

### **R33. Government Operations, Purchasing and General Services.**

#### **R33-17. Procurement Appeals Panel.**

##### **R33-17-101. Statutory Requirements.**

(1) Appeals of a protest decision shall be conducted in accordance with the requirements set forth in 63G-6a, Part 17, Utah Procurement Code. This administrative rule provides additional requirements and procedures and must be used in conjunction with the Procurement Code. All definitions in the Utah Procurement Code shall apply to this Rule.

##### **R33-17-101.1. Definitions.**

(1) "Administrative review" as used in this rule means, in accordance with the provisions set forth in Utah Code 63G-6a-1702, an examination conducted by a procurement appeals panel of:

- (a) The notice of appeal;
- (b) The protest appeal record pertaining to a protest officer's written decision;

(c) If an optional informal hearing was held, responses to questions asked by a procurement appeals panel to assist the panel in understanding the basis of the appeal and information contained in the protest appeal record, but otherwise without taking any additional evidence or any additional ground for the appeal.

(2)(a) "Appeal" as used in this rule means: a protestor filing a notice of appeal requesting an administrative review of the protest appeal record pertaining to a protest officer's decision in accordance with all provisions set forth in Utah Code 63G-6a, Part 17; and

(b) Does not include the appeal of a debarment or suspension under 63G-6a-904.

(3) "Protestor" as used in this rule means: a person who files a protest under Utah Code 63G-6a, Part 16, including any intervening party authorized under Utah Code 63G-6a-1603 and Rule R33-16-301.

(4) "Uphold the Decision of the Protest Officer" as used in this rule means: to support and maintain the decision of the protest officer, including giving deference to the protest officer's decision on questions of fact because the protest officer stands in a superior position, in terms of understanding the procurement, the needs of the agency, applicable laws, rules, ordinances, and policies, from which to evaluate and weigh the evidence and assess the credibility and accuracy of the facts, evidence, laws, and, if applicable, witnesses.

##### **R33-17-101.5. Procedures for Filing a Notice of Appeal.**

(1) When filing a notice of appeal, a protestor shall:

(a) File the notice of appeal in accordance with the requirements set forth in Utah Code 63G-6a, Part 17 and the following procedures:

(b) File the notice of appeal with the chair of the procurement policy board by the deadline for filing and include:

- (i) The address of record and email address of record of the party filing the notice of appeal;
- (ii) A statement indicating that:
  - (A) The protestor is filing a notice of appeal; and
  - (B) Requesting an administrative review of the protest officer's decision;
- (iii) A copy of the written protest decision;
- (iv) If applicable, the required security deposit or bond; and
- (v) Any other requirement set forth in Utah Code 63G-6a, Part 17;

(c) Not base a notice of appeal on a ground not specified in the person's protest under Section 63G-6a-1602 or new or additional evidence not considered by the protest officer.

(2) Any part of a notice of appeal that fails to comply with each of the requirements set forth in Utah Code 63G-6a, Part 17, this rule, a ground not specified in the person's protest under Section 63G-6a-1602, or new or additional evidence not considered by the protest officer shall be dismissed by the chair of the procurement policy board or the procurement appeals panel appointed to conduct the administrative review.

(3) The protest appeal record is restricted to the following:

- (a) A copy of the protest officer's written decision;
- (b) All documentation and other evidence the protest officer relied upon in reaching the protest officer's decision;
- (c) The recording of the hearing, if the protest officer held a hearing;
- (d) A copy of the protestor's written protest; and
- (e) All documentation and other evidence submitted by the protestor supporting the protest or the protestor's claim of standing.

##### **R33-17-101.8. Procedures for Conducting an Administrative Review.**

(1) When conducting an administrative review of a protest officer's decision, a procurement appeals panel:

(a) shall:

(i) Comply with all requirements set forth in Utah Code 63G-6a, Part 17 and this rule;

(ii) Conduct an administrative review of the appeal within 30 days after the day on which the procurement appeals panel is appointed, or before a later agreed to date, unless the appeal is dismissed by the chair of the procurement policy board:

(iii) Consider and decide the appeal based solely on:

(A) Without conducting a hearing:

- (I) the notice of appeal; and
- (II) the protest appeal record; or
- (B) If an informal hearing is held:

- (I) responses received during the informal hearing,
- (II) the notice of appeal; and
- (III) the protest appeal record; and
- (iv) Not otherwise take any additional evidence or consider any additional ground for the appeal;
- (v) Not consider any claim in the notice of appeal dismissed by the chair of the procurement policy board in consultation with the attorney general's office for noncompliance with Sections 63G-6a-1702(2)(3)(4), or 1703;
- (vi) Uphold a protest officer's decision unless the procurement appeals panel determines that the protest officer's decision is arbitrary and capricious or clearly erroneous; and
- (vii) Within seven days after the day on which the procurement appeals panel concludes the administrative review:
  - (A) issue a written decision of the appeal; and
  - (B) mail, email, or had deliver the written decision on the appeal to the parties to the appeal and to the protest officer; and
- (b) May:
  - (i) Consult with the assistant attorney general assigned to the appeal;
  - (ii) Conduct the administrative review without conducting a hearing;
  - (iii) At the sole discretion of the procurement appeals panel, conduct an informal hearing if the procurement appeals panel considers a hearing to be necessary:
    - (A) ask questions and receive responses during the informal hearing to assist the procurement appeals panel in understanding the basis of the appeal and information contained in the protest appeal record;
    - (B) not take any additional evidence or consider any additional ground for the appeal; and
    - (iv) Dismiss an appeal if the appeal does not comply with the requirements of Utah Code 63G-6a.

**R33-17-101.10. Determination Regarding Arbitrary and Capricious.**

(1) If, after reviewing the notice of appeal, the protest appeal record and, if applicable, responses received during an informal hearing, the protest appeals panel determines that:

(a) There is a reasonable basis for the decision made by the protest officer and, given the same facts and evidence as those reviewed by the protest officer, a reasonable person could have reached the same decision as the protest officer, then the protest appeals panel shall conclude that the protest officer's decision was not arbitrary and capricious and shall uphold the decision of the protest officer; or

(b) There is no reasonable basis for the protest officer's decision and, given the same facts and evidence as those reviewed by the protest officer, a reasonable person could not have reached the same decision as the protest officer, then the protest appeals panel shall conclude that the protest officer's decision was arbitrary and capricious and shall remand the matter to the protest officer to cure the problem or render a new decision.

(2) Minor errors and omissions committed by a protest officer during the protest decision process that are irrelevant, immaterial, or inconsequential to the overall protest decision may not be considered sufficient grounds for making a determination that the protest officer's decision was arbitrary and capricious.

**R33-17-101.13. Determination Regarding Clearly Erroneous.**

(1) If, after reviewing the notice of appeal, the protest appeal record and, if applicable, responses received during an informal hearing, the protest appeals panel determines that:

(a) There is a reasonable basis for the decision made by the protest officer and, given the same facts, evidence, and laws as those reviewed by the protest officer, a reasonable person could have reached the same decision as the protest officer, then the protest appeals panel shall conclude that the protest officer's decision was not clearly erroneous and shall uphold the decision of the protest officer; or

(b) There is no reasonable basis for the decision made by the protest officer and, given the same facts, evidence, and laws as those reviewed by the protest officer, a reasonable person could not have reached the same decision as the protest officer, then the protest appeals panel shall conclude that the protest officer's decision was clearly erroneous and shall remand the matter to the protest officer to cure the problem or render a new decision.

(2) Minor errors and omissions committed by a protest officer during the protest decision process that are irrelevant, immaterial, or inconsequential to the overall protest decision may not be considered sufficient grounds for making a determination that the protest officer's decision was clearly erroneous.

**R33-17-102. Verification of Legal Authority.**

(1) A person filing an appeal to a protest decision may be asked to verify that the person has legal authority to file an appeal on behalf of the public or private corporation, governmental entity, sole proprietorship, partnership, or unincorporated association. A person without legal authority shall be deemed to not have standing to file a notice of appeal.

**R33-17-103. Informal Hearing.**

(1) A hearing conducted under Part 17 shall be an informal procedure wherein the rules of evidence and civil procedures do not apply.

(2) A procurement appeals panel shall establish procedures for conducting an informal hearing including:

(a) establishing time limits and deadlines;

(b) determining who may address the procurement appeals panel; and

- (c) determining other procedural matters.
- (3) All communication during the informal hearing shall be directed to the coordinator of the procurement appeals panel.
- (a) A recording shall be made of each informal hearing held on an appeal under Utah Code 63G-6a, Part 17.

**R33-17-104. Expedited Proceedings.**

(1) A party to a protest having standing may submit a written request to the coordinator of the procurement appeals panel requesting that the administrative review be expedited. The coordinator of the procurement appeals panel shall consider the request and, if possible and practical, accommodate the request.

**R33-17-105. Electronic Participation.**

- (1) Any panel member or, if applicable, participant may participate electronically if:
  - (a) a request to participate electronically is submitted to the coordinator of the panel at least 24 hours in advance of the proceeding;
  - (b) the means for electronic participation, by phone, computer or otherwise, is available at the location; and
  - (c) the electronic means allows other members of the panel and, if applicable, other participants to hear the person or persons participating electronically.

**KEY: hearings, Procurement Appeals Board, verification of legal authority**

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**Authorizing, and Implemented or Interpreted Law: 63G-6a**