

FIXED TIME AND COST

Supplementary Rules for Fixed Time and Cost Construction Arbitration



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Supplementary Rules for Fixed Time and Cost Construction Arbitration



Introduction

The Supplementary Rules for Fixed Time and Cost Construction Arbitration (“Supplementary Rules”) have been developed by the American Arbitration Association® (AAA®), in conjunction with the National Construction Dispute Resolution Committee (NCDRC), to provide an arbitration process that will be predictable in terms of total time and cost. The Supplementary Rules are most appropriately used for cases with discrete issues that would benefit from limited document exchange and discovery. The Supplementary Rules envision the parties and their representatives working in a collaborative manner to move cases along within the required timeframes.

SR-1. Agreement of Parties and Applicability

The Supplementary Rules, along with the then-current Construction Industry Arbitration Rules of the American Arbitration Association, shall apply to disputes arising out of contracts or agreements providing for arbitration under the Supplementary Rules. Parties to an existing construction dispute who have not previously agreed to use these Supplementary Rules may also submit their dispute to arbitration as set forth in SR-8. To the extent there is any conflict between the Construction Industry Arbitration Rules and these Supplementary Rules, these Supplementary Rules shall govern.

Arbitrations administered under these Supplementary Rules shall be exclusively administered by the AAA, and all arbitrators appointed to arbitrations pursuant to these Supplementary Rules, including arbitrators appointed by the parties, shall be members of the AAA’s Roster of Construction Neutrals. These Supplementary Rules shall only apply in arbitrations where there are two parties to the arbitration; however, this limitation shall not apply to a surety that:

- a) is represented by the same counsel as its principal; and
- b) has not asserted in the arbitration an independent claim against either its principal or the other named party.

SR-2. Party Designations and Case Communications

Each party or party representative shall provide and/or confirm the name, address, telephone, and email address of a designated employee (“designated employee”), such as in-house counsel or senior-level executive, to the AAA and/or the arbitrator. The AAA and/or the arbitrator shall include such designated employees on all correspondence and communications related to the arbitration. All communication between the AAA, arbitrator, parties, and their representatives shall be via email.

SR-3. Time/Cost Schedules

The time to complete the arbitration, the number of hearing days, and AAA fees and arbitrator compensation, will be calculated according to the applicable Time/Cost Schedules and are based on the larger of the claim or counterclaim. The parties and their representatives shall adhere to the hearing days and time limitations set forth in Schedule 1 of these Supplementary Rules. Modifications to the number of hearing days or timeframe requirements in these Supplementary Rules may, at the discretion of the AAA, result in the case being administered under the Regular Track or Large, Complex Case Track of the Construction Industry Arbitration Rules, and associated fees will apply.

SR-4. Limits to Extensions, Removal to Standard Rules and Fees

Only the arbitrator, upon good cause shown, may grant requests made by one or both parties for:

- a) Additional hearing days beyond the number of hearing days provided for in Schedule 1.
- b) Extensions of timeframes for completion of the arbitration beyond the timeframes referenced in Schedule 1.

Requests for such additional hearing days or extensions of timeframes must be signed by the designated employee and representative (if any) of each party, and if granted may, at the discretion of the AAA, result in the case being administered pursuant to the Regular Track or Large, Complex Case Track Procedures of the AAA’s Construction Industry Arbitration Rules. In that event, these Supplementary Rules shall no longer apply to the arbitration, and all additional AAA administrative fees and deposits for arbitrator compensation must be made in accordance with the applicable Rules.

In the event the case continues to be administered under these Supplementary Rules after a hearing days' modification, additional arbitrator fees shall be billed at the hourly rate provided for in Schedule 1. Should a request for additional days or an extension be granted, the arbitrator shall have the discretion to apportion any additional fees incurred among the parties.

SR-5. Filing Requirements Under an Arbitration Agreement in a Contract

- a) The initiating party ("the claimant") shall, within the time period (if any) specified in the contract(s), file a Demand for arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract that provides for arbitration under these Supplementary Rules. Filing may be accomplished through any AAA Office.
- b) The Demand Shall Include:
 - i. The name of each party.
 - ii. The name, address, telephone, and email address of each party's designated employee, if known.
 - iii. If applicable, the names, addresses, telephone, and email address of the known representative for each party.
 - iv. A statement describing the claim and the relief sought. The statement shall be no longer than five (5) pages.
 - v. The locale requested, if the arbitration agreement does not specify one.
- c) The claimant shall simultaneously provide a copy of the Demand, the statement of claim, and the applicable arbitration agreement to the opposing party ("the respondent").

SR-6. Answers and Counterclaims

The respondent may respond to the claim not more than fourteen (14) days after initiation by the AAA, with an answer and/or counterclaim or both. If no answering statement is filed within the stated timeframe, respondent will be deemed to deny the claim. The answer and or counterclaim shall be no longer than five (5) pages. The respondent shall, at the time of any such filing, send a copy of the answer and/or counterclaim to the other party. Any additional administrative fee required under these Supplementary Rules must be paid at the time of filing the counterclaim.

SR-7. Changes of Claim or Counterclaim

A party may amend its claim or counterclaim at any time up to thirty (30) days from the filing of the counterclaim, the filing of the answer, or the deadline for the

filing of the answer. Exceptions to these timeframes may only be permitted upon the arbitrator's determination. If a change is made to the claim or counterclaim, the larger of the claim or counterclaim will govern the length of the proceedings, maximum number of hearing days, and arbitrator compensation as applicable in Schedule 1.

SR-8. Filing Requirements Under a Submission Agreement

Parties to an existing dispute, who have not previously agreed to use these Supplementary Rules, may commence an arbitration by filing a submission agreement to arbitrate under these Supplementary Rules, signed by the parties and submitted along with the required administrative filing fee through any AAA office. The submission shall include:

- a) The name of each party.
- b) The name, address, telephone number, and email address of each party's designated employee.
- c) If applicable, the names, addresses, telephone number, and email addresses of the representative for each party.
- d) Statements describing the respective parties' claim(s) and or counterclaim(s), which shall include the relief sought and amounts claimed. The statements filed by either party shall not exceed five (5) pages.
- e) The locale requested, if the arbitration agreement does not specify one.

SR-9. Administrative Conference

Within three (3) business days of the filing of the Demand or Submission for arbitration, or as soon as practicable, an administrative conference shall take place with the AAA and parties to expedite the arbitration, explore administrative details, establish an efficient means of selecting an arbitrator, ascertain the parties' preferred arbitrator qualifications, and address other issues raised by the parties regarding the conduct of the arbitration.

SR-10. Arbitrator List

All arbitrations administered under these Supplementary Rules shall proceed with a sole arbitrator. The AAA shall provide a list of at least ten (10) prospective arbitrators to the parties within two (2) business days, or as soon as practicable, after the administrative conference.

SR-11. Meet and Confer Conference

Within fourteen (14) days after the AAA Administrative Conference, the parties and representatives shall meet and confer. The Meet and Confer Conference may take place by either an in-person meeting, by telephone, or by video conference. The parties shall inform the AAA of the results of the Meet and Confer Conference not more than five (5) business days after the completion of the Conference. The parties shall determine the following during the Meet and Confer Conference:

a) The Selection of the Arbitrator

- i. The parties shall agree on three (3) prospective arbitrators and provide the names to the AAA in their agreed-upon order of preference.
- ii. Within one (1) business day, or as soon as practicable, after receipt of the parties' list of mutually acceptable arbitrators, the AAA shall invite one (1) of the three (3) arbitrators identified by the parties to serve. If the arbitrator is unable to serve, the AAA shall invite one (1) of the remaining mutually-acceptable arbitrators on the list. In the event that none of the mutually-acceptable arbitrators are able to serve, the AAA shall make the appointment from the AAA's National Roster of Construction Neutrals without the submission of additional lists.

b) Time, Date, and Place of the Hearing

- i. In the absence of an agreement by the parties regarding the time, date, and place of the hearing in a manner consistent with Schedule 1, the arbitrator shall make that determination in accordance with such Schedule, except as provided in SR-4.

c) Number of Hearing Days and Allocation of Days to Each Party

- i. Except as provided in SR-4, the number of hearing days shall not exceed the maximum number of days for the larger of the claim or counterclaim as applicable in Schedule 1.

d) Document Exchange and Discovery

The parties and their representatives shall determine the extent to which discovery is essential. Should the representatives and parties determine discovery is essential, the representatives and parties shall develop and prepare a discovery plan that shall be presented to the arbitrator for review and approval. The discovery plan shall incorporate the following:

- i. A specified time period during which all discovery must be conducted.
- ii. A deadline for discovery requests and disputes to be submitted to the arbitrator.

- iii. Limits on the amount of discovery, including:
 - 1. Whether depositions will be permitted and, if so, any time limits or other restrictions.
 - 2. The extent to which documents or categories of documents are “presumptively discoverable,” because they are relevant and material to the case, in the custody or control of the other party, are not privileged, do not constitute an unreasonable burden to produce, or constitute trade secrets.
 - 3. Deadlines for the exchange of all evidence, exhibits, etc., to be presented at the hearing, which shall be not less than ten (10) days prior to the scheduled hearing date.
 - 4. The format in which all evidence to be presented at the hearing is to be delivered to each of the parties and representatives.
- iv. Promptly upon appointment, the arbitrator shall review and approve the discovery plan to ensure that it adheres to the tenets of arbitration as a time- and cost-effective process as well as to the applicable timeframes referenced in Schedule 1. The arbitrator is authorized to modify such discovery plan prior to approval. Failure by any party to comply with the approved discovery plan may result in the exclusion of certain evidence, or whatever other measures are deemed appropriate by the arbitrator.

SR-12. Failure to Agree on Proposed Arbitrators

Should the parties and representatives not advise the AAA of three (3) mutually agreeable arbitrators in their Meet and Confer Report within five (5) days of the Meet and Confer Conference, the AAA shall administratively appoint an arbitrator from the list or from the AAA’s National Roster of Construction Neutrals.

SR-13. Failure to Agree on Other Aspects of the Meet and Confer Conference

Within seven (7) days of the arbitrator’s appointment, an administrative call with the arbitrator may be requested by either party to address any unresolved issues from the Meet and Confer Conference, including but not limited to:

- a) Time, date, and place of the hearing.
- b) Number of hearing days and allocation of days to each party.
- c) Approved discovery procedures that the parties and representatives must follow.

Should an arbitrator be required to resolve any issues from the Meet and Confer Conference, the arbitrator shall be compensated at the rate in Schedule 2 of these Supplementary Rules based on the larger of the claim or counterclaim

amount. The additional fees shall be borne equally by the parties or at the arbitrator's discretion.

SR-14. Failure of the Parties to Comply with Supplementary Rules and Request for Costs

If the parties fail to comply with the Supplementary Rules, the AAA at its discretion may determine to administer the arbitration pursuant to the Regular Track or Large, Complex Case Track of the Construction Industry Arbitration Rules. In that case, the parties will be responsible for all additional costs, fees, and arbitrator compensation due under the Construction Industry Arbitration Rules.

In the event a determination is made that an arbitration shall be administered under the Regular Track or Large, Complex Case Track of the Construction Industry Arbitration Rules, either party may make a request to the appointed arbitrator that any resulting additional costs of the arbitration shall be borne by the other party. Any such application must be in writing and limited to no more than two (2) pages. A party opposing such application may file a written response within two (2) business days of receiving a copy of the application. The response will be limited to no more than two (2) single-spaced pages.

SR-15. Hearings

The parties must adhere to the agreed-upon allocation and time limitations specified in Schedule 1. In addition, the arbitrator may impose a schedule and procedures for each party's presentation, including the use of a "chess clock," use of written witness statements in lieu of direct testimony, exclusion of repetitive witnesses or testimony, and other similar measures.

SR-16. Post-Hearing Briefs

There shall be no post-hearing briefs except upon the determination of the arbitrator or the mutual agreement of the parties, in which case post-hearing briefs shall not exceed five (5) pages. Should post-hearing briefs be permitted, the parties shall be charged according to the fees provided for in Schedule 4.

SR-17. Time of Award

The arbitrator shall make an award to the parties not more than twenty (20) days from the close of hearings.

SR-18. Form of the Award

- a) Any award shall be in writing and signed by the arbitrator. It shall be executed in the form and manner required by law and shall be no longer than three (3) pages.
- 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 nonmonetary components of the claims or counterclaims, the arbitrator shall include a line item disposition of each nonmonetary claim or counterclaim.
- c) Should the parties require a reasoned award or findings of fact and conclusions of law, the arbitration shall be administered under the Regular or Large, Complex Procedures of the American Arbitration Association's Construction Industry Arbitration Rules along with its associated fees.

SR-19. 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, which are indicated in the Time/Cost Schedules. The fees for the Supplementary Rules for Fixed Time and Cost Construction Arbitration 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.

SR-20. Arbitrator Compensation

The Arbitrator shall be compensated at a rate consistent with the Time/Cost Schedules contained in the Supplementary Rules for Fixed Time and Cost Construction Arbitration for the larger of the claim or counterclaim.

SR-21. Deposits

- a) The AAA shall require the parties to deposit, thirty (30) days in advance of any hearings, such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fees and expenses, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.
- b) Deposit amounts requested will be based on itemized estimates provided from the arbitrator.

SR-22. Remedies for Nonpayment, Request for Default Award

Failure of a party to pay requested fees or deposits without good cause shown shall result in a default award. Any party seeking a default award shall file a request for default with the AAA, arbitrator, and opposing party. The opposing party shall have seven (7) days to respond to the request. The party seeking a default award must prove its damages to the arbitrator at a scheduled hearing.

Fee Schedule

Fees will be billed in accordance with the following Time/Cost Schedules:

Schedule 1

CLAIM/COUNTERCLAIM AMOUNT	ABOVE \$75,000 - \$250,000	ABOVE \$250,000 - 500,000	ABOVE \$500,000 - \$1M	ABOVE \$1M - \$5M
AAA Fees	\$2,500	\$5,000	\$7,500	\$10,000
Maximum Days from Filing to Award	120	180	270	360
Number of Arbitrators	1	1	1	1
Maximum Number of Hearing Days	3	3	5	10
Arbitrator Hearing/Study Compensation per Hour	Up to \$250	Up to \$275	Up to \$300	Up to \$350
Maximum Arbitrator Study Time-Hours	8	12	20	40
Maximum Total Fees*	\$10,500	\$14,900	\$25,500	\$52,000

*Does not include possible additional fees as described in the Supplementary Rules and in the following charts. Total Fees also do not include reasonable travel-related expenses incurred by the Arbitrator.

Schedule 2: Arbitrator Conducts Pre-Hearing Conference

ARBITRATOR ADMINISTRATIVE CONFERENCE CALL				
CLAIM/COUNTERCLAIM AMOUNT	ABOVE \$75,000 - \$250,000	ABOVE \$250,000 - \$500,000	ABOVE \$500,000 - \$1M	ABOVE \$1M - \$5M
Arbitrator Compensation	Up to \$250	Up to \$275	Up to \$300	Up to \$350
Maximum Arbitrator Hours	4	4	4	4
Maximum Total Fees*	\$1,000	\$1,100	\$1,200	\$1,400

Schedule 3: Arbitrator Conducts a Site Visit with Parties

PROJECT SITE VISIT				
CLAIM/COUNTERCLAIM AMOUNT	ABOVE \$75,000 - \$250,000	ABOVE \$250,000 - \$500,000	ABOVE \$500,000 - \$1M	ABOVE \$1M - \$5M
Arbitrator Compensation	Up to \$250	Up to \$275	Up to \$300	Up to \$350
Maximum Arbitrator Hours	8	8	8	8
Maximum Total Fees*	\$2,000	\$2,200	\$2,400	\$2,800

Schedule 4: Arbitrator Must Review Post-Hearing Briefs

POST-HEARING BRIEFS REVIEW				
CLAIM/COUNTERCLAIM AMOUNT	ABOVE \$75,000 - \$250,000	ABOVE \$250,000 - \$500,000	ABOVE \$500,000 - \$1M	ABOVE \$1M - \$5M
Arbitrator Compensation	Up to \$250	Up to \$275	Up to \$300	Up to \$350
Maximum Arbitrator Hours	4	4	4	4
Maximum Total Fees	\$1,000	\$1,100	\$1,200	\$1,400

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