**MARCH 18, 2020**

**SECTION 105**

**CONTROL OF WORK**

Revise Section 105 of the Standard Specifications to include:

Under **105.22 Dispute Resolution**, revise the eighth paragraph as follows:

**105.22 Dispute Resolution.** Subsections 105.22, 105.23, and 105.24 detail the process through which the parties (CDOT and the Contractor) agree to resolve any issue that may result in a dispute. The intent of the process is to resolve issues early, efficiently, and as close to the project level as possible. Figure 105-1 outlines the process. Specified time frames may be extended by mutual agreement of the Engineer and the Contractor. In these subsections, when a time frame ends on a Saturday, Sunday or holiday, the time frame shall be extended to the next scheduled work day.

An issue is a disagreement concerning contract price, time, interpretation of the Contract, or all three between the parties at the project level regarding or relating to the Contract. Issues include, but are not limited to, a disagreement resulting from a delay, a change order, another written order, or an oral order from the Project Engineer, including any direction, instruction, interpretation, or determination by the Project Engineer, interpretations of the Contract provisions, plans, or specifications or the existence of alleged differing site conditions.

The Contractor shall be barred from any administrative, equitable, or legal remedy for any issue which meets either of the following criteria:

1. The Contractor did not bring the issue to the Project Engineer’s attention in writing within 20 days of the Contractor being aware of the issue.
2. The Contractor fails to continually (weekly or otherwise approved by both parties) work with CDOT towards a resolution.

A dispute is an issue which the Contractor and CDOT have not been able to resolve and for which the Contractor submits a written formal notice of dispute in accordance with subsection 105.22(b).

A claim is a dispute not resolved at the Resident Engineer level or resolved after a DRB recommendation.

The term "merit" refers to the right of a party to recover on a claim or dispute, irrespective of quantum, based on the substance, elements, and grounds of that claim or dispute. The term "quantum" refers to the quantity or amount of compensation or time deserved when a claim or dispute is found to have merit.

Disputes from subcontractors, material suppliers, or any other entity not party to the Contract shall be submitted through the Contractor. Review of a pass-through dispute does not create privity of Contract between CDOT and the subcontractor.

An audit may be performed by the Department for any dispute or claim. All audits will be completed within 90 days of the request for an audit, provided the Contractor allows the auditors reasonable and timely access to the Contractor’s books and records

If CDOT does not respond within the specified timelines, the Contractor may advance the dispute to the next level.

When the Project Engineer is a Consultant Project Engineer, actions, decisions, and determinations specified herein as made by the Project Engineer shall be made by the Resident Engineer.

The dispute resolution process set forth in this subsection shall be exhausted in its entirety prior to initiation of litigation or arbitration. Failure to comply with the requirements set forth in this subsection shall bar either party from any further administrative, equitable, or legal remedy. If a deadline is missed that does not prejudice either party, further relief shall be allowed.

All written notices of dispute shall be submitted within 30 days of date of the Project Engineer’s Final Acceptance letter; see subsection 105.21(b).

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Under **105.23 Dispute Review Board**, revise the (f) Pre-Hearing Submittal, 2., (3) paragraph as follows:

**105.23 Dispute Review Board.** A Dispute Review Board (DRB) is an independent third party that will provide specialized expertise in technical areas and administration of construction contracts. The DRB will assist in and facilitate the timely and equitable resolution of disputes between CDOT and the Contractor in an effort to avoid animosity and construction delays, and to resolve disputes as close to the project level as possible. The DRB shall be established and operate as provided herein and shall serve as an independent and impartial board. A DRB member shall not be called as witness for future litigation.

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1. *Pre-Hearing Submittal*. All Pre-Hearing Submittals shall include only arguments, supporting documentation, quantum, and other information as previously submitted in writing and as previously disputed in the formal dispute process covered in

subsection 105.22(b), (c), and (d). All Pre-Hearing Submittals planned to be used at the hearing, shall be submitted to the other party 35 days prior to the hearing for review for compliance with this requirement. If either party contends there are new arguments, supporting documents, new quantum, or any new information in a pre-Hearing Submittal, and the other party objects to this information being presented to the DRB, the objecting party shall submit its objections in writing to the other party within 10 days. The parties shall meet within five days to reconcile the objection before the submittal is submitted to the DRB.

If the parties cannot reconcile the objection, but the new argument, supporting documentation, new quantum, or new information does not change either party’s position on merit or quantum, the information shall be allowed in the Pre- Hearing submittal and presented to the DRB. If the parties cannot reconcile the objections within the five days allowed, each party shall submit a one page brief on their objections, but not the actual information objected to, to the DRB for a decision on the use of the documents. The DRB shall not approve any information simply because it is relevant to the dispute or referenced during the dispute. Neither party shall attempt to present anything to the DRB which they did not present to the other party during the dispute process. The dispute process shall be delayed while this determination is being made and a new hearing date set, if necessary. Pre-Hearing Submittals to the DRB are as follows:

1. Joint Statement: At least 20 days prior to the hearing the Joint Statement(s) shall be submitted to the DRB. The parties shall make every attempt to agree upon a Joint Statement of the dispute. If the parties cannot agree on the Joint Statement, each party’s independent statement shall be submitted to the DRB. The Joint Statement shall summarize, in a few sentences, the nature of the dispute(s) and the scope of the desired decision.
2. Position Paper: At least 15 days prior to the hearing, CDOT and the Contractor shall submit by email to the DRB Chairperson their party’s Position Paper. The DRB Chairperson shall simultaneously distribute by email the Position Papers to all parties and other DRB members, if any. The Position Paper shall contain the following:
   1. The basis and justification for the party’s position, with reference to specific contract language and the supporting documents of each element of the disputes.
   2. A list of proposed attendees for the hearing. In the event of any objection by a party, the DRB shall make a final determination as to who attends the hearing.
   3. When the scope of the hearing includes quantum, full cost details will be calculated in accordance with methods set forth in subsection 105.24(b)12. The Scope of the hearing will not include quantum if CDOT has requested,an auditwhich has not been completed.
3. Supporting Documents: At least 15 days prior to the hearing, each party shall submit a copy of all its supporting documents to the DRB and the other party. Supporting documents include any presentations, visuals, or handouts planned to be used at the hearing. To minimize duplication and repetitiveness, the parties are encouraged to identify a common set of documents that will be referred to by both parties and submit them in a separate package to the DRB at least 20 days prior to the hearing. Common documents are communications between parties, speed memos, change orders, schedules, request for equitable adjustment, and correspondence, and any document used in the subsection 105.22 process. CDOT shall submit the common set of documents to the Board and Contractor.
4. If relevant to the dispute and requested by the Board, the Engineer shall provide to the DRB either website links, electronic PDFs, or hard copies of pertinent contract documents such as plans, specifications, and M&S Standards.

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Under **105.24 Claims For Unresolved Disputes**, delete the paragraph (c), Audit, and re-number from there, revise from 60 days to 90 days, as shown:

**Section 105.24 Claims For Unresolved Disputes**

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1. In adjustment for the costs as allowed above, the Department will have no liability for the following items of damages or expense:
   1. Profit in excess of that provided in 12.A.(8) above.
   2. Loss of Profit.
   3. Additional cost of labor inefficiencies in excess of that provided in A. above.
   4. Home office overhead in excess of that provided in A. above.
   5. Consequential damages, including but not limited to loss of bonding capacity, loss of bidding opportunities, and insolvency.
   6. Indirect costs or expenses of any nature in excess of that provided in A. above.
   7. Attorney’s fees, claim preparation fees, and expert fees.

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1. *Region Transportation Director Decision*. When the Contractor properly files a claim, the RTD will review the claim and render a written decision to the Contractor to either affirm or deny the claim, in whole or in part, in accordance with the following procedure.

The RTD may consolidate all related claims on a project and issue one decision, provided that consolidation does not extend the time period within which the RTD is to render a decision. Consolidation of unrelated claims will not be made.

The RTD will render a written decision to the Contractor within 90 days after the receipt of the claim package or receipt of the audit whichever is later. In rendering the decision, the RTD: (1) will review the information in the Contractor's claim; (2) will conduct a hearing if requested by either party; and (3) may consider any other information available in rendering a decision.

The RTD will assemble and maintain a claim record comprised of all information physically submitted by the Contractor in support of the claim and all other discoverable information considered by the RTD in reaching a decision. Once the RTD assembles the claim record, the submission and consideration of additional information, other than for clarification and data supporting previously submitted documentation, at any subsequent level of review by anyone, will not be permitted.

The RTD will provide a copy of the claim record and the written decision to the Contractor describing the information considered by the RTD in reaching a decision and the basis for that decision. If the RTD fails to render a written decision within the 60 day period, or within any extended time period as agreed to by both parties, the Contractor shall either: (1) accept this as a denial of the claim, or (2) appeal the claim to the Chief Engineer, as described in this subsection.

If the Contractor accepts the RTD decision, the provisions of the decision shall be implemented in accordance with subsections 108.08, 109.04, 109.05, or 109.10 and the claim is resolved.

If the Contractor disagrees with the RTD decision, the Contractor shall either: (1) accept the RTD decision as final, or (2) file a written appeal to the Chief Engineer within 30 days from the receipt of the RTD decision. The Contractor hereby agrees that if a written appeal is not properly filed, the RTD decision is final.

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