**R23. Government Operations, Facilities Construction and Management.**

**R23-26. Dispute Resolution.**

**R23-26-1. Purpose and Scope.**

(1) The purpose of this rule is to establish a process for resolving disputes involved with contracts under the division's procurement authority. The objectives of the procedure are to:

(a) encourage the payment of the appropriate and fair amount on a timely basis for work or services performed;

(b) encourage the resolution of issues on an informal basis to minimize disputes and claims;

(c) encourage fair and timely settlement of claims;

(d) provide a process that is as simple as possible and minimizes the costs to all parties in achieving a resolution;

(e) maintain effective contractual relationships and responsibilities;

(f) when possible, resolve related issues and responsibilities as a package;

(g) discourage bad faith, frivolous or excessive claims;

(h) avoid having claims interfere with the progress of the work;

(i) assure that the presentation of good faith and non-frivolous issues and claims do not negatively affect selection processes for future work, while bad faith and frivolous issues, as well as the failure of a contractor or subcontractor to facilitate resolution of issues, may be considered in the evaluation of the contractor or subcontractor; and

(j) provide a process where subcontractors at any tier, which have a claim that involves a good faith issue related to the responsibility of the division or anyone for whom the division is liable, has the ability to present the matter for resolution in a fair and timely manner to those of any higher tier and ultimately to the division without creating any contractual relationship between the division and the subcontractor.

(2) This rule does not apply to any protest under Section 63G-6a-1602.

(3) A claim under this rule that does not include a monetary claim against the division, or its agents, is not limited to the dispute resolution process provided for in this rule.

(4) Persons pursuing claims under the process required by this rule:

(a) are bound by the decision reached under the process unless the decision is properly appealed; and

(b) may not pursue a claim under the dispute resolution process established in Title 63G, Chapter 6a, Utah Procurement Code.

(5) This rule does not apply to tort or other claims subject to the Utah Governmental Immunity Act.

(6) This rule shall not limit the right of the division to have any of the division's issues, disputes, or claims considered in accordance with the applicable contract or law.

**R23-26-2. Authority.**

This rule is authorized pursuant to Section 63A-5b-305 and Section 63A-5b-606.

**R23-26-3. Definitions.**

For purposes of this rule:

(1) "Claim" means a dispute, demand, assertion, or other matter submitted by a contractor that has a contract under the procurement authority of the division, including subcontractors as provided for in this rule. The claimant may seek, as a matter of right, modification, adjustment, or interpretation of contract terms, payment of money, extension of time, or other relief with respect to the terms of the contract. A request for preliminary resolution effort (PRE) shall not be considered a "Claim." A requested amendment requested change order, or a construction change directive (CCD) is not a PRE or claim unless agreement cannot be reached, and the procedures of this rule are followed.

(2) "Contractor" means a person or entity under direct contract with the division and under the division's procurement authority.

(3) "DFCM representative" means the division person directly assigned to work with the contractor on a regular basis.

(4) "Director" means the director of the division, including unless otherwise stated, the director's authorized designee.

(5) "Division" means the Division of Facilities Construction and Management established pursuant to Section 63A-5b-301. It may also be referred to in this rule as "DFCM."

(6) "Executive Director" means the Executive Director of the Department of Government Operations, including unless otherwise stated, the executive director's authorized designee.

(7) "Preliminary Resolution Effort" or "PRE" means the processing of a request for preliminary resolution or any similar notice about a problem that could potentially lead to a claim and is before reaching the status of a claim.

(8) "Resolution of the claim" means the final resolution of the claim by the director, but does not include any administrative appeal, judicial review, or judicial appeal thereafter.

(9) "Subcontractor" means any subcontractor or subconsultant at any tier under the contactor, including any trade contractor, specialty contractor, or consultant but does not include suppliers who provide only materials, equipment, or supplies to a contractor, subcontractor, or subconsultant. "Subcontractor" does not include any person or entity, at any tier, under contract with a lessor.

**R23-26-4. Procedure for Preliminary Resolution Efforts.**

(1) Request for Preliminary Resolution Effort (PRE). If a contractor wishes to raise an issue related to an alleged breach of contract by the division or an issue concerning time or money, the contractor shall file a PRE as a prerequisite for any consideration of the issue by the division. The labeling of the notice or request shall not preclude the consideration of the issue by the division.

(2) Time for Filing. The PRE must be filed in writing with the DFCM representative within 21 days after any of the following:

(a) The issuance of a construction change directive that states the adjustment in contract price or contract time, if any, if contractor disagrees with such adjustment;

(b) Issuance of a statement of DFCM's position with respect to the adjustment in the contract price or contract time, if the contractor disagrees with such statement;

(c) Issuance of a denial of a proposed change order initiated by contractor;

(d) In the case of a subcontractor, after the expiration of the time period for the contractor or subcontractor PRE process under Section R23-26-4; or

(e) Except as provided in Subsections R23-26-4(2)(a) through (e), when contractor knows or should have known about any other issue where contractor seeks an adjustment in the contract price, contract time, or other relief from DFCM.

(3) Content Requirement. The PRE shall be required to include in writing to the extent information is reasonably available at the time of filing of the PRE:

(a) a description of the issue;

(b) the potential impact on the work, contract, price or contract time; and

(c) an indication of the relief sought.

(4) Supplementation. Additional detail of the content requirement shall be provided later if the detail is not yet available at the initial filing as follows:

(a) While the issue is continuing or the impact is being determined, the contractor shall provide a written updated status report every 30 days or as otherwise reasonably requested by the DFCM representative; and

(b) After the issue is concluded or the impact is determinable, complete information, including any impacts on contract price, contract time or other relief requested, if any, must be provided to the DFCM representative within 21 days of the earlier of the date the issue is concluded, or the impact is determinable.

(5) Subcontractors.

(a) Under no circumstances shall any provision of this rule be interpreted or construed to create any contractual relationship between the division and any subcontractor.

(b) The contractor must include Subsection (5) in its subcontracts with each first tier subcontractor and require each first-tier subcontractor to do likewise in each first tier subcontractor's sub-subcontracts with sub-subcontractors. At the contractor's discretion, the contractor may allow a subcontractor at the 2nd tier and beyond to submit the PRE directly with the contractor.

(c) In order for a subcontractor at any tier to be involved with the preliminary resolution process of the division, the following conditions and process shall apply:

(i) The subcontractor must have attempted to resolve the issue with the contractor including the submission of a PRE with the contractor.

(ii) The subcontractor must file a copy of the PRE with the DFCM representative.

(iii) The PRE to the contractor must meet the time, content, and supplementation requirements of Section R23-26-4. The triggering event for a subcontractor to file a PRE shall be the time at which the issue cannot be resolved through negotiation.

(iv) The PRE submitted to the contractor shall only be eligible for consideration in the division's PRE process to the extent the issue is reasonably related to the performance of the division or an entity for which the division is liable.

(v) The contractor shall resolve the PRE with the subcontractor within 60 days of its submittal to the contractor or such other time period as subsequently agreed to by the subcontractor in writing. If the contractor fails to resolve the PRE with the subcontractor within the required time period, the subcontractor may submit in writing the PRE with the contractor and the division. To be eligible for division consideration of the PRE, the subcontractor must submit the PRE within 21 days of the expiration of the time period for the contractor/subcontractor PRE process. The division shall consider the PRE as being submitted by the contractor on behalf of the subcontractor.

(vi) Upon such PRE being submitted, the contractor shall cooperate with the DFCM representative in reviewing the issue.

(vii) The division shall not be obligated to consider any submission which is not in accordance with this rule.

(viii) The subcontractor may accompany the contractor in participating with the division regarding the PRE raised by the subcontractor. The division is not precluded from meeting with the contractor separately and it shall be the responsibility of the contractor to keep the subcontractor informed of any such meetings.

(ix) Notwithstanding any provision of this rule, a subcontractor shall be entitled to pursue a payment bond claim.

(6) PRE Resolution Procedure. The DFCM representative may request additional information and may meet with the parties involved with the issue.

(7) Contractor Required to Continue Performance. Pending the final resolution of the issue, unless otherwise agreed upon in writing by the DFCM representative, the contractor shall proceed diligently with performance of the contract and the division shall continue to make payments of undisputed amounts in accordance with the contract.

(8) Decision. The division shall issue to the contractor, and any other party brought into the process by the DFCM representative as being liable to the division, a written decision providing the basis for the decision on the issues presented by all parties within 30 days of receipt of all the information required under Subsections R23-26-4(3) and (4).

(9) Decision Final Unless Claim Submitted. The decision by the division shall be final, and not subject to any further administrative or judicial review, not including judicial enforcement, unless a claim is submitted in accordance with this rule.

(10) Extension Requires Mutual Agreement. Any time period specified in this rule may be extended by mutual agreement of the contractor and the division.

(11) If Decision Not Issued. If the decision is not issued within the 30 day period, including any agreed to extensions, the issue may be pursued as a claim.

(12) Payment for Performance. Except as provided in this rule, any final decision where the division is to pay additional monies to the contractor shall not be delayed by any PRE, claim or appeal by another party. Payment to the contractor in accordance with any final decision shall be made by the division consistent with the contract. Notwithstanding any other provision of this rule, payment to the contractor shall be subject to any set-off claims or counterclaims of the division. Payment to the contractor for a subcontractor issue submitted by the contractor shall be paid by the contractor to the subcontractor in accordance with the subcontract between the contractor and the subcontractor. Any payment or performance determined owing by the contractor to the division shall be made in accordance with the contract.

**R23-26-5. Resolution of Claim.**

(1) Claim. If the decision on the PRE is not issued within the required timeframe or if the contractor is not satisfied with the decision, the contractor or other party brought into the process by the division may submit a claim in accordance with this rule as a prerequisite for any further consideration by the division or the right to any judicial review of the issue giving rise to the claim.

(2) Subcontractors. In order for a subcontractor to have its issue considered in the claim process by the division, the subcontractor that had its issue considered under Subsection R23-26-4(5) may submit the issue as a claim by filing it with the contractor and the division within the same timeframe and with the same content requirements as required of a claim submitted by the contractor under this rule. The division shall consider the claim as being submitted by the contractor on behalf of the subcontractor. Under no circumstances shall any provision of this rule be interpreted or construed so as to create any contractual relationship between the division and any subcontractor.

(a) Upon such claim being submitted, the contractor shall fully cooperate with the director, the persons evaluating the claim and any subsequent reviewing authority.

(b) The director shall not be obligated to consider any submission which is not in accordance with this rule.

(c) The subcontractor may accompany the contractor in participating with the director, the persons evaluating the claim and any subsequent reviewing authority regarding the claim. The director, the person evaluating the claim, and any subsequent reviewing authority is not precluded from meeting with the contractor separately, and it shall be the responsibility of the contractor to keep the subcontractor informed of any such meetings and matters discussed.

(d) Notwithstanding any provision of this rule, a subcontractor shall be entitled to pursue a payment bond claim.

(3) Time for Filing. The claim must be filed in writing promptly with the director, but in no case more than 21 days after the decision is issued on the PRE under Subsection R23-26-4(8) or no more than 21 days after the decision is not issued under Subsection R23-26-4(11), whichever is later.

(4) Content Requirement. The written claim shall include:

(a) a description of the issues in dispute;

(b) the basis for the claim, including documentation and analysis required by the contract and applicable law and rules that allow for the proper determination of the claim;

(c) a detailed cost estimate for any amount sought, including copies of any related invoices; and

(d) a specific identification of the relief sought.

(5) Extension of Time to Submit Documentation. The time period for submitting documentation and any analysis to support a claim may be extended by the director upon written request of the claimant showing just cause for such extension, which request must be included in the initial claim submittal.

(6) Contractor Required to Continue Performance. Pending the final determination of the claim, including any judicial review or appeal process, and unless otherwise agreed upon in writing by the director, the contractor shall proceed diligently with performance of the contract and the division shall continue to make payments in accordance with the contract.

(7) Agreement of Claimant on Method and Persons Evaluating the Claim. The director shall first attempt to reach agreement with the claimant on the method and persons to evaluate the claim. If such agreement cannot be made within 14 days of filing of the claim, the director shall select the method and persons, considering the purpose of this rule as stated in Section R23-26-1. Unless agreed to by the director and the claimant, any selected person shall not have a conflict of interest or appearance of impropriety. Any party and the persons evaluating the claim has a duty to promptly raise any circumstances regarding a conflict of interest or appearance of impropriety. If such a reasonable objection is raised, and unless otherwise agreed to by the director and the claimant, the director shall take appropriate action to eliminate the conflict of interest or appearance of impropriety. The dispute resolution methods and persons may include any of the following:

(a) A single expert or hearing officer qualified in the field that is the subject of the claim;

(b) An expert panel, consisting of members that are qualified in a field that is the subject of the claim;

(c) An arbitration process which may be binding if agreed to by the parties to the claim;

(d) A mediator; or

(e) Any other method that best accomplishes the purpose of Section R23-26-1.

(8) Evaluation Process.

(a) No Formal Rules of Evidence. There shall be no formal rules of evidence but the persons evaluating the claim shall consider the relevancy, weight, and credibility of the evidence.

(b) Questions. Parties and the persons evaluating the claim have the right to ask questions of each other.

(c) Investigation and Documents. The persons evaluating the claim has the right to investigate and request documents, consider any claims or counterclaims of the division, may set deadlines for producing documents, and may meet with the parties involved with the claim together or separately as needed. Copies of submitted documents shall be provided to all parties.

(d) Failure to Cooperate. The failure of a party to cooperate with the investigation or provide requested documentation may be a consideration by the persons evaluating the claim in reaching the findings in its report.

(e) Record of the Proceeding. The persons evaluating the claim shall determine the extent to which formal minutes, transcripts, or recordings shall be made of the meetings or hearings and shall make copies available to all parties.

(f) Certification. The persons evaluating the claim may require certification of documents provided.

(9) Timeframe for Persons Evaluation of the Claim and Director's Determination. The claim shall be resolved no later than 60 days after the proper filing of the claim, which includes any extension of time approved under Subsection R23-26-5(5). The persons evaluating the claim may extend the time period for resolution of the claim by not to exceed 60 additional days for good cause. The time period may also be extended if the claimant agrees. The persons evaluating the claim shall issue to the parties a schedule providing the timeframe for the issuance of the following:

(a) a preliminary resolution report including the preliminary findings regarding the claim;

(b) the receipt of written comments concerning the preliminary resolution report. A copy of such comments must be delivered to the other parties to the claim within the same timeframe;

(c) a reply to written comments, which must also be delivered to the other parties to the claim within the same timeframe; and

(d) a final report and recommendation which must be delivered to the director and the other parties no later than seven days before the expiration of the required timeframe for resolution of the claim.

(10) Director's Final Resolution. The director shall consider the final recommendation and report and issue the final resolution of the claim, with any modifications, before the expiration of the required timeframe for resolution of the claim.

**R23-26-6. Administrative Appeal to the Executive Director of the Department of Government Operations.**

(1) Administrative Appeal. The contractor may file a written administrative appeal of the director's final resolution of the claim with the executive director. The administrative appeal is the prerequisite for any further consideration by the state, or to judicial review of the issue giving rise to the claim. It shall be considered that the contractor, or another party brought into the process by the division, has not exhausted its administrative remedies if such an administrative appeal is not undertaken.

(2) Time for Filing. The administrative appeal must be filed in writing promptly with the executive director and delivered to the other parties to the claim, but in no case more than 14 days after the contractor's receipt of the director's final resolution of the claim.

(3) Content. The administrative appeal must state the basis for the appeal.

(4) Response. Within five days of receipt of the administrative appeal, any party may deliver to executive director written comments concerning the appeal. A copy of such comments must be delivered to the other parties to the claim within the same five day time period.

(5) Reply to Written Comments. Within five days of receipt of written comments, any party may deliver to the executive director a reply to the written comments concerning the appeal. A copy of such reply must be delivered to the other parties to the claim within the same five day time period.

(6) Executive Director's Decision. Within 30 days of receipt of the administrative appeal, and after considering the appeal, the director's final resolution, responses, and replies, the executive director or their designee shall issue a final decision of the appeal in writing and shall state the basis of the decision. Failure of the executive director to issue a written decision within the 30 day time period shall entitle the appellant to seek judicial review of the claim. The time period for the executive director's decision may be extended by agreement of the executive director and the appellant.

**R23-26-7. Payment of Claim.**

(1) When a stand-alone component of a claim has received a final determination, and is no longer subject to review or appeal, that amount shall be paid in accordance with the payment provisions of the contract or judicial order.

(2) When the entire claim has received a final determination, and is no longer subject to review or appeal, the full amount shall be paid within 14 days of the date of the final determination unless the work or services has not been completed, in which case the amount shall be paid in accordance with the payment provisions of the contract to the point that the work or services is completed.

(3) The final determination date is the earlier of the date upon which the claimant accepted the settlement in writing with an executed customary release document and waived its rights of appeal, or the expiration of the appeal period, with no appeal filed, or the determination made resulting from the final appeal.

(4) Any final determination where the division is to pay additional monies to the contractor shall not be delayed by any appeal or request for judicial review by another party brought into the process by the division as being liable to the division.

(5) Notwithstanding any other provision of this rule, payment of all or part of a claim is subject to any set-off claims or counterclaims of the division.

(6) Payment to the contractor for a subcontractor issue (claim) deemed filed by the contractor, shall be paid by the contractor to the subcontractor in accordance with the subcontract between the contractor and the subcontractor.

(7) The execution of a customary release document by the claimant related to any payment may be required as a condition of making the payment. Except to the extent expressly and specifically released in writing by DFCM, settlement of a contractor or subcontractor claim by DFCM shall not be deemed a release of any claim by DFCM.

**R23-26-8. Judicial Review.**

(1) The executive director's decision on the appeal, or the failure to provide a decision within the required time period under Subsection R23-26-6(6), shall be deemed a final agency action subject to judicial review as provided in Sections 63G-4-401 and 63G-4-402, including, requirements for exhaustion of administrative remedies, the requirements for a petition of judicial review, jurisdiction, and trial de novo.

(2) The participation of a person in the claim evaluation process does not preclude the person from testifying in a judicial proceeding to the extent allowed by Utah law.

**R23-26-9. Allocation of Costs of Claim Resolution Process.**

(1) To file a claim, a claimant must pay a $1,500 filing fee to the division. When the claim is a pass-through from a subcontractor in accordance with Subsection R23-26-4(5), the payment of the fee shall be made by the subcontractor.

(2) Unless otherwise agreed to by the parties to the claim, the costs of resolving the claim shall be allocated among the parties on the same proportionate basis as the determination of financial responsibility for the claim.

(3) The costs of resolving the claim that are subject to allocation include the claimant's filing fee, the costs of any persons evaluating the claim, the costs of making any required record of the process, and any additional testing or inspection procured to investigate or evaluate the claim.

(4) Each party is responsible for its own attorney fees.

**R23-26-10. Alternative Procedures.**

To the extent otherwise permitted by law, if all parties to a claim agree in writing, a protocol for resolving a claim may be used that differs from the process described in this rule.

**R23-26-11. Impact on Future Selections.**

(1) The presentation of a good faith and non-frivolous issue or claim shall not be considered in the division's selection process for a future award of contract; and

(2) The submission of a bad faith and frivolous issue or claim or the failure by a contractor to facilitate resolution of a claim, may be considered in the division's evaluation of performance.

**R23-26-12. Delegated Projects.**

Projects delegated by the division shall provide for contract provisions which provide a similar dispute resolution process as provided for in this rule.

**KEY: resolutions, settlements, disputes**

**Date of Last Change: November 8, 2024**

**Notice of Continuation: December 9, 2019**

**Authorizing, and Implemented or Interpreted Law: 63A-5-208(6); 63A-5-103(1)(e); 63G-6-208(2)**