necessary to protect the substantial interests of the Commonwealth.

- In DGS, the Protest Coordinator follows up with Office of Chief Counsel & the Secretary's office after the 15 days has expired to verify if an appeal was filed by the Protesting Party in Commonwealth Court.

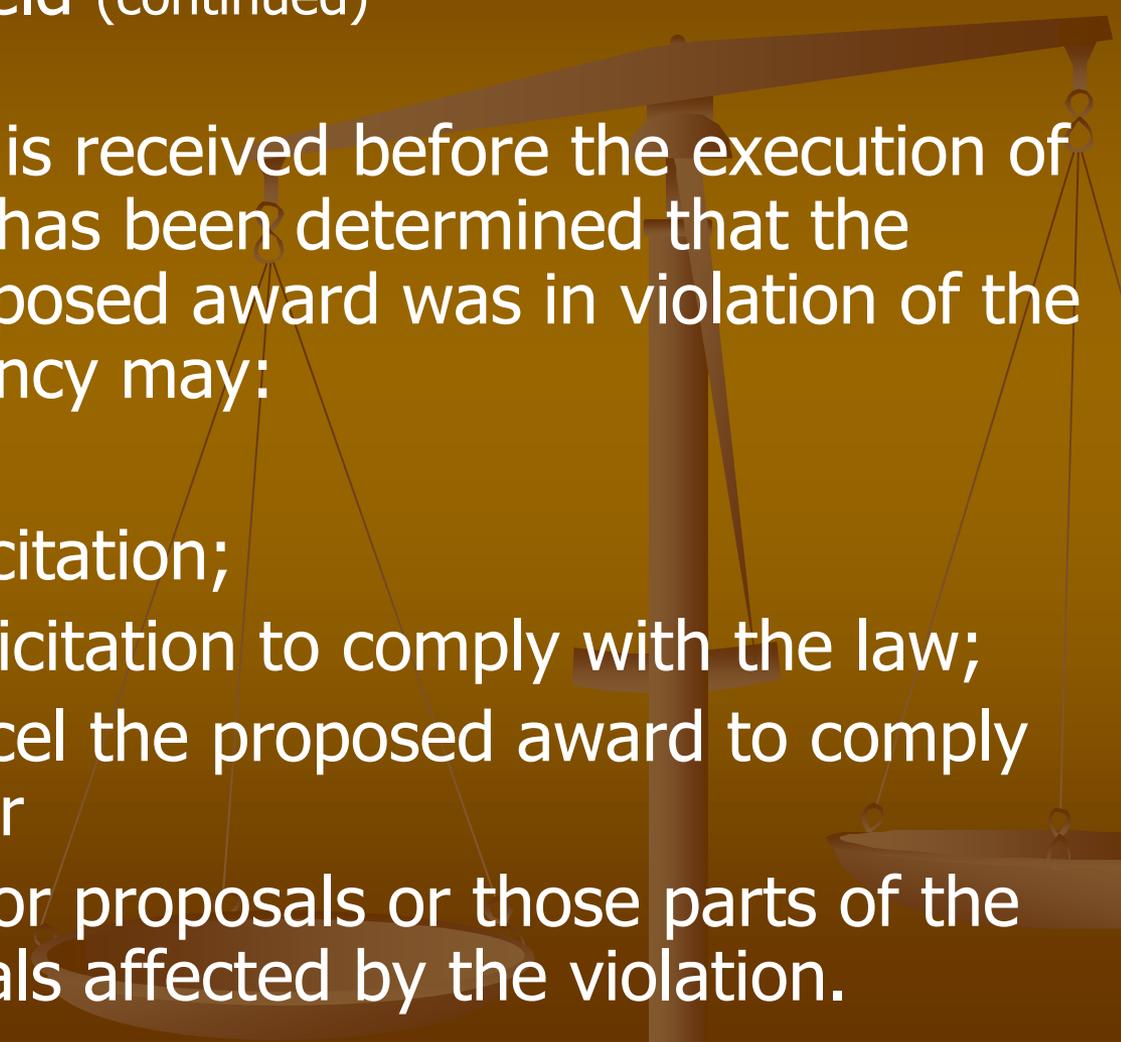
# Written Determination

- If the protest is upheld

...a letter is sent to the Protesting Party upholding the protest based upon the findings & applications of law.



# Written Determination



- If the protest is upheld (continued)

...and the protest is received before the execution of a contract, & if it has been determined that the solicitation or proposed award was in violation of the law, then the agency may:

- Cancel the solicitation;
- Change the solicitation to comply with the law;
- Change or cancel the proposed award to comply with the law; or
- Reject all bids or proposals or those parts of the bids or proposals affected by the violation.

# Written Determination

- If the protest is upheld (continued)

...and the protest is received after the execution of a contract, & if it has been determined that the solicitation or award was in violation of the law & the contractor did not act fraudulently or in bad faith, the contract may be:

- Ratified & affirmed provided the purchasing agency's determined action is in the best interest of the Commonwealth;
- Modified to comply with the law with the consent of all parties; or
- Cancelled & the contractor shall be compensated for the actual expenses reasonably incurred under the contract prior to the termination. Such compensation shall not include loss of anticipated profit, loss of the use of money, or administrative or overhead costs.

# Written Determination

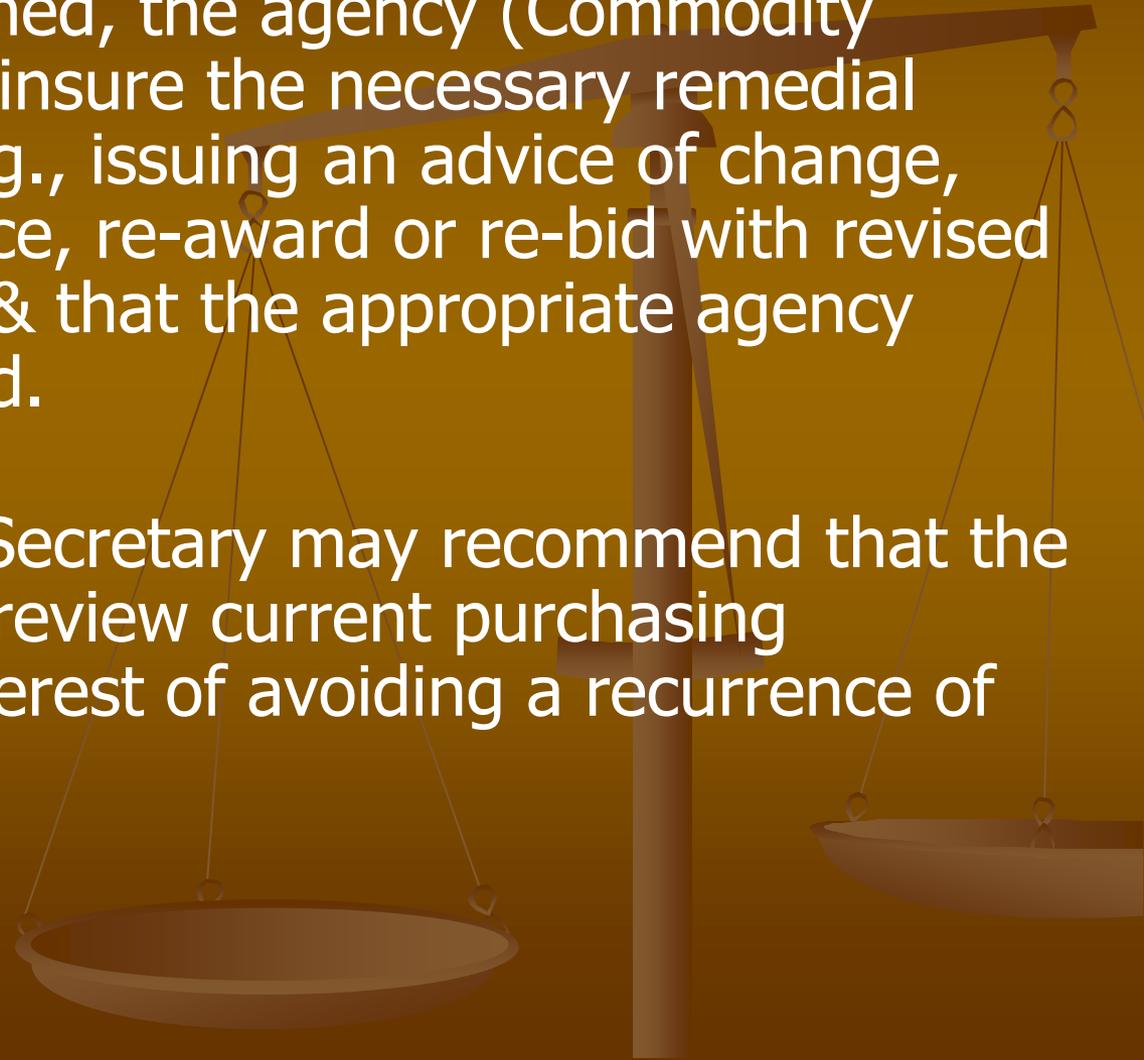
- If the protest is upheld (continued)

...and the protest is received after the execution of a contract, & if it has been determined that the solicitation or award was in violation of the law & the contractor acted fraudulently or in bad faith, the contract may be:

- Declared void;
- Modified to comply with the law with the consent of all parties; or
- Ratified & affirmed, if the purchasing agency's determined action is in the best interest of the Commonwealth & without prejudice to the right of the agency to damages from the contractor, as may be appropriate.

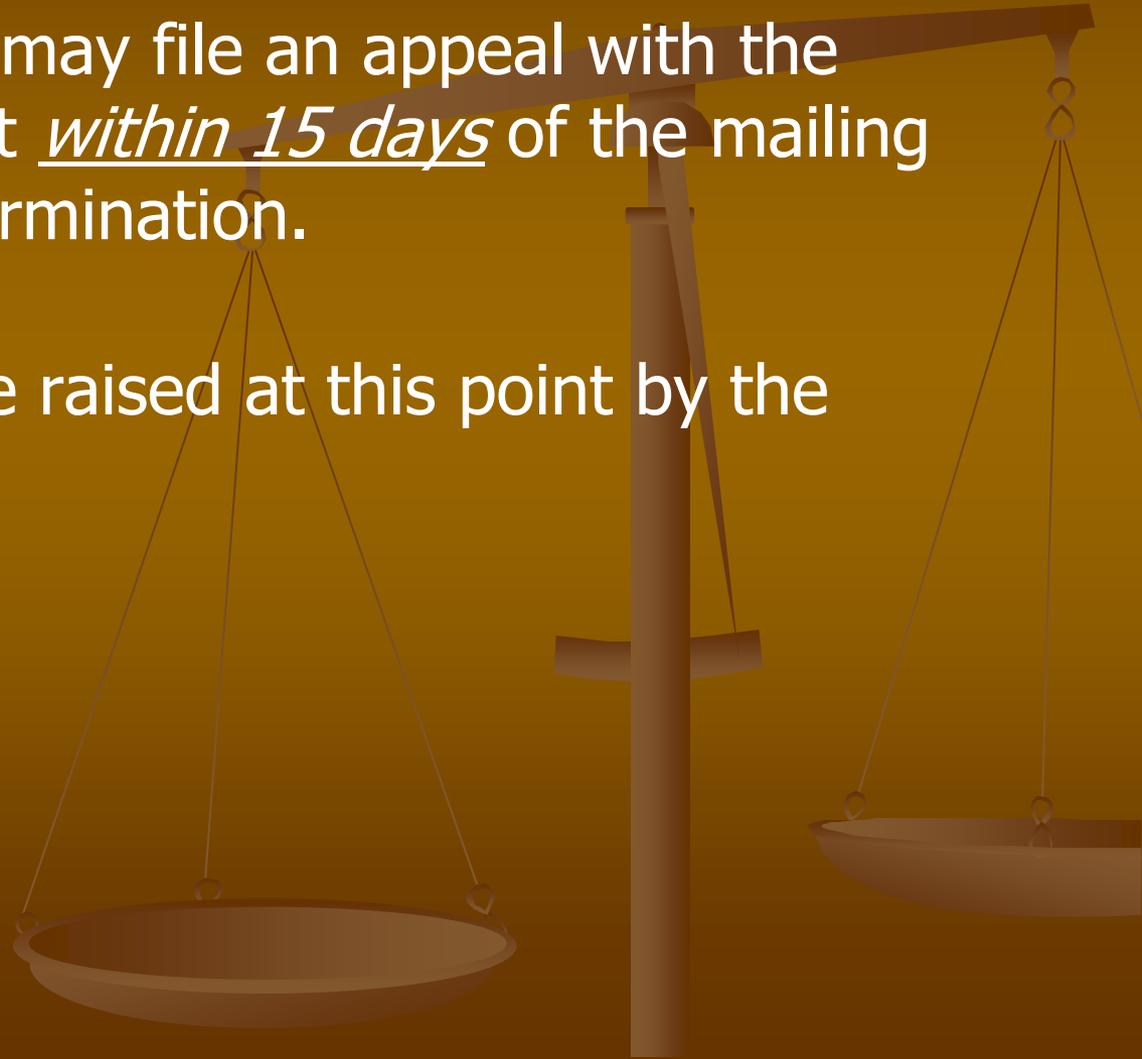
# Written Determination

- After the letter is signed, the agency (Commodity Director in DGS) will insure the necessary remedial actions are taken (e.g., issuing an advice of change, contract change notice, re-award or re-bid with revised specifications, etc.), & that the appropriate agency personnel are notified.
- In DGS, the Deputy Secretary may recommend that the Commodity Director review current purchasing procedures in the interest of avoiding a recurrence of the protest.

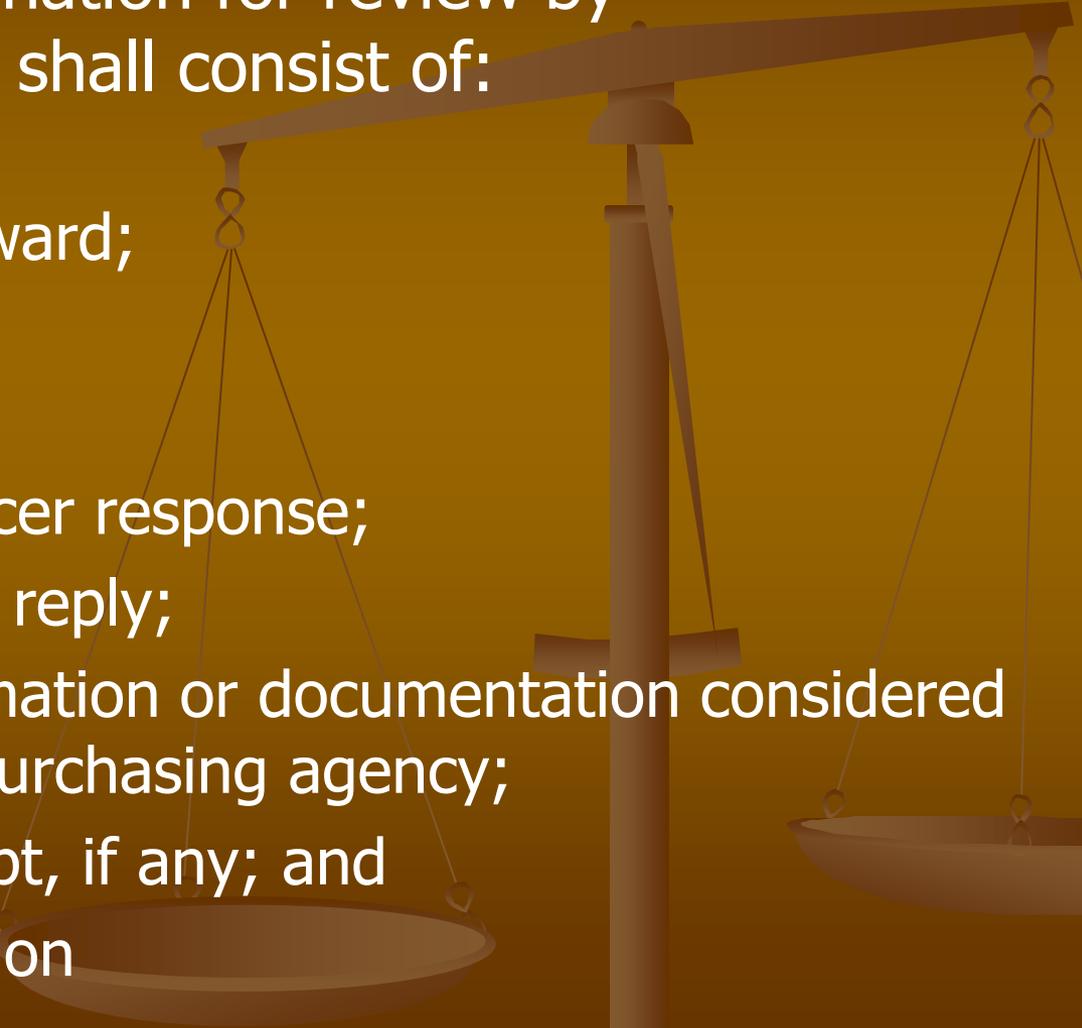


# Appeal

- The Protesting Party may file an appeal with the Commonwealth Court within 15 days of the mailing date of the final determination.
- No new issues can be raised at this point by the Protesting Party.

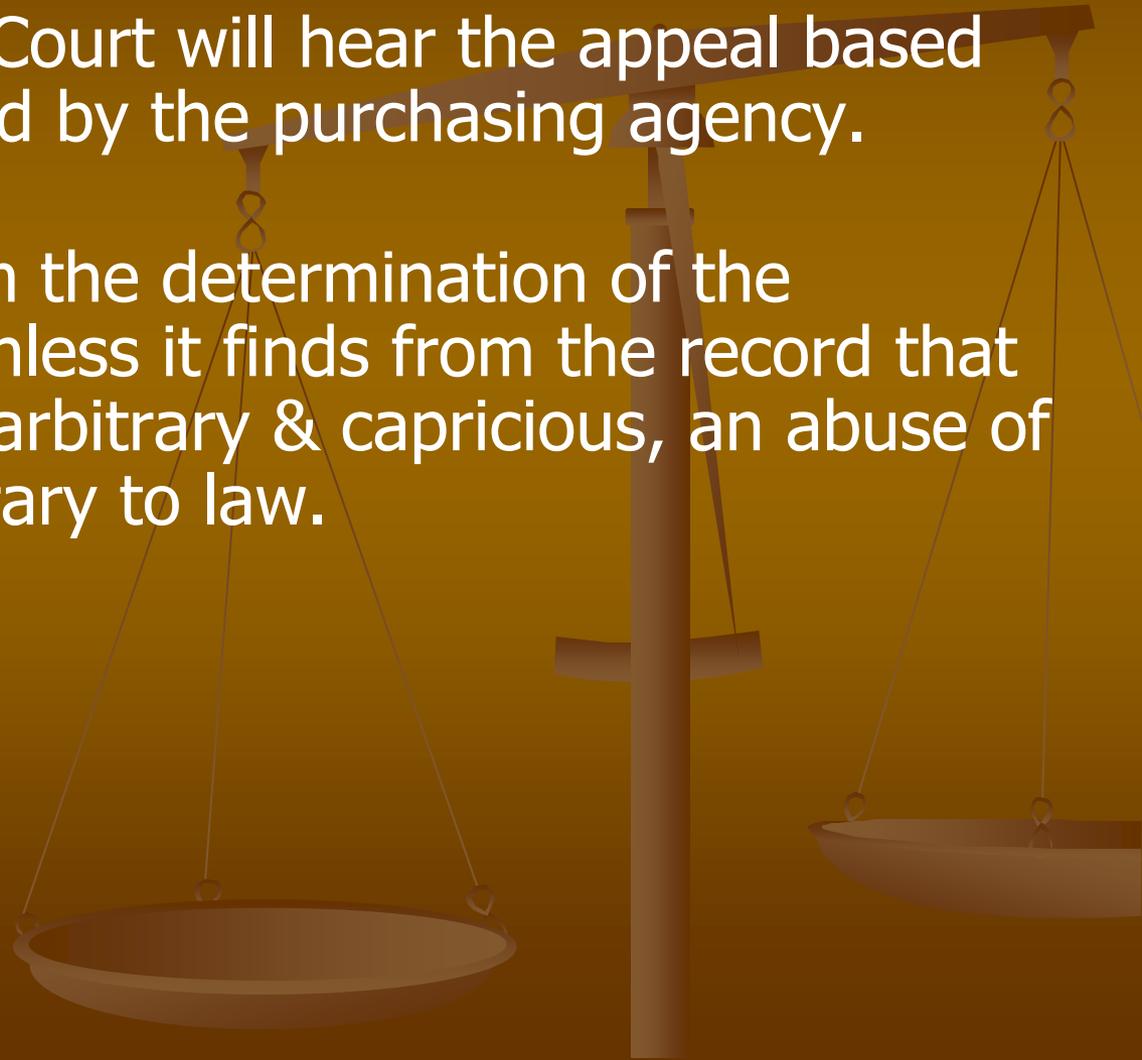


# Record of Determination

- The record of determination for review by Commonwealth Court shall consist of:
    - The solicitation or award;
    - The contract, if any;
    - The protest;
    - Any Contracting Officer response;
    - The Protesting Party reply;
    - Any additional information or documentation considered by the head of the purchasing agency;
    - The hearing transcript, if any; and
    - The final determination
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# Standard on Review

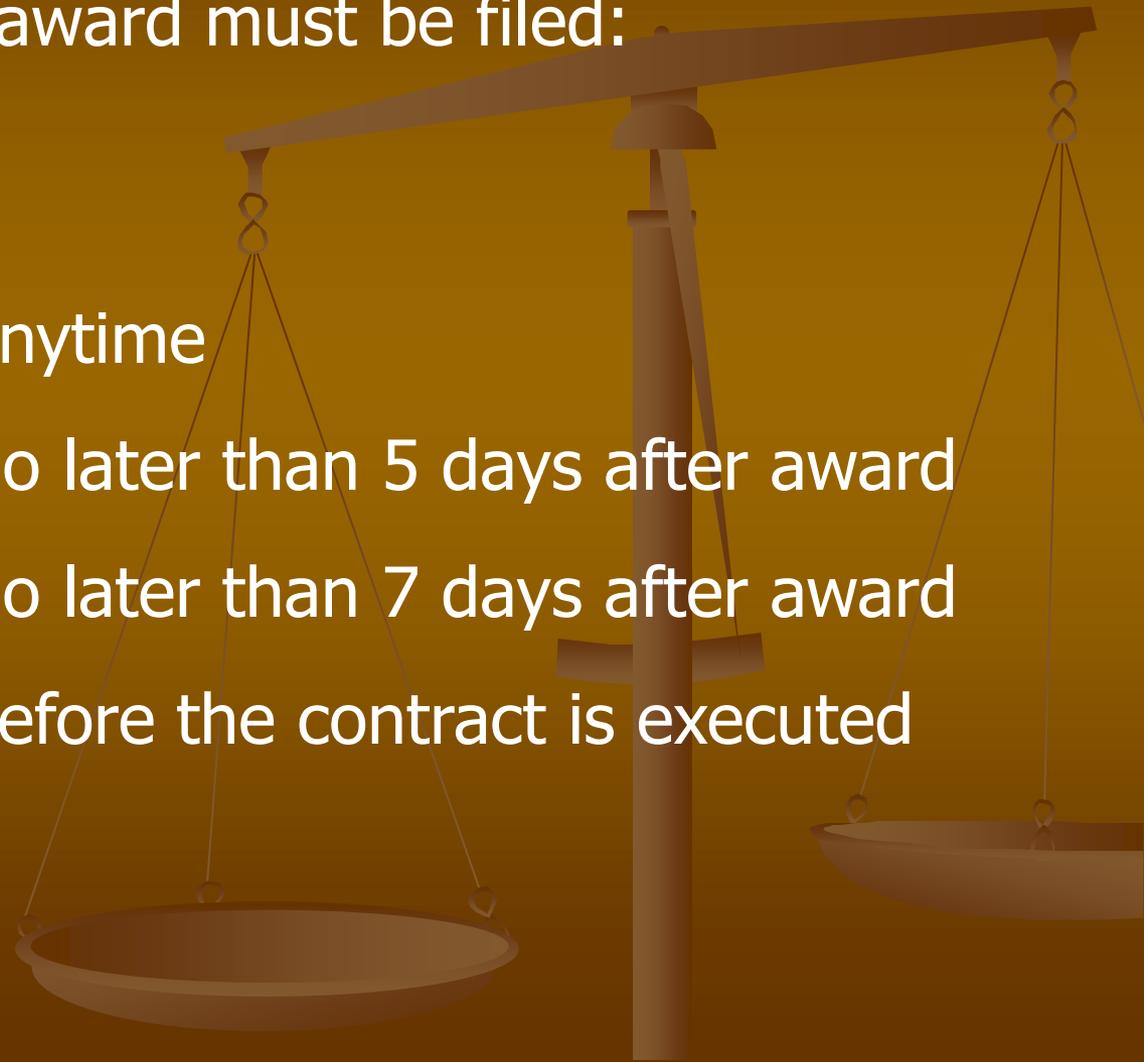
- The Commonwealth Court will hear the appeal based on the record certified by the purchasing agency.
- The Court shall affirm the determination of the purchasing agency unless it finds from the record that the determination is arbitrary & capricious, an abuse of discretion, or is contrary to law.



# Quick Check 1

A protest against an award must be filed:

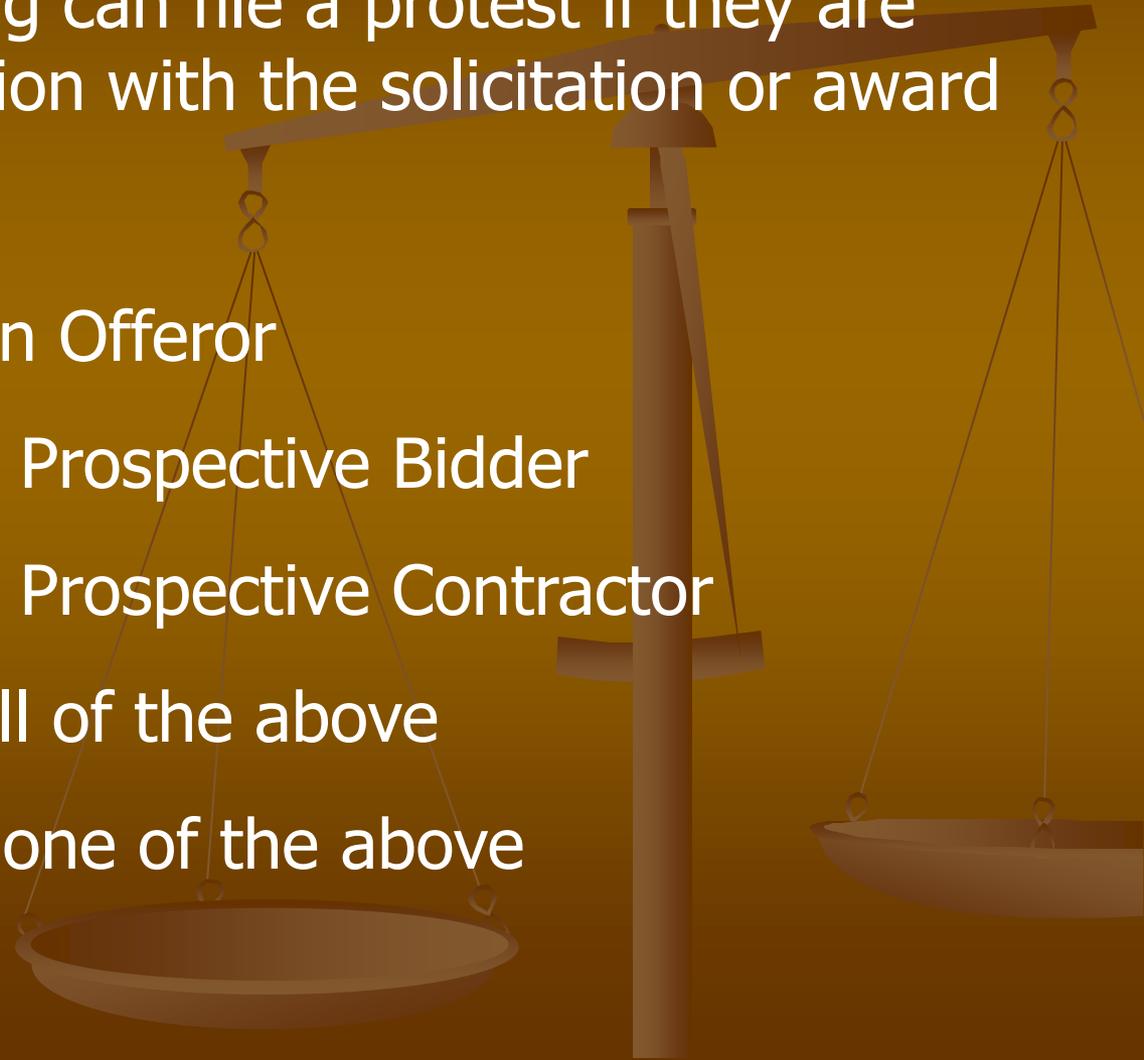
- Anytime
- No later than 5 days after award
- No later than 7 days after award
- Before the contract is executed



# Quick Check 2

Which of the following can file a protest if they are aggrieved in connection with the solicitation or award of a contract?

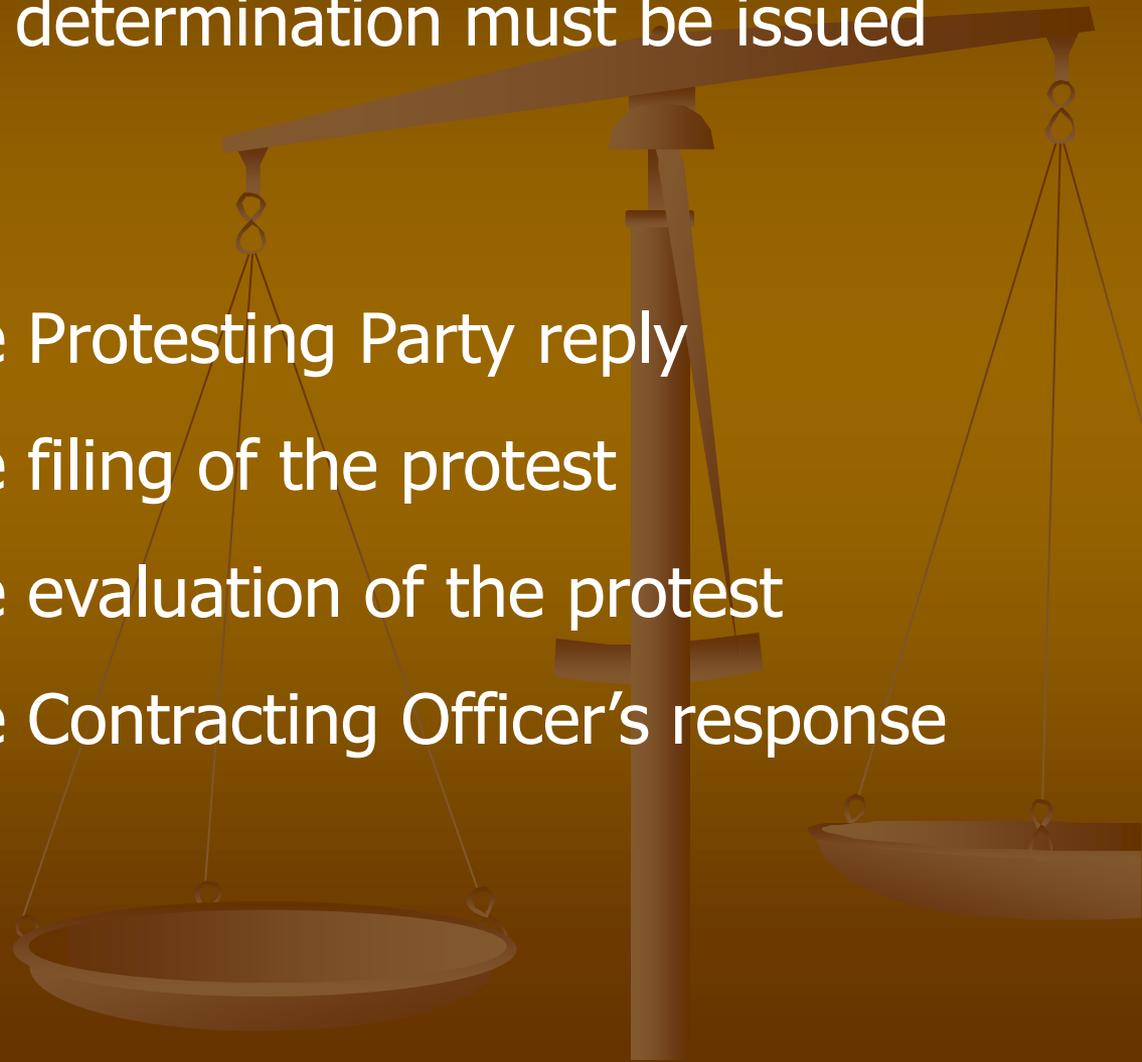
- An Offeror
- A Prospective Bidder
- A Prospective Contractor
- All of the above
- None of the above



# Quick Check 3

The written (or final) determination must be issued within 60 days of:

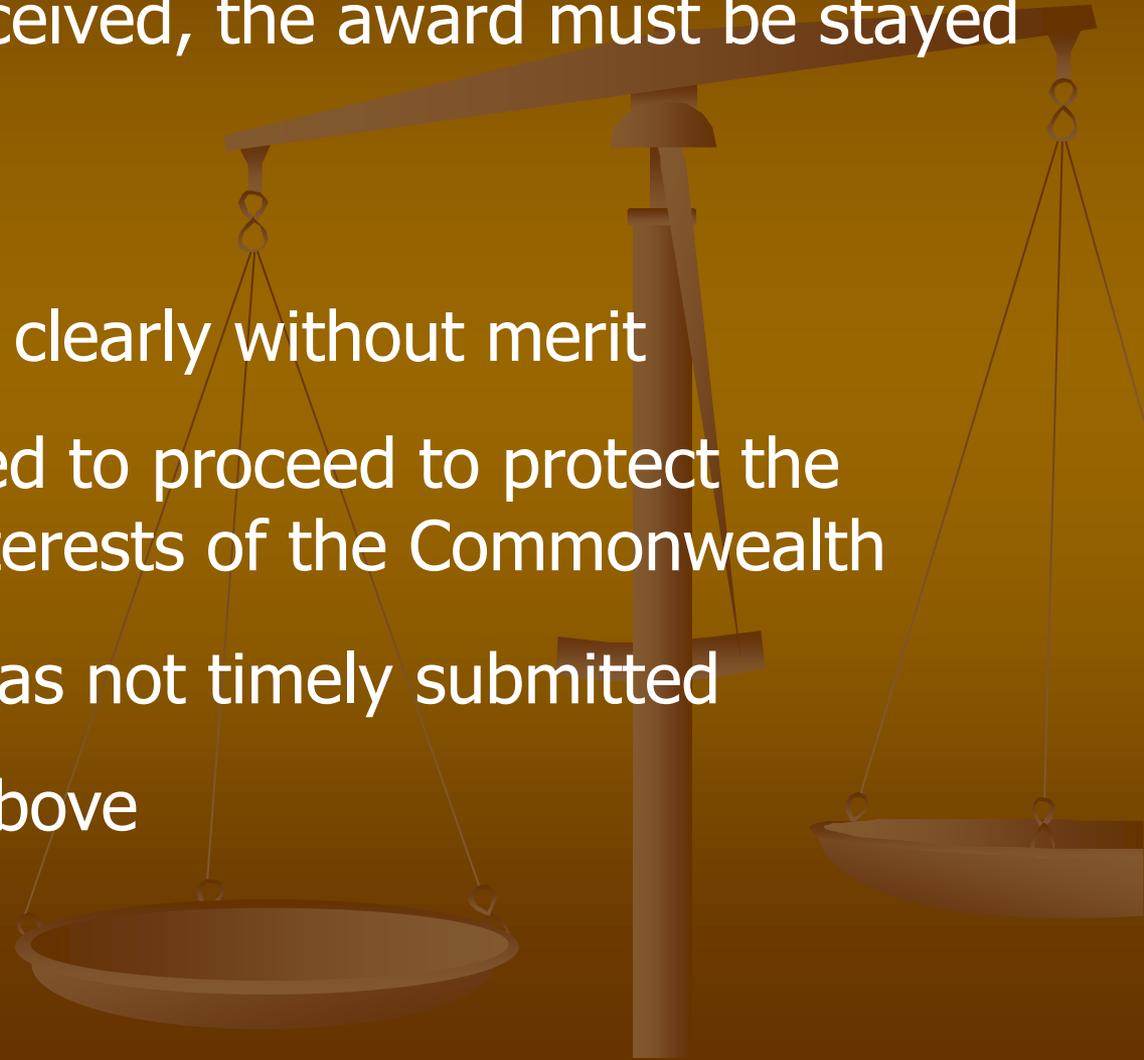
- The Protesting Party reply
- The filing of the protest
- The evaluation of the protest
- The Contracting Officer's response



# Quick Check 4

When a protest is received, the award must be stayed even if \_\_\_\_\_.

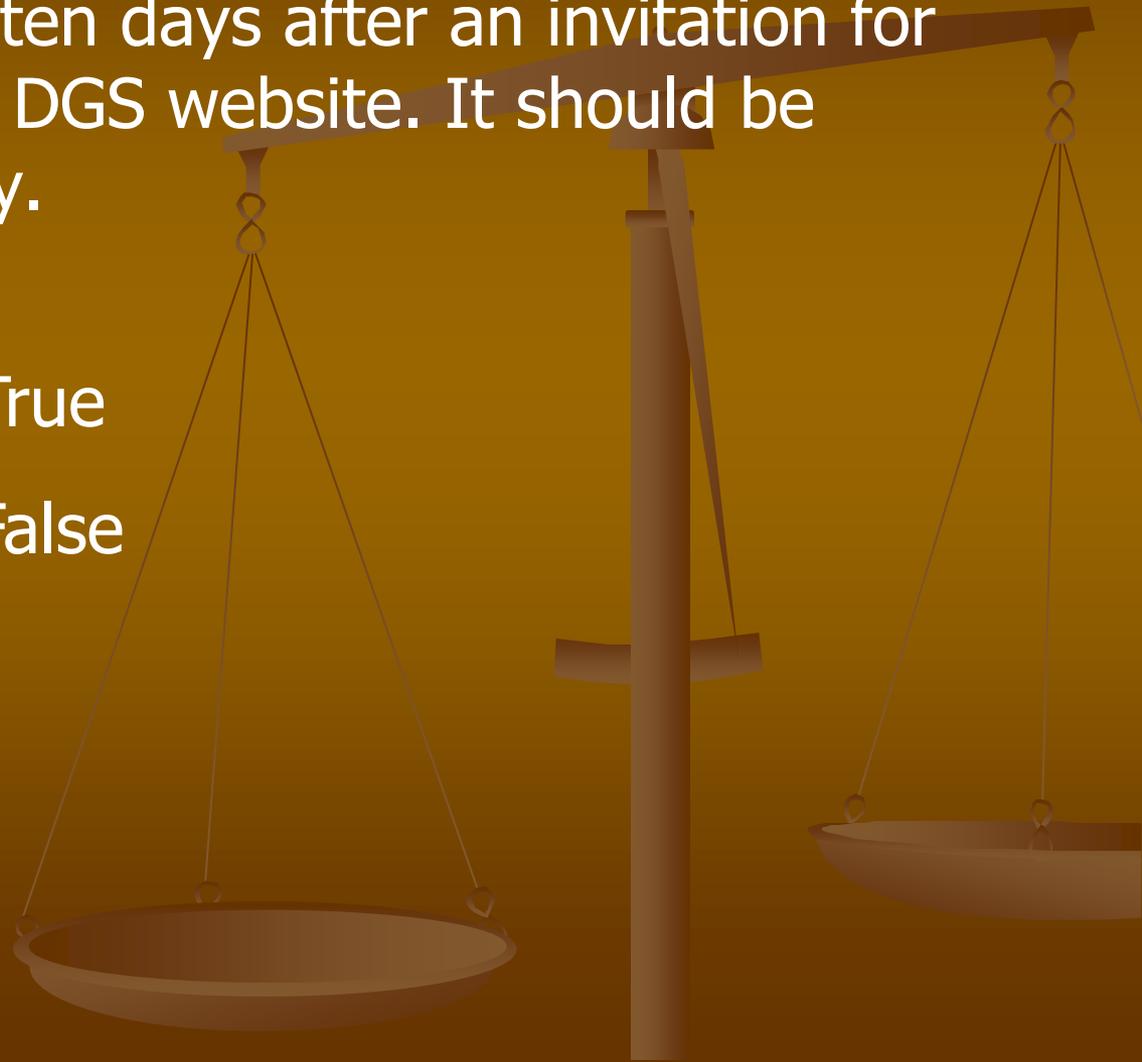
- The protest is clearly without merit
- There is a need to proceed to protect the substantial interests of the Commonwealth
- The protest was not timely submitted
- None of the above



# Quick Check 5

A protest is received ten days after an invitation for bids is posted on the DGS website. It should be dismissed as untimely.

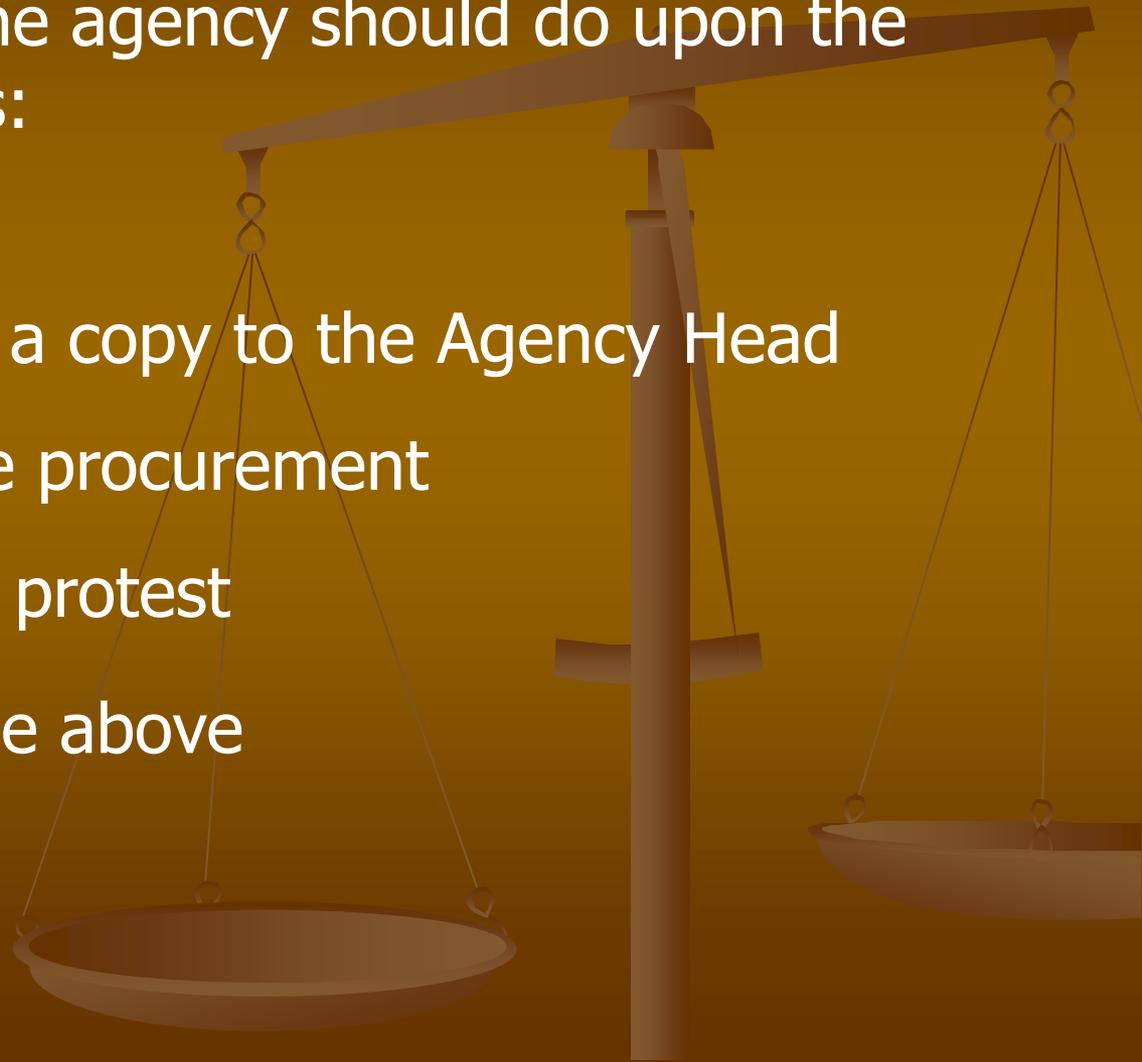
- True
- False



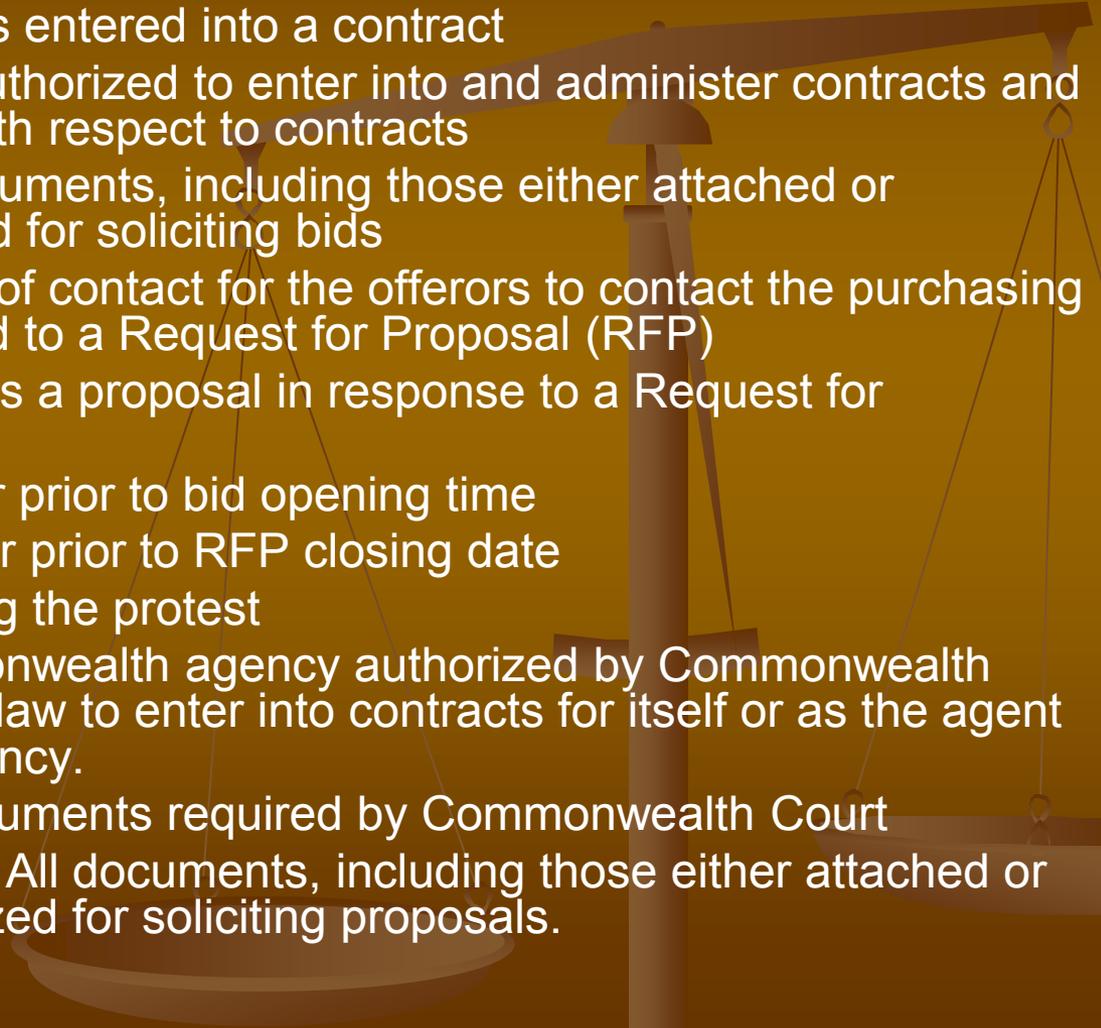
# Quick Check 6

The first thing that the agency should do upon the receipt of a protest is:

- Provide a copy to the Agency Head
- Stay the procurement
- Log the protest
- All of the above



# Definitions

- Bid – Supplier's response to an Invitation for Bid (IFB)
  - Bidder – A supplier who submitted a bid
  - Contractor – A supplier that has entered into a contract
  - Contracting Officer – Person authorized to enter into and administer contracts and make written determinations with respect to contracts
  - Invitation for Bid (IFB) – All documents, including those either attached or incorporated by reference, used for soliciting bids
  - Issuing Office – The sole point of contact for the offerors to contact the purchasing agency with questions in regard to a Request for Proposal (RFP)
  - Offeror – A supplier that submits a proposal in response to a Request for Proposals (RFP)
  - Prospective Bidder – A supplier prior to bid opening time
  - Prospective Offeror – A supplier prior to RFP closing date
  - Protesting Party – Supplier filing the protest
  - Purchasing Agency – A commonwealth agency authorized by Commonwealth Procurement Code or by other law to enter into contracts for itself or as the agent of another Commonwealth Agency.
  - Record of Determination – Documents required by Commonwealth Court
  - Request for Proposals (RFP) – All documents, including those either attached or incorporated by reference, utilized for soliciting proposals.
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You have successfully completed the  
Protest course!

Thank you!

