

RULES FOR ARBITRATION OF CCDC 2 CONSTRUCTION DISPUTES¹ (FOR USE WITH CCDC CONTRACT FORMS)

INTRODUCTION

Arbitration is the most formal of all ADR procedures. That is probably because the law governs its essential elements, because lawyers are often present at the process and are more comfortable with a greater degree of formality and because the award is binding on the parties and enforceable in the courts. The role of the arbitrator is to weigh and assess evidence presented by the parties. The arbitrator has the ability to call witnesses and to retain experts. The rules of evidence do not necessarily apply but the arbitrator cannot usually exclude evidence that a court would otherwise admit.

PART I GENERAL

Interpretation

1.1 Definitions - In these Rules

- (a) the terms and phrases have the same meanings as may be attributed to them under
 - (i) the arbitration legislation of the jurisdiction in which the arbitration under these Rules is conducted, and
 - (ii) the Contract,
- (b) "the Contract" means the CCDC contract containing the agreement to refer disputes to arbitration under these Rules,
- (c) "the Court" means the superior court of the jurisdiction in which the arbitration is to be conducted, and
- (d) "the parties" mean the parties to the Contract.

1.2 Time - In these Rules, time shall be calculated in the same manner as time is calculated in the Contract.

1.3 Arbitral Tribunal - In these Rules, a reference to an arbitrator includes a reference to a 3-person arbitral tribunal.

Application of Rules

2.1 Application - These Rules apply to an arbitration conducted under the Contract.

2.2 Variation of Rules - The parties may, by agreement in writing, change or make additions to these Rules.

2.3 Conflict of Provisions - If any provision of these Rules is inconsistent with or contrary to a mandatory provision of the arbitration legislation of the jurisdiction in which the arbitration under these Rules is conducted, the mandatory provision of the arbitration legislation shall be applied.

Communications

3.1 Written - All written communications under these Rules shall be given in the same manner as written notices are to be given in the Contract.

3.2 Copies to Arbitrator - A copy of all written communications between the arbitrator and a party shall be given to the other party at the same time.

¹ *Ed. Notes: These rules have been specifically developed for use with CCDC contract forms. They should not be used for other contract disputes and should not be amended or changed without proper legal advice. These rules may be amended from time to time. Parties should verify that they are using the most current rules when proceeding to arbitration.*

- 3.3 Oral - There shall not be any oral communications with respect to the issues in dispute between a party and the arbitrator unless it is made in the presence of both parties or their legal representatives.

Objections to Process

- 4.1 Early Objection - A party shall state any objections to any aspect of the arbitral proceedings or to the conduct of the other party or the arbitrator at the earliest possible time.
- 4.2 Arbitrator's Discretion - The arbitrator may refuse to consider an objection if a party fails to comply with clause 4.1.

Location of Arbitration

- 5.1 Location - The arbitration shall be conducted in the jurisdiction of the Place of the Work at a location to be determined by agreement of the parties.

PART II PRE-ARBITRATION CONSIDERATIONS

Notice to Arbitrate

- 6.1 Contents of Notice - Either party (the claimant) shall submit a dispute to arbitration, as permitted under the Contract, by giving the other party (the respondent) a written notice containing the following:
- (a) a description of the Contract;
 - (b) a statement of the issue in dispute;
 - (c) a request that the dispute be referred to arbitration;
 - (d) a description of the claim being made;
 - (e) the name or names of proposed arbitrators, along with the resume described in clause 8.6.

Commencement of Arbitration

- 7.1 Deemed to Commence - For purposes of the calculation of time under the Rules, the arbitration shall be deemed to have commenced on the later of
- (a) the date the respondent receives the notice under clause 6.1, or
 - (b) the applicable date referred to in the Contract.

Appointment of Arbitrator

- 8.1 Single Arbitrator - Subject to clause 8.2, the arbitration shall be conducted before a single arbitrator who possesses the qualifications specified in clause 8.5.
- 8.2 Three Arbitrators - The arbitration shall be conducted before 3 arbitrators, each of whom possess the qualifications specified in clause 8.5, if
- (a) the amount in dispute exceeds \$250,000, and
 - (b) one of the parties gives written notice of a request for 3 arbitrators within 15 days after the arbitration commences.
- 8.3 Appointment of Single Arbitrator - The parties shall make every reasonable effort to reach agreement on a single arbitrator within 30 days after the arbitration commences.
- 8.4 Appointment of 3 Arbitrators - If the arbitration is to be conducted before 3 arbitrators,
- (a) each party shall appoint an arbitrator within 30 days after the arbitration commences, and
 - (b) the 2 appointed arbitrators shall make every reasonable effort to reach agreement on a third arbitrator who shall be chairperson within 45 days after the arbitration commences.

- 8.5 Qualifications - An arbitrator must be impartial and independent of the parties and be an experienced and skilled commercial arbitrator and preferably shall reside or conduct business in the jurisdiction of the Place of the Work and have knowledge of relevant construction industry issues.
- 8.6 Resume - If a person proposes an individual as an arbitrator, the person shall provide a written resume of that individual's work background, qualifications and arbitration experience.
- 8.7 No Agreement Possible - If
- (a) an agreement is not possible under clause 8.3 or 8.4(b), or
 - (b) a party fails to make an appointment under clause 8.4(a),
- either party may make a written request, with a copy to the other party, to the neutral appointing authority named in the Supplementary Conditions to the Contract or, if none is named, to the Court to appoint an arbitrator as soon as possible.
- 8.8 Considerations - In making an appointment under clause 8.7, the neutral appointing authority or the Court shall give due consideration to the nature of the Contract, the issue in dispute, the required qualifications of the arbitrator and any other aspects which will help to identify an appropriately qualified, independent and impartial arbitrator.
- 8.9 Party Suggestions - The parties may make written suggestions to the neutral appointing authority or to the Court on individuals whom they believe would be suitable for appointment, but the appointing authority or the Court is not restricted to any individuals suggested.
- 8.10 Arbitrator's Statement - Before accepting an appointment, an arbitration shall provide the parties with a written statement declaring that there are no circumstances likely to give rise to justifiable doubts as to the arbitrator's independence or impartiality and that the arbitrator will disclose any such circumstances to the parties if they should arise before the arbitration is concluded.
- 8.11 Replacement - A single arbitrator who resigns for any reason, is unable or refuses to act or is removed from office, shall be replaced by another arbitrator under these Rules and any oral hearings previously held shall be rescheduled.
- 8.12 Court Order - If the parties do not agree that the circumstances specified in clause 8.11 exist, either party may apply to the Court for an order that the arbitrator should be replaced as required under clause 8.11.

Procedural Meeting

- 9.1 Agenda of Procedural Meeting - Within 5 days after being appointed, the single arbitrator or the chairperson of the arbitral tribunal shall convene a procedural meeting of the parties to reach a consensus, if possible, and to make orders, if necessary, on
- (a) the procedure to be followed in the arbitration,
 - (b) the time periods for taking steps in the proceedings,
 - (c) the scheduling of any oral hearings or meetings,
 - (d) any preliminary applications or objections a party may have, and
 - (e) any other matter which will assist the arbitration to proceed in an efficient and expeditious manner taking into account the complexity and numbers of issues in dispute.
- 9.2 Record of Procedural Meeting - The arbitrator shall prepare and distribute promptly to the parties a written record of all the business transacted and decisions and orders made at the procedural meeting in clause 9.1.
- 9.3 Conference Call - The procedural meeting in clause 9.1 may be conducted by conference call.

Powers of the Arbitrator

- 10.1 Conduct of Proceedings - Subject to any limitations in these Rules or any agreement reached by the parties, the arbitrator may conduct the arbitration in any manner the arbitrator considers appropriate but each party shall be treated fairly and shall be given full opportunity to present its case.
- 10.2 Ruling on Jurisdiction - The arbitrator may rule on the arbitrator's jurisdiction.
- 10.3 Discretion - The arbitrator may
- (a) adjourn the proceedings from time to time to facilitate settlement discussions between the parties or for any other reasonable purpose,
 - (b) make an interim order on any matter with respect to which a final award may be made, including an interim order for preservation of property which is subject matter of the dispute,
 - (c) order inspection of documents, exhibits or other property at any location,
 - (d) order the recording of any oral hearing or meeting,
 - (e) inspect the Place of the Work after giving the parties 7 days written notice of the intention to do so, and
 - (f) if the arbitrator considers it just and appropriate in the circumstances, extend or abridge a period of time
 - (i) required in these Rules, except a period of time specified under clause 18.2, or
 - (ii) fixed or determined by the arbitrator.
- 10.4 Decisions - If an arbitration is before a 3-person arbitral tribunal, the award may be made by a majority of arbitrators, but if there is no majority decision on any matter to be decided, the decision of the chairperson shall be the decision of the tribunal on that matter.

PART III PROCEEDINGS

Exchange of Statements

- 11.1 Time Limits - The parties shall exchange written statements of their respective positions in the dispute in the following manner:
- (a) the claimant shall give a statement outlining the facts, the matters in issue and the relief or remedy requested not later than 14 days after the procedural meeting is held in clause 9.1;
 - (b) the respondent shall give a statement outlining the response to the claimant's statement and the respondent's counterclaim, if any, not later than 14 days after receiving the claimant's statement;
 - (c) the respondent to the counterclaim shall give a statement outlining the defence to the counterclaim not later than 14 days after receiving the counterclaim.
- 11.2 Copies to Arbitrator - The parties shall provide the arbitrator with copies of the statements exchanged in clause 11.1.
- 11.3 List of Documents - Each party shall attach to each statement provided in clause 11.1 a list of documents
- (a) upon which the party intends to rely, and
 - (b) which describes each document by kind, date, author, addressee and subject matter.
- 11.4 Amendment of Statement - During the proceedings the arbitrator may allow a party to amend or add to any statement made in clause 11.1, including the list of documents, unless
- (a) the amendment or addition goes beyond the terms of the arbitration agreement in the Contract, or
 - (b) the other party would be prejudiced by the delay in making the amendment or addition.

Disclosure

- 12.1 Production of Documents - The arbitrator may order a party to produce, within a specified time, any documents which
- (a) have not been listed under clause 11.3,
 - (b) the party has in its care, custody or control, and
 - (c) the arbitrator considers to be relevant.
- 12.2 Access to Documents - Each party shall allow the other party the necessary access at reasonable times to inspect and take copies of all documents that the former party has listed in clause 11.3 or that the arbitrator has ordered to be produced in clause 12.1.
- 12.3 Agreed Statement of Facts - The parties shall prepare and send to the arbitrator an agreed statement of facts within the time specified by the arbitrator.
- 12.4 Witness Statements/Summaries - Not later than 21 days before any oral hearing commences, each party shall give the other party
- (a) the name and address of any witness and a written summary of the witness's evidence, and
 - (b) in the case of an expert witness, a written statement or report prepared by the expert witness.
- 12.5 Assembly of Documents - Not later than 15 days before the oral hearing commences, each party shall give to the other party and the arbitrator an assembly of all documents to be introduced at the hearing.

Hearings and Meetings

- 13.1 Notice - The arbitrator shall give the parties written notice of not less than
- (a) 7 days of any oral hearings, or
 - (b) 3 days of any meetings
- that have not been previously scheduled under clause 9.1.
- 13.2 Private and Confidential - All oral hearings and meetings in the arbitration shall be conducted in private and all written communications and documents in respect of these proceedings shall be kept strictly confidential by the arbitrator and the parties.
- 13.3 Consecutive Hearings - Oral hearings shall be scheduled for consecutive days until completion.

Evidence

- 14.1 Rules of Evidence Not Required - The arbitrator shall not be required to apply the legal rules of evidence and shall determine the relevance and materiality of the evidence presented.
- 14.2 Taking Oral Evidence - All oral evidence shall be taken in the presence of the arbitrator and all the parties unless a party is absent by default or has waived the right to be present.
- 14.3 Oath/Affirmation - The arbitrator may order any individual to be examined by the arbitrator under oath or on affirmation in relation to the issues in dispute and to produce before the arbitrator all relevant documents within the individual's care, custody or control.
- 14.4 Document Assemblies - The document assemblies delivered under clause 12.5 shall be deemed to have been entered into evidence at the oral hearing without further proof and without being read out at the hearing but a party may challenge the admissibility of any document so introduced.
- 14.5 Discretion - If the arbitrator considers it just and reasonable to do so, the arbitrator may permit a document to be introduced at the oral hearing which was not previously listed under clause 11.3 or produced as required under clause 12.1 or 12.5, but the arbitrator may take that failure into account when fixing the costs to be awarded in the arbitration.

- 14.6 Cross Examination - If the arbitrator permits the evidence of a witness to be presented as a written statement, the other party may require that witness to be made available for cross examination at the oral hearing.
- 14.7 Arbitrator called Witness - The arbitrator may order a witness to appear and give evidence, and, in that event, the parties may cross examine that witness and call evidence in rebuttal.

Arbitrator Retained Experts

- 15.1 Experts Retained - After consultation with the parties, the arbitrator may
- (a) retain one or more experts to give the arbitrator a written report on specific issues, and
 - (b) for that purpose, require a party to make available relevant documents, goods or other property for the expert's inspection.
- 15.2 Copies of Report - The arbitrator shall give a copy of the expert's report to the parties who shall have the opportunity to reply to it.
- 15.3 Production/Inspection of Information - On a request of a party, an expert retained under clause 15.1 shall
- (a) make available to the party for inspection all documents, goods or other property in the expert's possession which were provided to the expert, and
 - (b) provide the party with a list of all documents, goods or other property not in the expert's possession, but which were provided to the expert, and a description of the location of those documents, goods or other property.
- 15.4 Right to Cross Examine - The parties may cross examine an expert on the report prepared under clause 15.1 and may call evidence in rebuttal.

Default of Parties

- 16.1 Claimant Failure - If a claimant, without sufficient cause and after 5 days notice from the arbitrator, fails to provide the statement required in clause 11.1(a), the arbitrator may terminate the arbitration with respect to that claim.
- 16.2 Respondent Failure - If the respondent or the respondent to the counterclaim, without sufficient cause and after 5 days notice from the arbitrator, fails to provide the statement required in clause 11.1(b) or (c), the arbitrator shall
- (a) continue the arbitration, and
 - (b) require the claimant or the claimant by counterclaim, as the case may be, to submit such evidence to support the claim as the arbitrator may require before making an award.
- 16.3 Failure to Appear - If a party
- (a) without sufficient cause, fails to appear at a scheduled oral hearing, or
 - (b) fails to produce any evidence,
- the arbitrator may continue the arbitration and make an award based upon the evidence before the arbitrator.

Close of Hearings

- 17.1 Closure - The arbitrator shall close any oral hearings when
- (a) the parties advise they have no further evidence to give or submissions to make, or
 - (b) the arbitrator considers further hearings to be unnecessary or inappropriate.
- 17.2 Reopen Hearings - If the arbitrator considers it to be just and appropriate to do so, the arbitrator may reopen the oral hearings at any time before making the final award.

PART IV THE AWARD

Final Award

- 18.1 According to Law - Unless the parties agree otherwise, the arbitrator shall decide the dispute in accordance with the law.
- 18.2 Time Limit - The arbitrator shall make the final award as soon as possible and, in any event, not later than 30 days after
- (a) the hearings have been closed, or
 - (b) the final submission has been made,
- whichever is the later date.
- 18.3 Form - The final award of the arbitrator shall be in writing, shall state the reasons upon which it is based and shall be signed and dated.
- 18.4 Copies to Parties - The arbitrator shall give a copy of the award to each party.
- 18.5 Interest - The arbitrator may order interest to be paid in the final award.
- 18.6 Final and Binding - The final award is final and binding on the parties and the parties agree to comply with it as soon as possible.

Costs

- 19.1 Fixing Costs - The arbitrator shall fix the costs of the arbitration in the final award, which costs may include, but are not limited to, the following:
- (a) the fees of the arbitrator;
 - (b) any necessary and reasonable expenses incurred by the arbitrator to fulfil the arbitrator's functions;
 - (c) the fees and other necessary and reasonable expenses of
 - (i) the experts appointed by the arbitrator, and
 - (ii) the witnesses, as approved by the arbitrator;
 - (d) any necessary and reasonable fees, charges or expenses for providing services to the arbitrator or the parties in connection with the arbitration.
- 19.2 Costs to Successful Party - Except for the costs of legal fees and legal expenses of the successful party, the costs of the arbitration shall be borne by the unsuccessful party unless the arbitrator considers it appropriate in the circumstances to apportion them between the parties.
- 19.3 Legal Costs - The arbitrator
- (a) may decide which party shall bear the costs of legal fees and legal expenses of the successful party, if they were claimed during the arbitration,
 - (b) may apportion those costs if the arbitrator considers it just and reasonable to do so, and
 - (c) in either event, shall specify the amounts of those costs or the manner of determining those costs.
- 19.4 Legal Fees not Restricted - In making a decision under clause 19.3, the arbitrator is not limited to awarding the legal fees and legal expenses which a court may award to a successful party in a civil judicial proceeding.
- 19.5 Reasonable Fees - Subject to any agreement entered into among the parties and the arbitrator, the fees of the arbitrator shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrator and any other relevant circumstances.

Amendments and Corrections to the Award

- 20.1 Arithmetic/Clerical Error - The arbitrator may amend or vary a final award to correct
- (a) a clerical or typographical error,
 - (b) an accidental error, slip, omission or other similar mistake, or
 - (c) an arithmetical error made in a computation.
- 20.2 Time Limit - An application by a party to the arbitrator to amend or vary a final award shall be made within 15 days after that party receives the award.
- 20.3 Time Limit - The arbitrator shall not amend or vary the final award, without the consent of all parties, more than 30 days after all parties have received it.
- 20.4 Clarification - Not later than 15 days after receiving the final award, a party may apply to the arbitrator for clarification of the award, and the arbitrator may amend the award if the arbitrator considers that the amendment will clarify it.
- 20.5 Additional Award - Not later than 30 days after receiving the final award, a party may apply to the arbitrator to make an additional award with respect to claims presented in the proceedings but inadvertently omitted from the award.

PART V PROJECT DISPUTES

Consolidation

- 21.1 Criteria for Consideration - If
- (a) a common question of law or fact arises in more than one arbitration,
 - (b) the relief claimed in these arbitrations is in respect of or arises out of substantially the same factual situation, and
 - (c) the arbitrations are being conducted under these Rules,
- a party to any of the arbitrations may, by written notice given to each of the parties to the arbitrations, request that the arbitrations be consolidated.
- 21.2 Dispute - If any party disputes the consolidation of the arbitrations, the party may refer the dispute to the Court by giving written notice within 7 days of receiving the notice for consolidation.
- 21.3 Deemed Agreement - If none of the parties disputes the notice given under clause 21.1, within the time permitted in clause 21.2, each of the parties to the arbitrations shall be conclusively deemed to have agreed to the consolidation of the arbitrations.
- 21.4 Procedural Issues - If the parties to the consolidated arbitration are unable to agree on any of the procedural issues arising out of the consolidation of the arbitrations, including identifying whom the arbitrator shall be, any party to the consolidated arbitration may refer the outstanding issues to the Court.