

CONSTRUCTION

Construction

Industry Arbitration Rules and
Mediation Procedures

Including Procedures for Large, Complex Construction Disputes



AMERICAN ARBITRATION ASSOCIATION®

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Regional Vice Presidents

States: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia

Michael Marra
Vice President
Phone: 215.731.6136
Email: MarraM@adr.org

States: Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, West Virginia, Wisconsin

Linda Beyea
Vice President
Phone: 888.320.3490
Email: BeyeaL@adr.org

States: Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Wyoming

Rodney Toben
Vice President
Phone: 972.774.6947
Email: TobenR@adr.org

States: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington

Michael Powell
Vice President
Phone: 213.362.1900
Email: PowellM@adr.org

Case Management Vice Presidents and Directors

Jeffrey Garcia
Vice President
Phone: 559.490.1860
Email: GarciaJ@adr.org

Administers cases in AK, AZ, CA, CO, HI, ID, MT, NM, NV, OR, UT, WA, WY

John M. Bishop
Vice President
Phone: 404.320.5150
Email: BishopJ@adr.org

Administers cases in AL, DC, FL, GA, IN, KY, MD, NC, OH, SC, TN, VA

Harry Hernandez
Director
Phone: 972.774.6905
Email: HernandezH@adr.org
Administers cases in AR, IA, IL, KS, LA, MN, MO, MS, ND, NE, OK, SD, TX, WI

Yvonne Baglini
Director
Phone: 866.293.4053
Email: BagliniY@adr.org
Administers cases in CT, DE, MA, ME, MI, NH, NJ, NY, PA, RI, VT, WV

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Construction Industry Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Construction Disputes)



National Construction Dispute Resolution Committee

The National Construction Dispute Resolution Committee (NCDRC) is a Committee of the American Arbitration Association® (AAA®) that serves as an advisory body with regard to construction dispute resolution services. Composed of liaisons from a diverse group of leading construction industry and related organizations, the NCDRC provides industry guidance to the AAA on trends in alternative dispute resolution including recommendations for AAA rules and procedures.

For additional information regarding the NCDRC, please visit www.adr.org/NCDRC.

Important Notice

These Rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the American Arbitration Association. To insure that you have the most current information, visit www.adr.org. If an agreement for mediation or arbitration specifies that rules in effect at the time the agreement was executed be used, then absent the parties' agreement otherwise, the AAA shall apply the Rules as required by the agreement. We encourage parties to use the most current, state of the art, AAA rules available.

Introduction

Each year, many thousands of construction-related transactions take place. Occasionally, disagreements in connection with these transactions develop. Often, these disputes are resolved by arbitration, the voluntary submission of a dispute to a disinterested person or persons for final and binding determination. Arbitration has been proven to be an effective way to resolve disputes fairly, privately, promptly, and economically.

The American Arbitration Association is a public-service, not-for-profit organization offering a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on various forms of alternative dispute resolution.

Generally, the AAA's services are concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Mediation

By agreement, the parties may submit their dispute to mediation before arbitration under the mediation procedures herein. Mediation involves the services of one or more individuals, to assist parties in settling a controversy or claim by direct negotiations between or among themselves. The mediator or mediators participate(s) impartially in the negotiations, guiding and consulting the various parties involved. The result of the mediation should be an agreement that the parties find acceptable. The mediator cannot impose a settlement and can only guide the parties toward achieving their own settlement.

The AAA will administer the mediation process to achieve orderly, economical, and expeditious mediation, utilizing to the greatest possible extent the competence and acceptability of the mediators on the AAA's Construction Mediation Panel. Depending on the expertise needed for a given dispute, the parties can obtain the services of one or more individuals who are willing to serve as mediators and who are trained in mediation skills. In identifying those persons most qualified to mediate, the AAA is assisted by the National Construction Dispute Resolution Committee.

The AAA itself does not act as mediator. Its function is to administer the mediation process in accordance with the agreement of the parties, to teach mediation skills to members of the construction industry, and to maintain the National Panel from which mediators can be chosen.

Procedures for mediation cases are described in Sections M-1 through M-17.

Arbitration

The arbitration rules contain four procedural tracks: the Regular Track Procedures (Section R), the Procedures for the Resolution of Disputes through Document Submission (Section D), the Fast Track Procedures (Section F) and the Procedures for Large, Complex Construction Disputes (Section L). The Regular Track Procedures are applied to the administration of all arbitration cases, unless they conflict with any portion of Section D, Section F, or Section L whenever these Sections apply. In the event of a conflict, the Fast Track Procedures, Procedures for the Resolution of Disputes through Document Submission, or the Procedures for Large, Complex Construction Disputes apply.

Regular Track Procedures

The highlights of the Regular Track Procedures are that they enable:

- opportunities for an administrative conference to help structure the dispute resolution process from its starting point;
- party input into the AAA's preparation of lists of proposed arbitrators;
- checklists for parties and arbitrators to organize the management hearing to address the needs associated with each dispute;
- express arbitrator authority to control the discovery process;
- broad arbitrator authority to control the hearing;
- award format choices;
- a Demand Form and an Answer Form, both of which seek information that will help the AAA to better serve the parties.

Procedures for the Resolution of Disputes through Document Submission

The highlights of the Procedures for the Resolution of Disputes through Document Submissions are that they provide:

- a simple process for resolution of disputes where a face-to-face hearing is not necessary;
- flexibility to take advantage of technology options;
- the ability to be applied to any size dispute by party agreement.

Fast Track Procedures

The Fast Track Procedures are designed for cases involving claims between two parties where no party's disclosed claim or counterclaim exceeds \$100,000, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. The highlights of these Procedures are:

- a 45-day "time standard" for hearing process completion;
- the establishment of a special pool of arbitrators who are pre-qualified to serve on an expedited basis;
- an expedited arbitrator appointment process, with party input;
- a conference call with the arbitrator within 10 days of confirmation of the arbitrator;
- the presumption that cases involving \$25,000 or less will be decided on a documents only basis;
- a single day of hearing in most cases;
- an award in no more than 14 calendar days after completion of the hearing.

Procedures for Large, Complex Construction Disputes

Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes will be applied to all cases administered by the AAA under the Construction Arbitration Rules in which the disclosed claim or counterclaim of any party is at least \$1,000,000 exclusive of claimed interest, attorneys' fees, arbitration fees and costs.

The key features of these Procedures include:

- a highly qualified, trained Panel of Arbitrators, compensated at their customary rates;
- a mandatory preliminary hearing with the arbitrators, which may be conducted by telephone;
- broad arbitrator authority to order and control discovery, including depositions;
- the presumption that hearings will proceed on a consecutive or block basis;
- a reasoned award unless the parties agree otherwise.

The National Construction Panel

The AAA maintains a National Panel of individuals competent to hear and decide disputes administered under the Construction Industry Arbitration Rules. The AAA considers for appointment to the Construction Industry Panel persons recommended by the National Construction Dispute Resolution Committee, regional advisory committees and customers. These individuals are qualified to serve by virtue of their experience in the construction field. The majority of these arbitrators are actively engaged in the construction industry with attorney arbitrators generally devoting at least half of their practice to construction matters. Arbitrators serving on the Panel and under these Rules must also attend periodic training.

Administrative Fees

The AAA charges a filing fee based on the amount of claim or counterclaim. This fee information, which is available at www.adr.org/feeschedule, allows the parties to exercise control over their administrative fees and costs.

The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, nor do the fees cover reporting services, hearing room rental, or any post-award charges incurred by the parties in enforcing the award.

Alternative Dispute Resolution (ADR) Clauses

Mediation

If the parties elect to adopt mediation as a part of their contractual dispute settlement procedure, the following mediation clause can be inserted into the contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties choose to use a mediator to resolve an existing dispute, the following language may accompany the submission:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Construction Industry Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Arbitration

Parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Construction Industry Arbitration Rules the following controversy: (cite briefly). We further agree that the above controversy be submitted to

(one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of the court having jurisdiction may be entered on the award.

The AAA's *Guide to Drafting Dispute Resolution Clauses for Construction Contracts* offers additional information about dispute resolution options available for construction disputes. Parties can also utilize the AAA's ClauseBuilder® platform available at **www.clausebuilder.org**. For more information about the AAA's Construction Dispute Avoidance and Resolution Services, as well as the full range of other AAA services, contact the nearest AAA office or visit **www.adr.org**.

Construction Industry Arbitration Rules

Regular Track Procedures

R-1. Agreement of Parties and Designation of Applicable AAA Rules

- (a)** The parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Construction Industry Arbitration Rules or whenever they have provided for arbitration of a construction dispute pursuant to the Rules of the AAA without designating particular AAA Rules.
- (b)** Unless the parties or the AAA determines otherwise, the Fast Track Procedures shall apply in any case involving no more than two parties in which no disclosed claim or counterclaim exceeds \$100,000, exclusive of claimed interest, attorneys' fees and arbitration fees and costs. Parties may also agree to use these procedures in larger cases. The Fast Track Procedures shall be applied as described in Section F of these Rules, in addition to any other portion of these Rules that is not in conflict with the Fast Track Procedures.
- (c)** Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is \$1,000,000 or more, exclusive of claimed interest, attorneys' fees, and arbitration fees and costs. The Procedures for Large, Complex Construction Disputes shall be applied as described in Section L of these Rules, in addition to any other portion of these Rules that is not in conflict with the Procedures for Large, Complex Construction Disputes.
- (d)** Parties may, by agreement, apply the Fast Track Procedures, the Procedures for Large, Complex Construction Disputes, or Procedures for the Resolution of Disputes through Document Submission (Section D of these Rules) to any dispute.
- (e)** All other cases shall be administered in accordance with the Regular Track Procedures of these Rules.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these Rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these Rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Panel of Construction Arbitrators

The AAA shall establish and maintain a National Panel of Construction Arbitrators (“National Panel”) and shall appoint arbitrators as provided in these Rules. The term “arbitrator” in these Rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements Under an Arbitration Agreement in a Contract

(a) Filing of a Demand: Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

- i. The initiating party (“the claimant”) shall, within the time period, if any, specified in the contract(s), file with the AAA a demand for arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties’ contract which provides for arbitration. Filing may be accomplished through use of AAA WebFile, located at **www.adr.org**, or by filing the demand with any AAA office.
- ii. The claimant shall simultaneously provide a copy of the demand and the applicable arbitration agreement to the opposing party (“the respondent”).
- iii. The demand shall include:
 - a) the name of each party;
 - b) the address for each party, including, if known, telephone and fax numbers and email addresses;
 - c) if applicable, the names, addresses, telephone and fax numbers and, if known, email address of the known representative for each party;
 - d) a statement setting forth the nature of the claim including the relief sought and the amount involved;
 - e) the locale requested, if the arbitration agreement does not specify one.

(b) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a demand when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration, however any disputes in connection with the AAA’s determination may be decided by the arbitrator.

If a filing does not satisfy the Filing Requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the due date specified by the AAA, the filing may be returned to the filing party.

(c) Answers and Counterclaims

- i. *Answering Statement:* A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of

the answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

- ii. *Counterclaim:* A respondent may file a counterclaim within 14 calendar days after notice of the filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the counterclaim to the claimant and to all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.

If the counterclaim filing is deficient, and not cured by the date specified by the AAA, it may be returned to the filing party.

- (d) Parties are encouraged to provide descriptions of their claims, in any document filed pursuant to this section, in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Filing Requirements Under a Submission Agreement

Parties to any existing dispute, who have not previously agreed to use these Rules, may commence arbitration under these Rules by either filing online through AAA WebFile or by filing at any office of the AAA a written submission to arbitrate under these Rules, signed by the parties. The submission shall contain:

- (a) the names and addresses for each party and their representatives, including, if known, telephone and fax numbers and email addresses;
- (b) a statement setting forth the nature of the dispute including the relief sought, the amount involved and the claims and counterclaims asserted by the parties. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party;
- (c) the hearing locale, if agreed upon by the parties;
- (d) the appropriate filing fee for each claim or counterclaim as provided in the AAA Fee Schedule applicable at the time of filing.

Parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of their dispute clear to the arbitrator.

R-6. Changes of Claim or Counterclaim

- (a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties.
- (b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

R-7. Consolidation or Joinder

- (a) If the parties are unable to agree to consolidate related arbitrations or to the joinder of parties to an ongoing arbitration, the AAA shall directly appoint a single arbitrator (hereinafter referred to as the R-7 arbitrator) for the limited purpose of deciding whether related arbitrations should be consolidated or parties joined. All requests for consolidation or joinder must be submitted to the AAA prior to the appointment of an arbitrator pursuant to R-14 through R-16 (the Merits Arbitrator), or within 90 days of the date the AAA determined that all administrative filing requirements were satisfied, whichever is later. Requests for consolidation or joinder submitted beyond these timeframes shall not be permitted absent a determination by the Merits Arbitrator that good cause was shown for the late request.
- (b) To request consolidation of arbitrations, the requesting party must have filed a demand for arbitration, including the applicable arbitration provision(s) from the parties' contract(s) and must provide a written request for consolidation which provides the supporting reasons for such request. It is the requesting party's responsibility to provide a copy of the request to all parties at the same time the request is provided to the AAA. The other parties to the arbitration(s) shall provide their written responses to the request for consolidation within 10 days after notice of receipt of the request for consolidation is sent by the AAA.
- (c) To request joinder of parties, the requesting party must file with the AAA a written request to join parties to an existing arbitration which provides the names and contact information for such parties, names and contact information for the parties' representatives, if known, and supporting reasons for such request. The party requesting joinder shall be responsible for simultaneously providing a copy of the joinder request and supporting reasons to all parties to the arbitration and the party or parties sought to be joined. The other parties to the arbitration and the party that is sought to be joined shall provide their written responses to the request for joinder within 14 days after notice of receipt of the request of joinder is sent by the AAA. Any party to an ongoing arbitration administered by the AAA that fails to object to the joinder request shall be deemed to have waived their

objection to the joinder request. If the party sought to be joined is not a party to an ongoing arbitration administered by the AAA, the party seeking joinder shall comply with the provisions of Rule 4(a) as to that party. If no response to the joinder request is received by a party that is not a party to an ongoing arbitration, that party will be deemed to have denied the joinder request.

- (d)** Absent agreement of all parties, the R-7 arbitrator appointed under this Rule shall not be a Merits Arbitrator who is appointed to any pending case involved in the consolidation request at issue.
- (e)** If the R-7 arbitrator determines that separate arbitrations shall be consolidated or that the joinder of additional parties is permissible, that arbitrator may also establish a process for selecting Merits Arbitrators for any ongoing or newly constituted case and, unless agreed otherwise by the parties, the allocation of responsibility for arbitrator compensation among the parties, subject to reapportionment by the arbitrator(s) appointed to the newly constituted case in the final arbitration award.
- (f)** The AAA may take reasonable administrative action to accomplish the consolidation or joinder as directed by the arbitrator. Pending the determination on a consolidation or joinder request, the AAA shall have the authority to stay the arbitration or arbitrations impacted by the consolidation or joinder request.
- (g)** The AAA shall maintain a panel of construction attorneys who have experience with consolidation or joinder issues. All arbitrators appointed to hear requests under this Rule shall be appointed from that panel, unless the parties agree otherwise.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Jurisdiction

- (a)** The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement.
- (b)** The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

- (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-10. Mediation

In all cases where a claim or counterclaim exceeds \$100,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Construction Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, unless the parties' agreement includes a requirement for mandatory mediation, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm to the AAA the completion of any mediation or any decision to opt out of this rule. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-11. Administrative Conference

- (a) Before the appointment of the arbitrator, any party may request, or the AAA in its discretion, may schedule an administrative conference with a representative of the AAA and the parties and/or their representatives.
- (b) The purpose of the administrative conference is to organize and expedite the arbitration, explore administrative details, establish an efficient means of selecting an arbitrator, ascertain the parties' preferred arbitrator qualifications and openness to consider mediation as a dispute resolution option and to address other appropriate concerns of the parties, including but not limited to joinder of parties, consolidation of related cases, and changes to claims. The possibility of proceeding through the submission of documents only, as set out in optional Section D of the Rules, may also be explored.
- (c) Administrative conferences may be convened, at the AAA's discretion or at the request of any party, at other times during the case to address case management matters that do not require the arbitrator's involvement.

R-12. Fixing of Locale (the city, county, state, territory and, if applicable, country of the arbitration)

The parties may mutually agree to the locale where the arbitration is to be held. Any disputes regarding the locale must be submitted to the AAA and all other

parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

- (a) When the parties' arbitration agreement is silent with respect to locale and the parties are unable to agree upon a locale, the locale shall be the city nearest to the site of the project in dispute, as determined by the AAA, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing.
- (b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, the locale shall be that specified in the arbitration agreement.
- (c) If the reference to a locale in the arbitration agreement is ambiguous and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-13. Date, Time and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing and/or conference. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall provide notice of hearing to the parties at least seven calendar days in advance of the hearing date, unless otherwise agreed by the parties or so directed by the arbitrator.

R-14. Arbitrator Appointment from National Construction Panel

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

- (a) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Construction Panel. The parties are encouraged to agree on an arbitrator from the submitted list and to advise the AAA of their agreement.

- (b)** If the parties are unable to agree on an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA.

The parties shall not exchange arbitrator selection lists. If a party does not return the list within the time specified by the AAA, all persons named therein shall be deemed acceptable by that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve.

- (c)** If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the authority to make the appointment from among other members of the National Construction Panel without the submission of additional lists.
- (d)** Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators without the submission of lists.
- (e)** In a three-arbitrator case, the parties shall first attempt to agree on the professional backgrounds for the composition of the arbitration panel. If the parties are unable to agree, then the AAA shall determine the professional composition of the panel, taking into account any preferences expressed by the parties.

The AAA may provide the parties with lists, separated by industry, in order for the parties to select arbitrators from different professional backgrounds. If separate lists are used, the total number of names will be no less than 15, unless the AAA determines otherwise.

R-15. Direct Appointment by a Party

- (a)** If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name, address, telephone number, fax number and email, if known, of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Construction Panel from which the party may, if it so desires, make the appointment.
- (b)** Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of R-20 with respect to impartiality and independence unless the parties have specifically agreed pursuant to R-20(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.
- (c)** If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.

- (d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-16. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

- (a) If, pursuant to Section R-15, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA and the parties have authorized those arbitrators to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.
- (b) If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.
- (c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Construction Panel, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-14, a list selected from the National Construction Panel, and the appointment of the chairperson shall be made as provided in that Section.

R-17. Nationality of Arbitrator in International Arbitration

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-18. Number of Arbitrators

- (a) If the parties have not agreed on the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.
- (b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim must be made to the AAA and the other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-19. Disclosure

- (a) Any person appointed or to be appointed as an arbitrator as well as the parties and their representatives shall disclose to the AAA, as promptly as practicable, any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-42.
- (b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- (c) Disclosure of information pursuant to this Section R-19 is not to be construed as an indication that the arbitrator considers that the disclosed circumstances are likely to affect impartiality or independence.

R-20. Disqualification of Arbitrator

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and may be subject to disqualification for:
 - i. partiality or lack of independence,
 - ii. inability or refusal to perform his or her duties with diligence and in good faith, and
 - iii. any grounds for disqualification provided by applicable law.

The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-15 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

- (b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-21. Communication with Arbitrator and the AAA

- (a) No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator except as follows: A party or anyone acting on behalf of a party may communicate *ex parte* with a candidate for direct appointment pursuant to Section R-15 in order to advise the candidate of the general nature of the controversy, and of the anticipated proceedings and to discuss the candidate's

qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.

- (b)** R-21(a) does not apply to arbitrators directly appointed by the parties who, pursuant to R-20(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under R-20(a), the AAA shall as an administrative practice suggest to the parties that they agree further that R-21(a) should nonetheless apply prospectively.
- (c)** In the course of administering an arbitration, the AAA and the parties or anyone acting on behalf of any of the parties may communicate with each other either jointly or individually.
- (d)** As set forth in R-44, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-22. Vacancies

- (a)** If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules.
- (b)** In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.
- (c)** In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-23. Preliminary Management Hearing

- (a)** At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.
- (b)** At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-24. Pre-Hearing Exchange and Production of Information

- (a) Authority of arbitrator.** The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.
- (b) Documents.** The arbitrator may, on application of a party or on the arbitrator's own initiative:
- i. require the parties to exchange documents in their possession or custody on which they intend to rely;
 - ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;
 - iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and
 - iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-25. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-23 and R-24 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

- (a)** conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;
- (b)** imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;
- (c)** allocating costs of producing documentation, including electronically stored documentation;
- (d)** in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or

making special allocations of costs or an interim award of costs arising from such non-compliance; and

- (e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-26. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any person other than a party and its representative.

R-27. Representation

Any party may participate without representation (*pro se*), or by counsel or any other representative of that party's choosing, unless such choice is prohibited by applicable law. A party intending to have representation shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-28. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-29. Stenographic Record

- (a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least seven calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.
- (b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.

- (c) If the transcript or any other recording is agreed on by the parties and determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.
- (d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-30. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-31. Postponements of Hearings

The arbitrator for good cause shown may postpone any hearing upon agreement of the parties, upon request of a party, or upon the arbitrator's own initiative.

R-32. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award in whatever form the arbitrator deems appropriate, including conducting the hearings through document submissions only, videoconference, or telephonically.

R-33. Conduct of Proceedings

- (a) The claimant shall present evidence to support its claim. The respondent shall then present evidence supporting its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
- (b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.
- (c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must still afford a full opportunity for all

parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide an opportunity for cross-examination.

- (d) The parties may agree to waive oral hearings in any case.

R-34. Dispositive Motions

Upon prior written application, the arbitrator may permit motions that dispose of all or part of a claim, or narrow the issues in a case.

R-35. Evidence

- (a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.
- (b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered. The arbitrator may request offers of proof and may reject evidence deemed by the arbitrator to be cumulative, unreliable, unnecessary, or of slight value compared to the time and expense involved. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where:
 - 1) any of the parties is absent, in default, or has waived the right to be present, or
 - 2) the parties and the arbitrators agree otherwise.
- (c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.
- (d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently. Parties who request that an arbitrator sign a subpoena shall provide a copy of the request and proposed subpoena to the other parties to the arbitration simultaneously upon making the request to the arbitrator.

R-36. Evidence by Affidavit and Post-Hearing Filing of Documents or Other Evidence

- (a) The arbitrator may receive and consider the evidence of witnesses by declaration or affidavit, and shall give it such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.
- (b) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.

- (c) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.
- (d) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence, unless otherwise agreed by the parties and the arbitrator, shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-37. Inspection or Investigation

An arbitrator finding it necessary to make a site inspection or other investigation in connection with the arbitration shall set the date and time for such inspection or investigation and shall direct the AAA to so notify the parties. Any party who so desires may be present at such an inspection or investigation. Absent agreement of the parties, the arbitrator shall not undertake a site inspection unless all parties are present. In the event of a case proceeding in the absence of a party pursuant to Section R-32 of these Rules, agreement of the parties for the arbitrator to proceed without all parties present is not necessary so long as sufficient notice of the inspection or investigation is provided.

R-38. Interim Measures

- (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.
- (b) Such interim measures may be taken in the form of an interim award, and the arbitrator may require security for the costs of such measures. If it has been determined that an interim award is needed, the arbitrator shall establish a reasonable due date for issuing the interim award. In the event an arbitrator does not promptly establish such a due date, the AAA shall set the due date.
- (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.
- (d) The arbitrator shall have the discretion to apportion costs associated with the application for any interim relief in the interim award or in the final award.

R-39. Emergency Measures of Protection

- (a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after July 1, 2015.
- (b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.
- (c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.
- (d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or videoconference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 9, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 39.
- (e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.
- (f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.
- (g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.
- (h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a

special master to consider and report on an application for emergency relief, the AAA shall proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

- (i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-40. Closing of Hearing

- (a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.
- (b) If documents or responses are to be filed as provided in Section R-36 (d) or if briefs are to be filed, the hearing shall be declared closed as of the final due date set by the arbitrator for the receipt of documents, responses, or briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.
- (c) The time limit in which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for the rendering of the award only in unusual and extreme circumstances.

R-41. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties, the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Fast Track Procedures).

R-42. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-43. Extensions of Time

- (a) The parties may modify any period of time by mutual agreement, provided that any such modification that adversely affects the efficient resolution of the dispute is subject to review and approval by the arbitrator. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except as set forth in R-40 (c).
- (b) The AAA shall notify the parties of any extension.

R-44. Serving of Notice

- (a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.
- (b) The AAA, the arbitrator and the parties may also use overnight delivery, electronic fax transmission (fax), or electronic mail (email) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by other methods of communication.
- (c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-45. Majority Decision

- (a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement, a majority of the arbitrators must make all decisions; however, in a multi-arbitrator case, if all parties and all arbitrators agree, the chair of the panel may make procedural decisions.
- (b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve or delegate to another member of the panel to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-46. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of

closing the hearing, or if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-47. Form of Award

- (a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.
- (b) In all cases, unless waived by agreement of the parties, the arbitrator shall provide a concise written financial breakdown of any monetary awards and, if there are non-monetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each non-monetary claim or counterclaim.
- (c) The parties may request a specific form of award, including a reasoned opinion, an abbreviated opinion, findings of fact, or conclusions of law no later than the conclusion of the first Preliminary Management Hearing. If the parties agree on a form of award other than that specified in R-47 (b) of these Rules, the arbitrator shall provide the form of award agreed upon. If the parties disagree with respect to the form of the award, the arbitrator shall determine the form of award. After the conclusion of the Preliminary Management Hearing, the parties may not change the form of the award without the arbitrator's express consent. In such event, the arbitrator shall confirm the nature of the change to the form of award.

R-48. Scope of Award

- (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, equitable relief and specific performance of a contract.
- (b) In addition to the final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.
- (c) In the final award, the arbitrator shall assess fees, expenses, and compensation as provided in Sections R-55, R-56, and R-57. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.
- (d) The award of the arbitrator may include:
 - i. interest at such rate and from such date as the arbitrator may deem appropriate; and
 - ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-49. Award Upon Settlement

- (a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.
- (b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation amounts have been paid in full.

R-50. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at the last known address, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-51. Modification of Award

- (a) Within 20 calendar days after the transmittal of an award, the arbitrator on his or her initiative, or any party, upon notice to the other parties, may request that the arbitrator correct any clerical, typographical, technical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided.
- (b) If the modification request is made by a party, the other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.
- (c) If applicable law provides a different procedural time frame, that procedure shall be followed.

R-52. Release of Documents

The AAA shall, upon the written request of a party to the arbitration, furnish to that party, at its expense, copies or certified copies of papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-53. Withdrawal of Claims or Counterclaims

- (a) Once the AAA has provided notice to the parties that the filing requirements for a claim or counterclaim have been met, no claim or counterclaim may be withdrawn unless the parties agree or the arbitrator consents.
- (b) Disputes regarding whether a claim or counterclaim is withdrawn with or without prejudice may be decided by the arbitrator.

R-54. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these Rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to these Rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these Rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages, injunctive or declaratory relief for any act or omission in connection with any arbitration under these rules.
- (e) Parties to an arbitration under these Rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-55. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees and service charges to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable.

The filing fee shall be advanced by the party or parties, subject to final apportionment by the arbitrator in the award.

The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-56. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-57. Neutral Arbitrator's Compensation

- (a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.
- (b) Absent an agreement of the parties otherwise, or as determined by an arbitrator appointed under the auspices of Section R-7, each party shall share equally in the compensation of the arbitrator, subject to reapportionment in the final award. In the event that multiple parties are participating in the arbitration through a single representative, the AAA may consider them a single party for the purpose of allocating arbitrator compensation.
- (c) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the Association and confirmed to the parties.
- (d) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.
- (e) The arbitrator's requests for payment shall be made available to the parties upon request.

R-58. Deposits

- (a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.
- (b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity or length of each case.
- (c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation of the arbitrator's request for deposits.

R-59. Remedies for Nonpayment

- (a) If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.
- (b) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator issue an order directing what measures might be taken in light of a party's non-payment.

Such measures may include limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim. The arbitrator must provide the party opposing a request for such

measures with the opportunity to respond prior to making any such determination. In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments, to submit such evidence as the arbitrator may require for the making of an award.

- (c)** Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.
- (d)** If the arbitrator's compensation or administrative fees remain unpaid after a determination to suspend an arbitration due to nonpayment, the arbitrator has the authority to terminate the proceedings. Such an order shall be in writing and signed by the arbitrator.

R-60. Sanctions

- (a)** The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to the making of an award. The arbitrator may not enter a default award as a sanction.
- (b)** The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanction's application.

Preliminary Hearing Procedures

P-1. General

- (a)** In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.
- (b)** Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

- (a)** The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:
 - (i)** the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-10;
 - (ii)** whether all necessary or appropriate parties are included in the arbitration;
 - (iii)** whether a party will seek a more detailed statement of claims, counterclaims, or defenses;
 - (iv)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
 - (v)** which
 - (a)** arbitration rules,
 - (b)** procedural law, and
 - (c)** substantive law govern the arbitration;
 - (vi)** whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation:
 - (a)** any preconditions that must be satisfied before proceeding with the arbitration;
 - (b)** whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
 - (c)** consolidation of the claims or counterclaims with another arbitration; or
 - (d)** bifurcation of the proceeding.

- (vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;
 - (viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;
 - (ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;
 - (x) whether any measures are required to protect confidential information;
 - (xi) whether the parties intend to present evidence from expert witnesses and, if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;
 - (xii) whether, according to a schedule set by the arbitrator, the parties will:
 - (a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;
 - (b) exchange and pre-mark documents that each party intends to submit; and
 - (c) exchange pre-hearing submissions, including exhibits;
 - (xiii) the date, time and place of the arbitration hearing;
 - (xiv) whether, at the arbitration hearing:
 - (a) testimony may be presented in person, in writing, by videoconference, via the internet, telephonically, or by other reasonable means;
 - (b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;
 - (xv) whether any procedure needs to be established for the issuance of subpoenas;
 - (xvi) the identification of any ongoing, related litigation or arbitration;
 - (xvii) whether post-hearing submissions will be filed;
 - (xviii) the form of the arbitration award; and
 - (xix) any other matter the arbitrator considers appropriate or a party wishes to raise.
 - (xx) whether any site visits will be required and timing of said visits.
- (b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Procedures for the Resolution of Disputes through Document Submission

D-1. Applicability

- (a)** In any case, regardless of claim size, the parties may agree to waive in-person hearings and resolve the dispute through submission of documents to one arbitrator. Such agreement should be confirmed in writing no later than the deadline for the filing of an answer.
- (b)** If one party makes a request to use the Procedures for the Resolution of Disputes through Document Submission (D-Procedures) and the opposing party is unresponsive, the arbitrator shall have the power to determine whether to proceed under the D-Procedures. If both parties seek to use the D-Procedures after the appointment of an arbitrator, the arbitrator must also consent to the process.
- (c)** When parties agree to the D-Procedures, the procedures in Sections D-1 through D-4 of these Rules shall supplement other portions of these rules which are not in conflict with the D-Procedures.

D-2. Preliminary Management Hearing

Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator shall convene a preliminary management hearing, via conference call, videoconference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.

D-3. Removal From the D-Procedures

- (a)** The arbitrator has the discretion to remove the case from the D-Procedures if the arbitrator determines that an in-person hearing is necessary.
- (b)** If the parties agree to in-person hearings after a previous agreement to proceed under the D-Procedures, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to the D-Procedures, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.

D-4. Time of Award

- (a)** The arbitrator shall establish the date for either final written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.

- (b)** Unless the parties have agreed to a form of award other than that set forth in Rule R-47 (b), when the parties have agreed to resolve their dispute by the D-Procedures, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.
- (c)** If the parties agree to a form of award other than that described in Rule R-47 (b), the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.
- (d)** The award is subject to all other provisions of the Regular Track of these Rules which pertain to awards.

Fast Track Procedures

F-1. Fast Track Applicability

The Fast Track Procedures shall apply to all two-party cases where no party's disclosed claim or counterclaim exceeds \$100,000.

If a claim or counterclaim is amended to exceed \$100,000, the case will be administered under the Regular Track Procedures (or Large, Complex Case Procedures, if applicable) unless all parties agree that the case may continue to be processed under the Fast Track Procedures.

The AAA, in its discretion, may reassign a matter to the Regular Track Procedures or, if applicable, Large, Complex Case Procedures, upon the occurrence of any of the following events:

- (a) the case is to be decided by more than one arbitrator;
- (b) the parties agree to any information exchange beyond that permitted by Section F-8;
- (c) the timing of the case exceeds the Time Standards set forth in Section F-12; or
- (d) hearing time exceeds what is allowable under Section F-11.

Where no party's claim exceeds \$25,000, exclusive of interest, attorneys' fees and arbitration costs, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing or conference call is necessary. The arbitrator shall establish a fair and equitable procedure for the submission of documents, as set forth in the D-Procedures of these Rules.

F-2. Answers and Counterclaims

If an answer or counterclaim is to be filed, it shall be filed within seven calendar days after notice of the filing of the demand is sent by the AAA. All other requirements of Section R-4 apply.

F-3. Limitation on Extensions

- (a) In the absence of extraordinary circumstances, the AAA may grant no more than one seven-calendar-day extension of the time in which to respond to a demand for arbitration or a counterclaim as provided in F-2.
- (b) All other requests for extensions of time are subject to Sections F-12 and R-43 of these Rules, as applicable.

F-4. Changes of Claim or Counterclaim

- (a) A party may increase or decrease the amount of its claim or counterclaim up to seven calendar days prior to the first scheduled hearing, subject to the provisions of F-1. Such changes must be made in writing and provided to the AAA and the opposing party.
- (b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of seven calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed no new or different claim or counterclaim may be submitted without the arbitrator's consent.

F-5. Appointment and Qualification of Arbitrator

- (a) Immediately after the filing of the submission or the answering statement or the expiration of the time within which the answering statement is to be filed, the AAA shall simultaneously submit to each party an identical list of five names from the Construction Panel from which one arbitrator shall be appointed.
- (b) The parties are encouraged to agree to an arbitrator from this list, and to advise the Association of their agreement.
- (c) If the parties cannot agree upon an arbitrator, each party may strike up to two names from the list and rank the remaining names in order of preference. The list shall be returned to the AAA within seven calendar days of the AAA's transmission of the list. If a party does not return the list by the due date, all names shall be deemed acceptable to that party.
- (d) The AAA will appoint the agreed-upon arbitrator, or in the event the parties cannot agree on an arbitrator, will designate the arbitrator from among those names not stricken. The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in R-20.
- (e) Within the time period established by the AAA, the parties shall notify the AAA of any objection to the arbitrator appointed. Any objection by a party to the arbitrator shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.
- (f) Absent agreement of the parties, the arbitrator shall not have served as the mediator in the mediation phase of the instant proceeding.
- (g) In the event the AAA is unable to appoint an arbitrator from the first list submitted, the AAA is empowered to appoint an arbitrator without the submission of additional lists.

F-6. Serving of Notice for Hearing

In addition to notice being provided according to the means specified in R-44, parties shall accept notice of hearings, including preliminary hearings, by telephone, email, AAA WebFile, fax, or mail.

F-7. Preliminary Telephone Management Hearing

- (a) A preliminary telephone conference shall be held among the parties or their representatives and the arbitrator within 10 business days from the confirmation of the arbitrator's appointment.
- (b) During this conference, the arbitrator shall direct the parties' preparations and presentations so that the Fast Track F-12 Time Standards can be met. Arrangements made during the Preliminary Management Hearing shall be confirmed in writing to the parties.

F-8. Exchange of Information

At least five business days prior to the hearing or no later than the date established by the arbitrator, the parties shall (a) exchange directly between themselves copies of all exhibits, affidavits and any other information they intend to submit at the hearing, and (b) identify all witnesses they intend to call at the hearing. The arbitrator is authorized to resolve any disputes concerning the exchange of information.

F-9. Discovery

There shall be no discovery, except as provided in F-8 or as ordered by the arbitrator in exceptional cases.

F-10. Date, Time and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing. The hearing shall be set so that the time standards in F-12 will be satisfied. The AAA will notify the parties in advance of the hearing date.

F-11. The Hearing

The hearing should not exceed one day. For good cause shown, the arbitrator may schedule additional time, which shall not exceed the equivalent of one day. The arbitrator shall schedule any additional time so as to comply with the F-12

Time Standards. At the discretion of the arbitrator, this additional time can take the form of an in-person meeting, a conference call, or some other means of taking testimony, provided that each party has the right to be heard and is given a fair opportunity to present its case.

F-12. Time Standards

The hearing shall be closed no later than 45 calendar days after the date of the preliminary telephone conference, unless all parties and the arbitrator agree otherwise or the arbitrator extends this time in extraordinary cases when the demands of justice require it and such agreement is memorialized by the arbitrator prior to the expiration of the initial 45-day period. Such report shall include the reason for the extension of the Time Standards. The AAA may extend the Time Standards in the event the parties agree to AAA mediation.

F-13. Time of Award

The award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

F-14. Neutral Arbitrator's Compensation

Arbitrators serving on Fast Track cases will receive compensation at rates established by the AAA.

Procedures for Large, Complex Construction Disputes

L-1. Applicability

Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes (hereinafter LCC) shall apply to all cases administered by the AAA under the Construction Industry Arbitration Rules in which the disclosed claim or counterclaim of any party is \$1,000,000 or more, exclusive of claimed interest, attorneys' fees and arbitration fees and costs. Parties may agree to use these Procedures in cases involving claims or counterclaims under \$1,000,000 or in cases involving non-monetary claims. The LCC Procedures are designed to complement the Regular Track of these Rules. To the extent there is any conflict between the Regular Track and the LCC procedures, the LCC Procedures shall control.

L-2. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference call will take place within 14 calendar days after the notice that the administrative filing requirements have been satisfied. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- (a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) to discuss the views of the parties about the technical and other qualifications of the arbitrator as well as an efficient method for selecting the arbitrator;
- (c) to obtain conflicts statements from the parties;
- (d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate;
- (e) to identify whether there are other related arbitrations for potential consolidation or parties who may request to join the arbitration;
- (f) to discuss means and methods for cost-effective case management; and
- (g) to discuss any other items which may facilitate the management of a complex arbitration.

L-3. Arbitrators

- (a) Large, Complex Construction Cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. If the parties are unable to agree, three arbitrators shall hear the case.
- (b) The parties are encouraged to agree upon a method for selection of the arbitrator(s). The AAA shall appoint arbitrator(s) by the method agreed upon by the parties.
- (c) If the parties are unable to agree on a method of appointment, the AAA shall appoint the arbitrators from the Large, Complex Construction Case Panel, in the manner provided in the Regular Construction Industry Arbitration Rules. The AAA shall determine the number of names on the list(s).
- (d) Absent agreement of the parties, the arbitrator shall not have served as the mediator in the mediation phase of the instant proceeding.

L-4. Preliminary Management Hearing and Management of Proceedings

- (a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Construction Dispute.
- (b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.
- (c) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with R-24 of the AAA Construction Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.
- (d) The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator may place such limitations on the conduct of such discovery as the arbitrator shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator, consistent with the expedited nature of arbitration, may establish the extent of the discovery.
- (e) Parties shall cooperate in the exchange of documents, exhibits and information within such party's control if the arbitrator considers such production to be consistent with the goal of achieving a just, efficient and cost-effective resolution of a Large, Complex Construction Case.
- (f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.

- (g) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.
- (h) The arbitrator, or any single member of the arbitration panel, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in R-24 and R-25 of the AAA Construction Rules.
- (i) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

L-5. Form of Award

In addition to the award requirements set forth in R-47 (a) and (b) unless the parties agree otherwise, the arbitrator shall issue a reasoned award.

Administrative Fee Schedules (Standard And Flexible Fee)

*FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT **www.adr.org/feeschedule**.*

Construction Industry Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association (AAA) or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedures, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail, or fax. Requests for mediation may also be filed online via AAA WebFile at **www.adr.org**.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

- i. a copy of the mediation provision of the parties' contract or the parties' stipulation to mediate;
- ii. the names, regular mail addresses, email addresses (if available), and telephone numbers of all parties to the dispute and representatives, if any, in the mediation;
- iii. a brief statement of the nature of the dispute and the relief requested;
- iv. any specific qualifications the mediator should possess.

M-3. Fixing of Locale (the city, county, state, territory and, if applicable, country of the Mediation)

- (a) When the parties' agreement to mediate is silent with respect to locale and the parties are unable to agree upon a locale, the locale shall be the city nearest to the site of the construction project in dispute as determined by the AAA.

- (b) When the parties' agreement to mediate requires a specific locale, absent the parties' agreement to change it, the locale shall be that specified in the agreement to mediate.
- (c) If the reference to a locale in the agreement to mediate is ambiguous, the AAA shall have the authority to consider the parties' arguments and determine the locale.

M-4. Representation

Any party may participate without representation (*pro se*), or by any representative of that party's choosing, or by counsel, unless such choice is prohibited by applicable law. A party intending to have representation shall notify the other party and the AAA of the name, telephone number and address, and email address if available of the representative.

M-5. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

- i. Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.
- ii. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable to that party. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.
- iii. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-6. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the *Model Standards* and any provision of these Mediation

Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-7. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-5.

M-8. Duties and Responsibilities of the Mediator

- i. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
- ii. The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person, or otherwise.
- iii. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

- iv. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
- v. In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties for a period of time in an ongoing effort to facilitate a complete settlement.
- vi. The mediator is not a legal representative of any party and has no fiduciary duty to any party.
- vii. The mediator shall set the date, time, and place for each session of the mediation conference. The parties shall respond to requests for conference dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established conference schedule. The AAA shall provide notice of the conference to the parties in advance of the conference date, when timing permits.

M-9. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s), the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-10. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-11. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

- i. views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- ii. admissions made by a party or other participant in the course of the mediation proceedings;
- iii. proposals made or views expressed by the mediator; or
- iv. the fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-12. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-13. Termination of Mediation

The mediation shall be terminated:

- i. by the execution of a settlement agreement by the parties; or
- ii. by a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- iii. by a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
- iv. when there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-14. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act, or omission in connection with any mediation conducted under these procedures. Parties to a mediation under these procedures may not call the mediator, the AAA, or AAA employees as a witness in litigation or any

other proceeding relating to the mediation. The mediator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

M-15. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-16. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-17. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

Cost of Mediation

*FOR THE CURRENT ADMINISTRATIVE FEE SCHEDULE, PLEASE VISIT **www.adr.org/feeschedule**.*

Regional Vice Presidents

States: Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia

Michael Marra
Vice President
Phone: 215.731.6136
Email: MarraM@adr.org

States: Alabama, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, West Virginia, Wisconsin

Linda Beyea
Vice President
Phone: 888.320.3490
Email: BeyeaL@adr.org

States: Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, Wyoming

Rodney Toben
Vice President
Phone: 972.774.6947
Email: TobenR@adr.org

States: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington

Michael Powell
Vice President
Phone: 213.362.1900
Email: PowellM@adr.org

Case Management Vice Presidents and Directors

Jeffrey Garcia
Vice President
Phone: 559.490.1860
Email: GarciaJ@adr.org
Administers cases in AK, AZ, CA, CO, HI, ID, MT, NM, NV, OR, UT, WA, WY

John M. Bishop
Vice President
Phone: 404.320.5150
Email: BishopJ@adr.org
Administers cases in AL, DC, FL, GA, IN, KY, MD, NC, OH, SC, TN, VA

Harry Hernandez
Director
Phone: 972.774.6905
Email: HernandezH@adr.org
Administers cases in AR, IA, IL, KS, LA, MN, MO, MS, ND, NE, OK, SD, TX, WI

Yvonne Baglini
Director
Phone: 866.293.4053
Email: BagliniY@adr.org
Administers cases in CT, DE, MA, ME, MI, NH, NJ, NY, PA, RI, VT, WV



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