

Apr 28 2025

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Appellate Case No. 2024-002009

Dow, Inc., ...Appellant

v.

Beth Bartolini.....Respondent

**RECORD ON APPEAL
(PAGES 1-182)**

Paul Robert Rahn
Robertson Hollingsworth Manos & Rahn, LLC
40 Calhoun Street, Suite 330
Charleston, SC 29401
(843) 723-6470
pr@roblaw.net

Attorney for Respondent

s/Ronald L. Richter, Jr.
Ronald L. Richter, Jr. (SC Bar No. 66377)
Scott M. Mongillo (SC Bar No. 16574)
BLAND RICHTER, LLP
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
T: 843.573.9900 | F: 843.573.0200
ronnie@blandrichter.com
scott@blandrichter.com

Eric S. Bland (SC Bar No. 64132)
105 West Main Street, Suite D
Lexington, South Carolina 29072
T: 803.256.9664 | F: 803.256.3056
ericbland@blandrichter.com

Alexander James Rudiak
James D. Smith
McAngus Goudelock & Courie, LLC
735 Johnnie Dodds Blvd, Unit 200
Mt. Pleasant, SC 29464
(843) 576-2900
alexander.rudiak@mgclaw.com
jsmith@mgclaw.com

Attorneys for Appellant

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP1004865

Dow Inc

PLAINTIFF(S)

Beth Bartolini

DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter came before the Court on Plaintiff's Motion to Compel Arbitration. After review of the record, arguments, and relevant law, the Court DENIES this Motion for failure to comply with South Carolina Code Section 15-48-10(a).

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/19/2024 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Dow Inc VS Beth Bartolini

Case Number: 2023CP1004865

Type: Order/Electronic Form 4

So Ordered

s/ Maite Murphy 2166

Electronically signed on 2024-11-20 16:01:11 page 3 of 3

ROA-0003

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
) CIVIL ACTION NO: 2023-CP-10-_____

Dow, Inc.,)
Plaintiff,)

vs.)

Beth Bartolini,)
Defendant.)

SUMMONS
(Bench Trial Requested)

TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Charleston, South Carolina
October 3, 2023

BLAND RICHTER, LLP
Attorneys for Plaintiffs

s/Ronald L. Richter, Jr.
Ronald L. Richter, Jr. (SC Bar No. 66377)
s/Scott M. Mongillo
Scott M. Mongillo (SC Bar No. 16574)
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
t: 843.573.9900 | f: 843.573.0200
Ronnie@blandrichter.com
Scott@blandrichter.com

s/Eric S. Bland
Eric S. Bland (SC Bar No. 64132)
105 West Main Street, Suite D
Lexington, South Carolina 29072
t: 803.256.9664 | f: 803.256.3056
ericbland@blandrichter.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO: 2023-CP-10-_____
Dow, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COMPLAINT TO
	)	COMPEL ARBITRATION
Beth Bartolini,	)	(Bench Trial Requested)
	)	
Defendant.	)	
	)	

The Plaintiff, complaining of the conduct of the Defendant herein, alleges as follows:

PARTIES AND JURISDICTION

1. Plaintiff Dow, Inc. is a South Carolina corporation with its principal place of business located in Charleston County, South Carolina.
2. Defendant Beth Bartolini is a resident and citizen of Charleston, County, South Carolina.
3. This Court has jurisdiction over the parties and subject matter of this action.

FACTUAL BACKGROUND

4. All paragraphs stated above are incorporated herein as if realleged and restated in full verbatim.
5. Plaintiff is a licensed general contractor which does new construction, historic preservation, and remodeling for both commercial and residential properties in the Lowcountry area.
6. Defendant is the owner of, and resides at, 759 Lake Frances Drive, Charleston, SC 29412.
7. On August 17, 2022, the Plaintiff and the Defendant entered into a binding

“Construction Contract” (“Contract”) for interior and exterior construction work at Defendant’s residence. (Please see the Contract attached as **Exhibit A** and incorporated by reference.)

8. Plaintiff completed the required construction work in a timely, professional and workmanlike manner.

9. The Plaintiff’s work was completed according to industry standards and all applicable codes.

10. On September 6, 2023, Plaintiff invoiced the Defendant for the remaining contractually owed balance due of seventy-one thousand, four hundred and fifty and 71/100 (\$71,450.71). (Please see invoice attached as **Exhibit B** and incorporated by reference.)

11. Despite repeated demands, Defendant has refused to pay for the Plaintiff’s labor, equipment, and materials necessary for the installation of the interior and exterior work at Defendant’s residence.

12. Defendant is in breach of the contract with the Plaintiff.

13. On September 29, 2023, Plaintiff filed a mechanic’s lien with the Charleston County RMC office concerning the balance due.

14. Along with this Complaint, Plaintiff filed a *lis pendens* on 759 Lake Frances Drive, Charleston, SC 29412.

15. The Contract deals with interstate commerce because the Contract contemplated and then used materials manufactured outside the state of South Carolina and could not have been completed without the use of materials provided via interstate commerce.

16. The Contract has an arbitration provision in Section 11 requiring the parties to arbitrate “any claim or controversy” with the American Arbitration Association.

17. That because of the Defendant’s breach of contract, the Plaintiff is entitled to

recover monetary damages in an amount determined by the American Arbitration Association sufficient to compensate it fully for the harm it has suffered as well as to foreclose on the mechanics lien filed in the Charleston County RMC office.

FOR A FIRST CAUSE OF ACTION
(COMPEL ARBITRATION PURSUANT TO
THE FEDERAL ARBITRATION ACT, 9 U.S.C. §4)

18. All paragraphs stated above are incorporated herein as if realleged and restated in full verbatim.

19. In relevant part, the Federal Arbitration Act provides that a “written provision ... in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, ... shall be valid, irrevocable, and enforceable, save upon such grounds exist at law or equity for the revocation of any contract.” 9 U.S.C. §2.

20. The Federal Arbitration Act also provides that a “party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court ... for an order directing that such arbitration proceed in the manner provided for in such agreement ... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration of the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.” 9 U.S.C. §4.

21. The Contract involves interstate commerce.

22. The Contract’s arbitration provision complies with the Federal Arbitration Act and states that “any claim or controversy” will be decided by arbitration.

23. Based upon the Federal Arbitration Act, the Plaintiff requests an order from this

Court requiring the Plaintiff to **immediately arbitrate** this breach of contract matter with the American Arbitration Association as well as the foreclosure of the mechanics lien filed in the Charleston County RMC office.

WHEREFORE, Plaintiff prays for judgment against the Defendant from this Court requiring the Defendant to immediately proceed in arbitration and once in arbitration, Defendant seeks its actual damages from the Plaintiff in a sum sufficient to compensate the Defendant fully for all losses occasioned herein, whether past, present or future, as well as prejudgment and post judgment interest in accordance with the S.C. Code of Laws, attorney's fees and costs, and any other relief granted by the American Arbitration Association.

Charleston, South Carolina
October 3, 2023

BLAND RICHTER, LLP
Attorneys for Plaintiff

s/ Ronald L. Richter
Ronald L. Richter, Jr. (SC Bar No. 66377)
s/ Scott M. Mongillo
Scott M. Mongillo (SC Bar No. 16574)
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
t: 843.573.9900 | f: 843.573.0200
ronnie@blandrichter.com
scott@blandrichter.com

s/ Eric S. Bland
Eric S. Bland (SC Bar No. 64132)
105 West Main Street, Suite D
Lexington, South Carolina 29072
t: 803.256.9664 | f: 803.256.3056
ericbland@blandrichter.com

DOW INCORPORATED

◆ LICENSED GENERAL & RESIDENTIAL

CONSTRUCTION CONTRACT

THIS AGREEMENT FINAL REVISED, Made as of August 17th, In the Year of 2022

Between the Owner: **Beth Bartolini**
759 Lake Frances Drive
Charleston, SC 29412

And the Contractor: **Dow Incorporated**
P.O. Box 727
Mt. Pleasant, S.C. 29465

For the Project: **Miscellaneous Interior and Exterior Work**

Construction Lending Institution : **None**

ARTICLE 1. CONTRACT DOCUMENTS

1.1 The contract documents consist of this agreement, General Conditions, Project Scope, Construction Documents, Specifications, Allowances, Finish Schedules, Construction Draw Schedule, all Addenda issued prior to execution of this agreement and all Change Orders or modifications issued and agreed to by both parties. All documents noted herein shall be provided to the Contractor by the Owner. These contract documents represent the entire agreement of both parties and supersede any prior oral or written agreement. Documents will be added to agreement, as they are developed and approved by both parties.

ARTICLE 2. SCOPE OF WORK

2.1 The Contractor agrees to repair the above mentioned structure and fixtures attached thereto in **Charleston, South Carolina** according to the Construction Documents, Allowances, Finish schedules, all addenda, change orders, modifications and specifications set forth in the specification booklet. The Project Scope is outlined below in Exhibit "A". Any additions or deletions will be added by mutual consent, as they are defined. The terms of this agreement shall endure for all succeeding Phases.

The total scope of the overall project will be defined as work progresses, as documented by approved plans, specs, and directives.

ARTICLE 3. TIME OF COMPLETION

3.1 The approximate commencement date of the project shall be execution of agreement. The approximate and estimated completion of work will be **180 working days from issuance of permit**. However, any change orders and/or unusual weather might delay or otherwise affect the completion date. The contract execution date shall be **(August 15th 2022)**.

ARTICLE 4. THE CONTRACT PRICE

Initialed by: Owner  Contractor 

General Conditions

Project Name: 759 Lake Frances Drive

4.1 The construction contract shall be calculated on a cost plus basis, with all Labor, Materials, Subcontractor, Permits and Insurance figured as costs. Construction coordination services shall be charged at Cost plus (percent) 27% of costs.

4.2 Pre-construction estimates for this work and coordination are approximately (estimated only owners final decisions could exceed the estimated cost show) This estimate is to be evaluated after work as begun. Monthly cost analysis will be completed on where are expenditures are on a regular basis for owners review and consideration. **One hundred and fifty thousand to Two hundred and twenty five thousand Dollars, (\$150,000.00 to \$225,000.00)** pending owners final selections and selections and approvals of the scope of work. (note there are so many hidden unknowns hidden costs may vary, owner will need to be available on decisions of final scope and week to seek agenda review and pricing.

4.3 The Owner and the Contractor acknowledge that the Owner will pay a sum of (seventy eight thousand Dollars, (\$78,000.00), upon signing of this contract and before construction begins as a deposit and part of the of the project cost. The deposit will be exhausted prior to any additional draw request. Monthly accounting will be provided to the owner upon each draw request. Quick books Word docs or excel spread sheets will be used as a form of invoicing and back up accounting methods.

ARTICLE 5. PROGRESS PAYMENTS

5.1 The Owner will make payments to the contractor every 3.5 weeks or 25 days based on invoices for labor and materials submitted. Construction coordination fees shall also be paid with those draws. Owner shall make payments to contractor within (5 days) after request by contractor. Should the owner fail to make payment, contractor may charge a penalty of 1.5% monthly upon the unpaid amount until paid.

5.2 If payment is not received by the Contractor within (10 days) days after delivery of payment demand for work satisfactorily completed, contractor shall have the right to stop work or terminate the contract at his option. Termination by Contractor under the provisions of this paragraph shall not relieve the Owner of the obligations of payments to Contractor for that part of the work performed prior to such termination. Termination by Owner under the provisions of this paragraph shall not relieve the Owner of the obligations of payments to Contractor for that part of the work performed prior to such termination.

ARTICLE 6. DUTIES OF THE CONTRACTOR

6.1 All work shall be in accordance to the provisions of the plans and specifications. All systems shall be in good working order.

6.2 All work shall be completed in a workman like manner, and shall comply with all applicable national, state and local building codes and laws.

6.3 All work shall be performed by licensed individuals to perform their said work, as outlined by law.

6.4 Contractor shall obtain all permits necessary for the work to be completed.

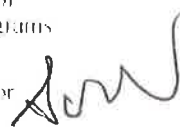
6.5 Contractor shall remove all construction debris and leave the project in a broom clean condition

6.6 Upon satisfactory payment being made for any portion of the work performed, Contractor shall furnish a full and unconditional release from any claim or mechanics' lien for that portion of the work for which payment has been made.

ARTICLE 7. OWNER

7.1 The Owner shall communicate with subcontractors only through the Contractor.

7.2 The Owner will not assume any liability or responsibility, nor have control over or charge of construction means, methods, techniques, sequences, procedures, or for safety precautions and programs in connection with the project, since these are solely the Contractor's responsibility.

Initialed by: Owner  Contractor 

General Conditions

Project Name: 759 Lake Frances Drive

ARTICLE 8. FINISH SCHEDULES

8.1 A Change Order is any change to the original plans and/or specifications. All change orders need to be agreed upon in writing, including cost, additional time considerations, approximate dates when the work will begin and be completed, a legal description of the location where the work will be done and signed by both parties or approved through email if parties are not present. 50% of the cost of each change order will be paid prior to the change, with the final 50% paid upon completion of the change order. A 27% fee shall be added to all change orders and overages in excess of initial allowances. Additional time needed to complete change orders shall be taken into consideration in the project completion date.

8.2 Completed Finish Selection Schedules shall be submitted to the Contractor and Owner as follows:

8.2.1 Schedule #1 at contract signing. Schedule to match the existing finish schedule provided prior to contract. Architect of record will provide as built and finish drawings where needed by the owner and contractor.

8.3 Any delays or changes in finish selection schedules will delay the projected completion date.

ARTICLE 9. INSURANCE

9.1 The Owner will keep in force a Builder's Risk Insurance Policy on the said property to protect both owner's and contractor's interests until construction is completed.

9.2 The Owner will purchase and maintain property insurance to the full and insurable value of the project, in case of a fire, vandalism, malicious mischief or other instances that may occur. Owner will fully insure all personal property and effect, whether on site or in storage.

9.3 The Contractor shall purchase and maintain needed Workman's Compensation and Liability insurance coverage as required by law and deemed necessary for his own protection.

ARTICLE 10. HAZARDOUS MATERIALS, WASTE AND ASBESTOS

10.1 Both parties agree that dealing with hazardous materials, waste or asbestos requires specialized training, processes, precautions and licenses. Therefore, unless the scope of this agreement includes the specific handling, disturbance, removal or transportation of hazardous materials, waste or asbestos, upon discovery of such hazardous materials the Contractor shall notify the Owner immediately and allow the Owner/Contractor to contract with a properly licensed and qualified hazardous material contractor. Any such work shall be treated as a Change Order resulting in additional costs and time considerations.

ARTICLE 11. ARBITRATION OF DISPUTES

11.1 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.

ARTICLE 12. WARRANTY

12.1 At the completion of this project, Contractor shall execute an instrument to Owner warranting the project for one year against defects in workmanship or materials utilized. The manufacturers warranty will prevail. No legal action of any kind relating to the project, project performance or this contract shall be initiated by either party against the other party after (one years) beyond the completion of the project or cessation of work.

Initialed by: Owner

Contractor

ROA-0011

General Conditions

Project Name: 759 Lake Frances Drive

ARTICLE 13. TERMINATION OF THE CONTRACT

13.1 Should the Owner or Contractor fail to carry out this contract, with all of its provisions, the following options and stipulations shall apply:

13.1.1 The Contractor will be paid for all unpaid invoices and all pending invoices to the date of termination. The Contractor will furnish final release of lien concurrent with final payment. The Owner may terminate this agreement at any time, with written notice and final payment of invoices, as stated above.

ARTICLE 14. ATTORNEY FEES

14.1 In the event of any arbitration or litigation relating to the project, project performance or this contract, the prevailing party shall be entitled to reasonable attorney fees, costs and expenses.

ARTICLE 15. ACCEPTANCE AND OCCUPANCY

15.1 Upon completion, the project shall be inspected by the Owner and the Contractor, and any repairs necessary to comply with the contract documents shall be made by the Contractor.

15.2 The Owner shall occupy the property with the understanding the owner will make available the scheduled work areas. It is understood this will include, but not limited to Kitchen, Dining Room, Living Room, Pool and Pool Deck, Exterior Decks and areas of the ground floor where structural supports are located. Owner will be using portions of the residence as needed and will be cognizant of safety needs during construction. Every effort will be taken to ensure easy access to the entire house and kitchen. The pool deck will be blocked off once stone has been removed.

WITNESS our hand and seal on this 9th day of Sept, 2022

Signed in the presence of:

Kim Saldana
Witness

Kim Saldana
Witness

[Signature]
Contractor Signature

[Signature] President
Owner Signature

Preliminary Scope:

Attachment "A"

KIM M. SALDANA
Notary Public
State of South Carolina
My Commission Expires Jun 7, 2032

1. Provide General Conditions and Supervision for the complete project. Provide Permitting and Business License as required for the project. Sanitation and debris removal will be provided on a daily basis.
2. Assess and provide pricing for repairing and/or replacing HVAC units and ductwork throughout.
3. Repair loose gable end brace and rotten HVAC stand in Attic
4. Replace undersized drop girder at second floor, expose and repair undersized floor joists and level second floor
5. Remove and reinstall or replace windows to confirm proper installation, waterproofing and flashing
6. Repair/replace all deteriorated floor joists, replace undersized drop girder and add additional drop girder or floor joists to support stairs at first floor

Initialed by: Owner

Contractor

ROA-0012

General Conditions

Project Name: 759 Lake Frances Drive

7. Install new sheathing and flooring throughout first floor
8. Monitor cracking at CMU walls under house and repair walls and piers as needed
9. Properly attach deck ledger to rim joist and install proper hangers at joists under house

***** Please note that this contract only outlines items presented in provided Engineer's report. Additional items to include, but not limited to interior and exterior finishes, may be added throughout the project based on Owner's approval. ***** See additional scope of work below.

Cost for labor as follows for typical working hours 7:30 AM to 5 PM M-Thurs and 7:30 to noon on Fridays; (night and off hour working will be billed at time and a half plus O&P as described.

- (a) General Conditions dumpsters, toilets, fees, fuel, vehicles and other general costs plus
- (b) Carpentry repairs will require @ a rate of \$65/hr. and assisting carpentry laborer and or helpers @ \$42/hr. Over time costs will increase from 27% O&P to time and a half plus 27% O&P.
- (c) Project managers will be invoiced on an as needed basis at \$85.00 per hour, Supervisor rate on site or off site - \$68.00 hr. plus 27%
- (d) Carpentry repair labor will be billed in 30 minute increments
- (e) Carpentry repairs include demolition as needed, corrective action and clean up
- (f) Supplies used will be calculated in complete unit increments, i.e. if 1/2 of one 2 X 4 is used the cost of one complete unit 2 X 4 will be invoiced to the process.
- (g) All supplies associated with a carpentry repair will be invoiced at Contractor's cost plus 27%. Cost of most commonly used materials will be provided to the project on a monthly basis by copy of Contractor's selected vendor price sheet.
- (h) Intermediate touch up and or protective priming and painting will be performed by a qualified painter selected by Contractor at a rate of \$55/hr. plus the cost of paint plus 27%. Fixed bids will be acquired and shared with owners
- (i) All costs associated with the project will be billed on a time and materials bases until a clear scope of work is defined and priced and a signed contract / confirmation agreement executed
- (j) All work will be documented and costs will be itemized for each invoice

Subtotal \$ Cost plus 27 %

Project Expenses:

Disks & Photos - \$15.50 per disk
 Printing color photos - \$.65 per copy one side
 Binding - estimated \$ 14.00 per book under fifty pages
 Folder's, note books, files and documents cost plus 27%
 Building Materials cost plus 27%
 Permits and licensing - cost plus 27%
 Clark Ferguson - Paul Curry - Chris Constantine - see quoted cost attached cost plus 0.00 pd invoices direct by client
 Travel (Auto or Truck) - \$00.57 per mile cost plus 27%
 Gate passes - cost plus 0.00 if required

Initialed by: Owner Contractor



ROA-0013

General Conditions

Project Name: 759 Lake Frances Drive

ROOF and ATTIC:

Repair loose gable end brace. Rebuild rotten HVAC stand. Service or replace air handler in Attic. When turned on pan is full and appears to have overflowed at some point.



Photo 3. Attic overview. (1) loose gable end brace, (2) chimney, (3) over-framed portion of roof.



Photo 4. AHU catch pan. Note fungal hyphae and evidence of deterioration to AHU platform.

SECOND FLOOR:

Replace under-sized drop girder. Expose and repair improperly installed and under-sized floor joists. Floor is very out of level. Need to determine and repair cause.

Initialed by: Owner

[Handwritten signature]

Contractor

[Handwritten signature]

General Conditions

Project Name: 759 Lake Frances Drive



6. Floor slope 2.8% at stair landing.



Photo 8. Second floor drop girder over dining area (red arrow).

FIRST FLOOR:

Replace/repair deteriorated floor joists. Replace under-sized drop girder and add additional drop girder or floor joists to properly support stairs at first floor. Install new sheathing and flooring.

Initialed by: Owner

Contractor

General Conditions

Project Name: 759 Lake Frances Drive



Photo 17. Deteriorated 2x10 floor joists (typical).



Photo 24. Drop girder in kitchen area.

CRAWL SPACE:

Monitor cracking at CMU block walls. Properly attach deck ledger to rim joist. Install proper hangers at joists. Option to encapsulate crawl space or clean and install moisture barrier.



Initialed by: Owner  Contractor 

General Conditions

Project Name: 759 Lake Frances Drive



23. Drop girder in crawl space. The girder does not contact the joists and ore, does not support the floor framing.



Photo 25. Drop girder under kitchen area.

Initialed by: Owner _____ Contractor _____

[Handwritten signature]

[Handwritten signature]

General Conditions

Project Name: 759 Lake Frances Drive



Photo 27. Deck ledger (no lag screws observed).

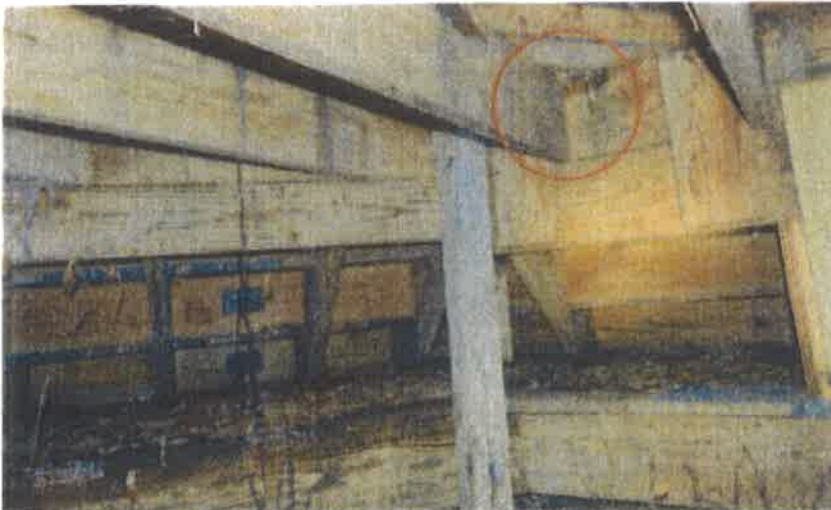


Photo 28. Deck joists not attached with framing connector or supported by deck ledgers.

Basic in Process Scope of Work

1. Remove and replace all rotted and damaged framing at the first level to include the under sized beam at the kitchen to dining area previously a porch
2. Drop all electrical and plumbing attached to the present floor system
3. Remove and replace all exposed Polly piping under the residence - this will not include plumbing hidden in the walls
4. Remove all duct at the first floor and debris left under the residence and in crawl space and perimeter of the property. Remove drywall and trim where applicable to accomplish the new floor framing installation
5. Kitchen to remain at this time until pricing and drawings are completed

Initialed by: Owner

[Signature]

Contractor

[Signature]

General Conditions

Project Name: 759 Lake Frances Drive

6. Floor layout will be provided for the kitchen and first floor bath ~ alternate entry into the future office and bathroom will be provided. No additional architectural or engineering has been allowed at this time.
7. Scrape all ceilings throughout the residence creating a smooth ceiling surface throughout.
8. Frame the structural beam between kitchen and living reducing columns and size of header where applicable and meets engineers report.
9. First floor bath will be gutted and re-constructed to include a relocation of the entry door layout for hallway access. The future office may be reduced to increase the size of the bathroom.
10. The wood floors at the second floor will be replaced with a laminate flooring. First floor will be a combination of tile and lument flooring. Stairs will be sanded and sanded dark and clear coated.
11. Supply and install a new glass door at the new first floor office.
12. Supply and install new wall at the exterior of the breakfast area deleting the full height sheets of glass. Build a half wall at the base of the three existing openings and frame for three new window units. Three new window units assumed to be single or double hung to be approved by the owner – Anderson, Integrity or equal.
13. Repair and or replace some of the masonry foundation under the existing floor system
14. Plumbing labor and supplies **allowance - \$ 3,800.00**
15. Electrical wiring and labor **allowance - \$ 4,500.00**
16. Inspect and review both heating and air units in the residence – price a repair and replacement for the owner's consideration – **allowance \$15,000.00**
17. Supply and install a new tankless water heater – **allowance - \$ 2,800.00**
18. Supply and install new light fixtures at the first-floor - **allowance - \$ 2,300.00**
19. Supply and install new plumbing fixtures at the first-floor bathroom – **allowance - \$ 1,500.00**
20. Window and door allowance for the above listed work is – **allowance - \$ 9,500.00**

Options to be priced but NOT included in this proposal until pricing has been completed and approved by owner:

Pricing will be on going:

1. New windows and doors throughout out the residence
2. Fencing and gates around the property
3. New garage door and overhead door
4. Replace bottom place of garage – damaged sheathing – rotted siding and missing flashing
5. New kitchen cabinets and counter tops
6. Appliances by owner
7. Owner to open an account with a gas utility company to supply proper fuel to the new water heater
8. Supply and install ventless logs into the existing fireplace and utilize the existing equipment to accomplish the change from wood to gas fireplace
9. Install moisture barrier under house with option to encapsulate and dehumidify crawl space
10. Install sod, plantings, mulch, and irrigation system (recommended)
11. Deck and dock repairs and upgrades

Initialed by: Owner _____ Contractor _____

ROA-0019



AMENDED FINAL INVOICE #4

Contractor: Dow Inc.

9/6/23

TO: Beth Bartolini
759 Lake Francis Dr.
Charleston, SC

Job Summary	Amount
Total Cost of Project	\$399,569.68
Contractor's Fee 27%	<u>\$107,883.81</u>
Total Job Cost	\$507,453.49
Scott Dow's time	N/C
Receive & Store Appliances & Tile (\$125.00)	N/C
Deposit	\$ 78,000.00
Payment 1	\$ 94,120.83
Payment 2	\$112,821.53
Payment 3	<u>\$150,000.00</u>
Subtotal of Payments	<\$434,942.36>
Credit On Final Invoice	<u><\$ 1,060.42></u>
Total Credits/Payments	<\$436,002.78>
BALANCE DUE	\$ 71,450.71

THANK YOU!
DOW, INC.

Based on
Meeting
on site
9-1-23

Dennis Lett
Lett
man

last date
on site
installed
copper new
Bath tub
Aug. 11th 2023
Ryan on site

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO: 2023-CP-10-04865
Dow, Inc.,	)	
Plaintiff,	)	
	)	
vs.	)	LIS PENDENS
	)	
Beth Bartolini,	)	
	)	
Defendant.	)	
	)	

NOTICE is hereby given that an action has been commenced by the Plaintiff against the Defendant on October 3, 2023, in the Charleston County Court of Common Pleas, Civil Action Number: 2023-CP-10-04865. Judgment in that matter may result in a lien against the following described property affected by this matter, which is situated in Charleston County, South Carolina:

ALL THAT CERTAIN PIECE, PARCEL OR LOT OF LAND, TOGETHER WITH THE BUILDINGS AND IMPROVEMENTS THEREON, SITUATE, LYING AND BEING ON JAMES ISLAND, IN THE CITY OF CHARLESTON, STATE OF SOUTH CAROLINA, AND BEING SHOWN AND DELINEATED AS LOT EIGHT (8), CONTAINING 0.18 ACRES, MORE OR LESS, LAKE SHORE COMMONS, PHASE 1, ON A PLAT DATED SEPTEMBER 24, 1984, LAST REVISED OCTOBER 17, 1984, BY E.M. SEABROOK, JR., INC., ENTITLED, "LAKE SHORE COMMONS, CITY OF CHARLESTON, S.C. PLATS OF LOTS 7 14", RECORDED IN THE ROD FOR CHARLESTON COUNTY IN PLAT BOOK BD AT PAGE 35; AND HAVING THE SAME SIZE, SHAPE, BUTTINGS, BOUNDINGS, DIMENSIONS AND LOCATION AS WILL BY REFERENCE TO SAID PLAT MORE FULLY APPEAR, WHICH PLAT IS SPECIFICALLY INCORPORATED HEREIN BY SPECIFIC REFERENCE THERETO.

TMS# 426-11-00-078

Deed Recorded on May 17, 2022, at 11:56:16 AM in Book 1109 Page 655

Property Address: 759 Lake Frances Drive, Charleston, SC 29412

{SIGNATURE PAGE TO FOLLOW}

Charleston, South Carolina
October 3, 2023

BLAND RICHTER, LLP
Attorneys for Plaintiff

s/ Ronald L. Richter

Ronald L. Richter, Jr. (SC Bar No. 66377)

s/ Scott M. Mongillo

Scott M. Mongillo (SC Bar No. 16574)

18 Broad Street, Mezzanine

Charleston, South Carolina 29401

t: 843.573.9900 | f: 843.573.0200

ronnie@blandrichter.com

scott@blandrichter.com

s/ Eric S. Bland

Eric S. Bland (SC Bar No. 64132)

105 West Main Street, Suite D

Lexington, South Carolina 29072

t: 803.256.9664 | f: 803.256.3056

ericbland@blandrichter.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2023-CP-10-04865
 Dow, Inc.,	)	
	)	
Plaintiff,	)	Defendant Beth Bartolini's Answer and
	)	Counterclaims
vs.	)	(Jury Trial Demanded)
	)	
Beth Bartolini,	)	
	)	
Defendant.	)	
_____	)	

COMES NOW, Defendant Beth Bartolini (hereinafter "Bartolini"), answering the Complaint ("Complaint") of Dow, Inc. (hereinafter "Dow"), alleges and states as follows:

1. Bartolini denies any and all allegations not otherwise specifically admitted herein.
2. Paragraphs 1 and 2 are admitted.
3. In response to Paragraph 3, Bartolini states that this Paragraph contains legal conclusions to which no response is required; to the extent a response is required, Bartolini denies the allegations contained in said Paragraph.
4. In response to Paragraph 4, Bartolini reasserts and realleges each of her prior responses as if fully set forth verbatim herein.
5. Paragraphs 5 and 6 are admitted.
6. In response to Paragraph 7, Bartolini admits that the parties executed a Contract but denies its validity due to Dow's fraudulent inducement into the same.
7. Paragraphs 8 and 9 are denied and strict proof is demanded thereof.

8. In response to Paragraph 10, Bartolini craves reference to said invoice, the terms of which speak for itself, Bartolini denies said Paragraph to the extent they are inconsistent with this response.

9. Paragraphs 11 and 12 are denied.

10. In response to Paragraphs 13 and 14, Bartolini states that these Paragraphs contain legal conclusions to which no response is required; to the extent a response is required, Bartolini denies the allegations contained in said Paragraphs.

11. Bartolini is without knowledge as to the truth or falsity of the allegations contained in Paragraph 15, and therefore denies same and demands strict proof thereof.

12. In response to Paragraph 16, Bartolini states that this Paragraph contains legal conclusions to which no response is required; to the extent a response is required, Bartolini denies the allegations contained in said Paragraph.

13. Paragraph 17 is denied.

**FURTHER ANSWERING DOW'S COMPLAINT
AND RESPONDING TO THE FIRST CAUSE OF ACTION
(Compel Arbitration Pursuant to the Federal Arbitration Act, 9 U.S.C. §4)**

14. In response to Paragraph 18, Bartolini reasserts and realleges each of its prior responses as if fully set forth verbatim herein.

15. In response to Paragraphs 19 and 20, Bartolini states that these Paragraphs contain legal conclusions to which no response is required; to the extent a response is required, Bartolini denies the allegations contained in said Paragraphs.

16. Bartolini is without knowledge as to the truth or falsity of the allegations contained in Paragraph 21, and therefore denies same and demands strict proof thereof.

17. Paragraphs 22 and 23 are denied.

AS TO THE WHEREFORE CLAUSE

18. Bartolini specifically denies that Dow is entitled to any relief from her.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

19. Dow's claims against Bartolini are barred because Dow has failed to state facts sufficient to constitute a cause of action against Bartolini.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

20. The claims against Bartolini are barred by the doctrines of waiver, estoppel, Laches and/or because Dow comes to the Court with unclean hands.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

21. Pursuant to South Carolina Code Section 15-32-520, Bartolini requests that any proceeding to determine punitive damages should be bifurcated from any trial determining liability and compensatory damages.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

22. Bartolini is entitled to a set off for any amounts paid to Dow by a Third-Party as compensation or settlement for the damages claimed by it.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

23. Dow's claims are barred because the Complaint fails to state facts sufficient to constitute a cause of action against Bartolini.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

24. Dow's claim for quasi contract (quantum meruit) is barred by the doctrines of waiver and/or estoppel.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

25. Bartolini is entitled to set-off the entire amount claimed by Dow by the value of materials that were misappropriated and/or damaged, funds that were misappropriated and were not paid by Dow to subcontractors and suppliers, the cost of work which was not performed, the cost incurred and to be incurred to repair and replace deficiently performed work, the cost to address damage caused by deficiently performed work, and delay damages.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

26. Dow's mechanic's lien claim is barred as a result of its failure to comply with statutory requirements.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

27. Dow's claim for quasi contract (quantum meruit) is barred by doctrine of unclean hands.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

28. Dow's claims are barred because Dow has been paid in full or overpaid for the actual labor and material provided to the Residence by or on behalf of Dow.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

29. Dow's demand for Arbitration should be denied because the contract between the parties was procured by Dow's fraudulent acts.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

30. Dow's demand for Arbitration should be denied because the arbitration and other anti-remedy provisions in the Contract are wholly unconscionable, contrary to South Carolina law, and thus, unenforceable.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE THERETO

31. Bartolini reserves additional defenses as may be revealed during the course of discovery and hereby incorporates all affirmative defenses within SCRCP 8 as if restated herein *verbatim*.

Bartolini further reserves the right to amend its Answer in order to assert third-party claims to the extent evidence presented by Dow or its experts supports such a claim which presently is unknown.

**FURTHER ANSWERING DOW'S COMPLAINT
AND AS A COUNTERCLAIM THERETO**

32. Bartolini is the owner of the Residence, which is located in Charleston County and is the subject of this action.

33. Upon information and belief, Dow is a corporation organized and existing under the laws of the State of South Carolina that does business in Charleston County, South Carolina as a general contractor.

**FOR A FIRST CAUSE OF ACTION AGAINST DOW
(Breach of Contract)**

34. Bartolini reiterates and realleges every preceding paragraph as if repeated herein *verbatim*.

35. Bartolini entered the Contract with Dow to provide certain labor and material for the improvement of the Residence.

36. Dow breached the Contract in numerous particulars, including but not limited to the following:

- a) Failing to complete work;
- b) Failing to perform or complete work in a timely manner;
- c) Failing to perform the work in a workmanlike fashion and free from deficiencies,

- including but not limited to defects related to the following: Interior painting; exterior sanding and painting; insulation; flooring; electrical work; windows; and, doors;
- d) Misappropriation of material removed from the Residence;
- e) Misappropriation of funds paid by Bartolini to Dow for labor and material incorporated (or intended to be incorporated) in the Residence and for subcontractor work performed;
- f) Seeking and receiving payment for labor and for administration services not provided;
- g) Failing to provide adequate manpower and resources to make sufficient progress towards completion of the work;
- h) Making unauthorized changes without properly approved change orders;
- i) Failing to properly manage and supervise subcontractors;
- j) Failing to prevent and correct damage to the Residence resulting from improper management and supervision of subcontractors; and
- k) Other particulars that may be uncovered during discovery and shown at the trial of the case.

37. As a direct and proximate result of Dow's breach of the Contract as above-described, Bartolini has and will suffer damages associated with costs: To engage the services of others to evaluate, remove, repair, replace, and complete the defective and deficient work performed by Dow and the damage to the Residence resulting therefrom; to pay certain subcontractors and/or suppliers for labor and material which Bartolini previously paid to Dow, thereby paying double for certain portions of the Project; and, to incur such other losses, damages, and expenses proximately resulting from Dow's breach of the Contract.

38. Based on the foregoing, Dow is liable to Bartolini for the actual, incidental, consequential, and special damages proximately resulting from Dow's breach of the Contract, including the costs and attorney's fees associated with the same.

39. Bartolini is informed and believe that the damages for which Dow is liable for breach of the Contract will substantially exceed any amounts Dow is or alleges to be due and owing.

**FOR A SECOND CAUSE OF ACTION AGAINST DOW
(Negligence/Gross Negligence)**

40. Bartolini reiterates and alleges every preceding paragraph as if repeated herein verbatim.

41. Dow had a duty, separate from and addition to those in the Contract, to use due care and to perform its work in a reasonable and workmanlike fashion, in accordance with building codes and regulations, in accordance with industry standards, and free from defects.

42. Dow breached its duty of care by negligently, recklessly, intentionally, willfully, and/or wantonly performing its work at the Residence as described in Paragraph 34 above.

43. As a direct and proximate result of Dow's breach of its duty of care as above-described, Bartolini has and will suffer damages as described in Paragraph 35 above.

44. Based on the foregoing, Dow is liable to Bartolini for the actual, incidental, consequential, and special damages proximately resulting from Dow's breach of its duty of care, including the costs and attorney's fees associated with the same, and for punitive damages in an amount to be determined by the trier of fact.

45. Bartolini is informed and believes that the damages for which Dow is liable for breach of its duty of care will substantially exceed any amounts Dow is or alleges to be due and owing.

**FOR A THIRD CAUSE OF ACTION AGAINST DOW
(Breach of Warranties)**

46. Bartolini reiterates and realleges every preceding paragraph as if repeated herein verbatim.

47. Dow made certain express warranties in connection with the labor and material it provided to and for the Residence and certain implied warranties in connection with the labor

and material it provided to and for the Residence, including implied warranties of habitability, workmanlike service, and fitness for particular purpose.

48. Dow breached its express and implied warranties by performing its work at the Residence as described in Paragraph 34 above.

49. As a direct and proximate result of Dow's breach of its express and implied warranties as described above, Bartolini has and will suffer damages as described in Paragraph 35 above.

50. Based on the foregoing, Dow is liable to Bartolini for the actual, incidental, consequential, and special damages proximately resulting from Dow's breach of its express and implied warranties, including the costs and attorney's fees associated with the same.

51. Bartolini is informed and believes that the damages for which Dow is liable for breach of its express and implied warranties will substantially exceed any amounts Dow is or alleges to be due and owing.

**FOR A FOURTH CAUSE OF ACTION AGAINST DOW
(Violation of SCUPTA)**

52. Bartolini reiterates and realleges every preceding paragraph as if repeated herein verbatim.

53. Dow's conduct as described in Paragraph 34 above conduct constitutes unfair and deceptive trade practices and is a violation of the South Carolina Unfair Trade Practices Act found at South Carolina Code Section 39-5-10, et seq. Furthermore, Dow's conduct was intentional and willful.

54. Dow's conduct is capable of repetition, and, upon information and belief, has been repeated.

55. Dow's conduct affects the public interest.

56. Dow knew or should have known that its actions as described in Paragraph 34 above constituted unfair and deceptive trade practices.

57. As a direct and proximate result of Dow's violation of the South Carolina Unfair Trade Practices Act as described above, Bartolini has and will suffer damages as described in Paragraph 35 above.

58. Based on the foregoing, Dow is liable to Bartolini for the actual damages proximately resulting from Dow's violation of the South Carolina Unfair Trade Practices Act, which should be trebled, and for the costs and attorney's fees associated with this action.

**FOR A FIFTH CAUSE OF ACTION AGAINST DOW
(Conversion)**

59. Bartolini reiterates and realleges every preceding paragraph as if repeated herein verbatim.

60. Bartolini and Dow entered the Contract in which Dow agreed to provide certain labor and materials for the improvement of the Residence.

61. During the construction process, Dow requested progress payment for labor and material provided to the Residence by its subcontractors and/or suppliers, and Bartolini remitted payment to Dow for that labor and material.

62. Dow is and was required by the Contract and by law to pay its subcontractor and suppliers from the funds which Bartolini paid to Dow, but Dow wrongfully failed and refused to pay several of its vendors and subcontractors out of the funds it received from Bartolini, thereby converting said funds to its own use by exercising unauthorized dominion and control of those funds in willful and reckless disregard of Bartolini's rights and interests.

63. As a direct and proximate result of Dow's conversion of funds as described above, Bartolini has or will be forced to pay subcontractors and suppliers for labor and/or material which Bartolini previously paid Dow.

64. Based on the foregoing, Dow is liable to Bartolini the actual damages resulting from its conversion of funds, plus punitive damages in an amount to be determined by the trier of fact.

**FOR A SIXTH CAUSE OF ACTION
(Fraudulent/Negligent Misrepresentation)**

65. Bartolini reiterates and realleges every preceding paragraph as if repeated herein verbatim.

66. Bartolini and Dow entered the Contract in which Dow agreed to provide certain labor and materials for the improvement of the Residence.

67. During the construction process, Dow requested progress payment for labor and material which it claimed to have provided to the Residence, and Bartolini remitted payment to Dow for that labor and material.

68. Toward the end of Dow's involvement with the Residence, Bartolini discovered that the progress payment requests submitted by Dow for labor and material which it claimed to have provided to the Residence were grossly overstated and inaccurate.

69. Dow's submission of grossly overstated and inaccurate progress payment requests constitutes a fraudulent misrepresentation, because Dow made false and material representations knowing of their falsity or with reckless disregard for their truth or falsity with the intention that Bartolini would act upon them by making payment; Bartolini was ignorant of the falsity of the progress payment requests but had the right to and, in fact, relied on them as truthful and accurate by paying them.

70. Alternatively, Dow's submission of grossly overstated and inaccurate progress payment requests constitutes a negligent misrepresentation, because Dow made a false representation to Bartolini with a pecuniary interest in doing so and in breach of its duty to submit truthful and accurate progress payment requests; Bartolini was ignorant of the falsity of the progress payment requests but had the right to and, in fact, relied on them as truthful and accurate by paying them.

71. As a direct and proximate result of Dow's fraudulent and/or negligent misrepresentation as described above, Bartolini has suffered damages in the form of overpayment to Dow for labor and material which were not provided by Dow to the Residence.

72. Based on the foregoing, Dow is liable to Bartolini for the actual damages resulting from its fraudulent and/or negligent misrepresentation, plus punitive damages in an amount to be determined by the trier of fact.

**FOR A SEVENTH CAUSE OF ACTION
(Accounting)**

73. Bartolini reiterates and realleges every preceding paragraph as if repeated herein verbatim.

74. Bartolini has repeatedly requested that Dow provide documentation of the Costs of the Work including but not limited to requests for labor and material invoices.

75. Dow has failed to provide said documentation despite demanding and receiving payments for Work it claims to have completed, which is denied.

76. Bartolini is entitled to these records and an accounting by Dow and hereby demands the same.

WHEREFORE, Bartolini hereby requests that the Court deny Plaintiff's Motion to Compel Arbitration, dismiss Dow's Complaint, that all issues of fact be tried by a jury; enter

Judgment in favor of Bartolini on its Counterclaims, and award Bartolini attorney's fees, expenses and costs and such other and further relief that this Court deems just and proper.

ROBERTSON HOLLINGSWORTH MANOS & RAHN
550 King Street, Suite 300
Charleston, South Carolina 29403
T: (843) 723-6470
Email: PRR@roblaw.net

BY: s/Paul R. Rahn
PAUL R. RAHN (SC Bar No. 15977)
Attorneys for Beth Bartolini

November 10, 2023

Charleston, South Carolina

1 STATE OF SOUTH CAROLINA
2 IN THE COURT OF COMMON PLEAS
3 COUNTY OF CHARLESTON

4 Dow, Inc.,

5 Plaintiff,

6 vs.

Transcript of Record
2023-CP-10-04865

7 Beth Bartolini,

8 Defendant.

9
10
11 July 28, 2024
12 Charleston, South Carolina

13 B E F O R E:

14 The HONORABLE MAITE MURPHY

15 A P P E A R A N C E S:

16
17 Scott Mongillo, Representing the plaintiff

18 Paul Rahn, Representing the defendant

19
20
21 SHARON G. HARDOON, CSR
22 Official Circuit Court Reporter, III
23
24
25

1 THE CLERK: Case number 2023-CP-10-04865, *Dow*
2 *Incorporated vs. Beth Bartolini.*

3 THE COURT: Good morning, Counsel.

4 MR. MONGILLO: Good morning, Your Honor.
5 Scott Mongillo with Bland Richter for the
6 plaintiff, Scott Dow.

7 THE COURT: And this is a motion to
8 compel arbitration?

9 MR. MONGILLO: Yes, Your Honor.

10 THE COURT: All right. Sir, I'll be happy to
11 hear from you?

12 MR. MONGILLO: Okay. Your Honor, may I
13 approach the bench?

14 THE COURT: Okay.

15 MR. MONGILLO: I'm handing you and
16 opposing the construction contract which brings us
17 here today. I highlighted and tabbed it identical
18 for everyone.

19 If you'll look at the first page, it's
20 entitled construction contract. The owner of the
21 home is Beth Bartolini, the defendant. The
22 contractor is Dow Incorporated owned by Scott Dow,
23 and the project is for miscellaneous
24 interior/exterior work.

25 If you turn to page 3 at the green tab,

1 there's Article 11, arbitration of distributes.
2 We agree that this contract doesn't comply with
3 the South Carolina Arbitration Act, but it does
4 comply with the Federal Arbitration Act, the FAA.
5 And there is arbitration on the American
6 Arbitration Association under its construction
7 industry rules. And there, about an inch away,
8 half an inch away is where it's initialed by both
9 parties to the contract.

10 We filed this case back in October of
11 2023. The complaint is, please arbitrate. The
12 defendant filed a counterclaim and said they
13 wanted a jury trial. So in November of 2023, we
14 filled a motion to compel arbitration.

15 Last night the defendant filed a memo in
16 opposition, and in their memo in opposition on
17 page 5 they state: "There is no evidence before
18 this court to suggest that any of those repairs
19 involve interstate commerce, and as such, there is
20 no evidence before the court to support the
21 plaintiff's allegations that the case is subject
22 to the Federal Arbitration Act.

23 Your Honor, the proof is right in front
24 of you if you'll turn to the orange tab at page
25 10.

1 Your Honor, if you read from the *New Hope*
2 contract -- I'm sorry. The *New Hope* case from the
3 court of appeals in 2008, 379 S.C. 620, which it
4 says in the case there, "It would be virtually
5 impossible to construct a 18-story apartment
6 building between 1971 and 1973 with materials,
7 equipment, and supplies all produced and
8 manufactured solely within the state of South
9 Carolina." This was a 2008 case that said that
10 the contract doesn't comply with the South
11 Carolina Arbitration Act. You have to go to the
12 FAA. And then the Court looks at the evidence
13 before it, but the contract -- the construction
14 contract you have to determine if it involves
15 interstate commerce.

16 So, first, on page 10: Remove and
17 replace all the damaged framing.

18 Number 3 -- and this is all highlighted
19 for both of you-all. Remove and replace all
20 exposed poly piping. Removed all the duct work.

21 Going to the next page, number 9:
22 Replace the laminate flooring. Supply and install
23 a new glass door. Supply and install a new wall.
24 Three new windows, Anderson quality, Anderson
25 Windows. A new tankless water heater. New light

1 fixtures. Bathroom floor, and it keeps going on
2 and on.

3 Your Honor, this is evidence, obviously
4 this isn't interstate commerce. I mean, to take
5 their theory, if they had a nail involved in this
6 job and it hadn't been mined -- the iron mined
7 here, produced in South Carolina, sold only in
8 South Carolina, advertised only in South Carolina,
9 and then transferred, not over interstate
10 commerce, but interstate roads or highway. It's
11 ridiculous.

12 So, really, what their complaint says -- or
13 their memo in opp says last night is that we don't
14 have an affidavit that says it's interstate commerce.
15 Frankly, we don't need an affidavit. You don't need
16 an affidavit to tell you that today end with a "Y."

17 This is obvious. The case that I cited
18 states it would be virtually impossible 50 years ago
19 to build a building.

20 Now, these cases do deal with the
21 construction of a new home. They also raise that
22 part. It doesn't deal with repairs. That's just
23 another silly legal argument.

24 This matter should have been arbitrated
25 already and done with, but now we're here months

1 and months later because they ignore the plain
2 unambiguous language here in this contract, and
3 it's not right, Your Honor. Some arguments just
4 shouldn't be made.

5 Thank you.

6 THE COURT: Thank you.

7 Response.

8 MR. RAHN: Your Honor, Paul Rahn for the
9 defendant Beth Bartolini.

10 I appreciate counsel for the plaintiff
11 skipping to my arguments before I make them, but I
12 want to make it clear, the reason that we're in
13 this case is because the plaintiff was hired to
14 repair my client's existing home and represents
15 himself as an expert in construction repairs and
16 construction cost estimating. He's actually a
17 named expert in numerous cases throughout
18 South Carolina. And he represented to my client
19 that he would fix her house for between 150 and
20 \$225,000, and that's what is in the contract.

21 He ended up charging her \$500,000, a
22 little over \$500,000, which is why we rightly say
23 that there's fraud of inducement in this case,
24 there's negligent misrepresentation about what
25 this was going to cost. My client has paid over

1 \$400,000 in repair costs for her home.

2 So we rightly asserted counterclaims. I
3 certainly don't think there is anything
4 ridiculous about our arguments, but I'll go
5 through them.

6 The plaintiff admits that the
7 South Carolina Arbitration Act doesn't apply
8 because it doesn't comply with the statutory
9 requirements that are involved.

10 With respect to the Federal Arbitration
11 Act, there are cases that, in fact, say you need
12 an affidavit stating that there's interstate
13 commerce involved in order to support the notion
14 that there is. And, again, this is not a new
15 construction case. This is a case that involves
16 the removal and replacement of existing windows,
17 repairs to structural framing.

18 And there is no case necessarily that
19 those items are coming from out of state. There
20 are lumber mills in South Carolina. There are
21 trees cut down in South Carolina. There's nothing
22 before the Court that says that stuff came from
23 out of state.

24 In addition -- and I'll just cite to the
25 two cases. There's the *Hicks Unlimited* case,

1 which is a 2023 case before the Supreme Court of
2 South Carolina, and that's the one where they
3 don't just blanketly accept that interstate
4 commerce is just assumed, and that FAA is just
5 assumed as controlling. You have to have
6 evidence. They hold that, "A party seeking
7 arbitration under the FAA must demonstrate that
8 the contract implicates interstate commerce." I
9 don't know how they've done that.

10 And I will point out, Your Honor, the
11 plaintiff seeks to arbitrate this and complains
12 about the delay in arbitrating this case, yet they
13 never filed anything with the American Arbitration
14 Association, a construction dispute. So there's
15 no pending arbitration action that's been filed.
16 They complained about the delay, but they haven't
17 even done that.

18 Additionally, we're asserting that the
19 contract itself is unenforceable because it was
20 induced based on fraud. The fraud being that they
21 -- my client was told it was going to be 150 to
22 \$225,000. The leading construction cost expert in
23 South Carolina ended up charging her \$500,000.

24 But the biggest -- I think the biggest
25 point and the biggest issue is that, even if the

1 FAA does control and even if there is interstate
2 commerce and the Court accepts the lack of
3 affidavit and presumes interstate commerce is
4 involved, there is no need for meeting of the
5 minds here and that's something that's essential.
6 And that was set out in both the *Hicks* and the
7 *Grant* case, which is that, *In order to have an*
8 *enforcible arbitration agreement, there has to be*
9 *a meeting of minds as to what that is.*

10 And I believe that we sent my memo to the
11 Court, but I'm happy to pass one up if you don't
12 have one.

13 THE COURT: That would be helpful. Thank
14 you.

15 MR. RAHN: But the issue is this, Your
16 Honor. It's not that -- there's a lot here.
17 There's no who, what, when, or why in this
18 arbitration clause, and it's too vague to be
19 enforceable. And what I mean is, just referring
20 to the matter to the American Arbitration
21 Association doesn't tell you enough about what the
22 parties are agreeing to.

23 As an example, I want to hand up what --
24 I'm going to hand up the rules for the AAA, as
25 well as a summary of the changes to the rules that

1 were made this year.

2 So the American Arbitration Association
3 construction rules were amended earlier -- I think
4 in March of 2024. And that summary implicates
5 important facets of how the arbitration is going
6 to be conducted, and I those are substantive
7 issues, not ancillary. There is some case law
8 that says, just because you-all don't agree on
9 what -- you know, the exact location you're going
10 to arbitrate the case, that's not necessarily a
11 material term to an arbitration. But there are
12 terms that are essential. They have to have a
13 meeting of the minds.

14 For one thing, because the arbitration --
15 AAA has changed their rules and some of those are
16 substantive changes, there could have been no
17 meeting of the minds because those rules didn't
18 exist at the time this contract was entered into.
19 And a great example of that is, the fact that the
20 right to have dispositive motions heard by an
21 arbitrator is now subject to the arbitrator's
22 discretion. So you don't have an automatic right
23 to file a summary judgment motion or any other
24 kind of dispositive motion. That's rule 34 of the
25 new rules.

1 That's significant in our case because we
2 believe that at least a portion of this case is
3 going to get decided on dispositive motions based
4 on the plaintiff's failure to comply with the
5 statutory requirements of filing the mechanic's
6 lien and perfecting it.

7 Further, once we get into those rules,
8 Your Honor, there are several different paths that
9 cases take under the AAA construction rules.
10 There are the regular procedures. There's
11 fast-track procedures. There's large
12 case-designation complex track. And then there's
13 a whole separate track from what's called the home
14 construction arbitration rules procedures, which
15 are another track. And none of those has been set
16 out as to what is going to be done, which one of
17 those you're going to use in the arbitration
18 agreement.

19 I don't believe, based on what they pled
20 and what they asserted, they had asserted what one
21 applies either. So how is that to get decided if
22 it's not agreed to in the arbitration agreement.
23 That's a substantive provision. It's not just a
24 minor detail that got omitted. It's just --
25 there's only one sentence here that says it will

1 be arbitrated in accordance with the AAA
2 construction rules. It doesn't say anything else.

3 And so based on that, I don't think there was
4 a meeting of the minds. And under *Hicks* and *Grant*, I
5 believe that would invalidated the arbitration
6 agreement.

7 Thank you, Your Honor.

8 THE COURT: Thank you, Counsel.

9 Response.

10 MR. MONGILLO: Your Honor, briefly. The
11 reason we haven't filed with the AAA is because we
12 got a counterclaim back asking for a jury trial,
13 so it would be silly and a waste of time and money
14 if they don't agree to go. So we had to force
15 them here and it's taken a long time to get here.
16 We shouldn't have to do it.

17 In 2002, the South Carolina Supreme Court
18 directed the lower courts to resolve any doubts --
19 any doubts concerning the scope of the
20 arbitratable issues, in quote, "In favor of
21 arbitration." That's *Bazzle vs. Green Tree*
22 *Financing*, 351 S.C. 244, 2002. And the Court of
23 Appeals said in 2003 that, "It is the policy of
24 the State to favor arbitration in disputes."
25 That's in the middle source at page 356 S.C 370,

1 2002, Court of Appeals.

2 Been a lawyer for over 25 years now.

3 I've seen a lot of these, unfortunately, arguments
4 that you shouldn't arbitrate and they're always
5 pushed into arbitration.

6 So there is a meeting of the minds. It's
7 right here. She literally initialed a half inch
8 away that says what rules we're going to use. To
9 take the defendant's argument, you'd have to have
10 a 20-page contract versus 10-page contract.

11 Clearly, there was a meeting of the minds
12 because she read it. She has a duty to read it
13 when signed and it says arbitration. We have what
14 rules we're going to use and we should be in
15 arbitration right now.

16 And we would ask the Court that if you
17 need an affidavit or want an affidavit, I can have
18 it. You can hold it in abeyance. I'll have the
19 affidavit tonight from Mr. Dow that he bought the
20 nails through interstate commerce. I don't think
21 you need that. If you want it, you can.

22 Your Honor, we're fine with a Form 4
23 order. We just want to get this going. We are
24 now, ironically, in ADR notice because we haven't
25 mediated it yet. So, I mean, if you want to put

1 in the order -- I'm fine with this -- the parties
2 have to mediate within 30 days, if the defendant
3 wants to or if they don't. And then we have to
4 start the arbitration process in another 30 days.

5 But, clearly, this should be in
6 arbitration.

7 THE COURT: Thank you, Counsel. As far
8 as the affidavit is concerned, I'll leave that in
9 your discretion as to whether you're compliant
10 with the rules as to what's required for my
11 ruling, but I will leave the record open for the
12 remainder of the day for you to submit something
13 if you wish to do so.

14 Otherwise, I'll take the matter under
15 advisement and provide you an opinion.

16 MR. RAHN: Thank you, Your Honor.

17 (Hearing concluded.)

18

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CERTIFICATE OF REPORTER

I, SHARON G. HARDOON, Official Circuit Court Reporter, III for the State of South Carolina at Large, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the **** Family Court for Charleston County, South Carolina.

I do further certify that I am neither kin, counsel, nor interest to any party hereto.

January 9, 2024



Sharon G. Hardoon, CSR
Official Circuit Court Reporter, III

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
) CIVIL ACTION NO: 2023-CP-10-04865

Dow, Inc.,)
Plaintiff,)
) **PLAINTIFF’S MOTION TO COMPEL**
vs.) **ARBITRATION PURSUANT TO THE**
) **FEDERAL ARBITRATION ACT**
Beth Bartolini,)
)
Defendant.)

TO: THE DEFENDANT ABOVE NAMED BY AND THROUGH HER ATTORNEY OF RECORD:

NOTICE AND MOTION

YOU WILL PLEASE TAKE NOTICE that the Plaintiff Dow, Inc. (“Dow”) will move before the Presiding Judge of the Ninth Judicial Circuit, within ten (10) days of the filing of this Motion, or as soon thereafter as counsel may be heard, pursuant to the Federal Arbitration Action (9 U.S.C. 1 *et seq.*) for an Order staying the matter and directing the parties to submit any and all claims alleged in the Complaint to binding arbitration pursuant to the signed written contract between the parties (see “Construction Contract” attached as **Exhibit A**). In support of the motion, Dow submits the following:

MEMORANDUM IN SUPPORT

1. Procedural History

On October 3, 2023, Dow filed a complaint in this matter seeking to have its claims heard in arbitration pursuant to the written terms of the parties’ contract which was attached as **Exhibit A** to the complaint. On November 11, 2023, Defendant filed an answer with counterclaims seeking a jury trial despite the unambiguous four corners of the parties’ contract requiring all matters be heard in arbitration. Plaintiff filed a reply to the counterclaims which, once again, sought to have

this matter arbitrated. Dow now files this motion to finally compel the Defendant into arbitration as per the four corners of the unambiguous contract executed by the Plaintiff and Defendant.

2. Discussion

A. Facts

On August 17, 2022, Dow and the Defendant freely entered into a binding “Construction Contract” (“Contract”) for interior and exterior construction work at Defendant’s residence. Plaintiff completed the required construction work in a timely, professional, and workmanlike manner. The Plaintiff’s work was completed according to industry standards and all applicable codes.

On September 6, 2023, Plaintiff invoiced the Defendant for the remaining contractually owed balance due of seventy-one thousand, four hundred and fifty and 71/100 (\$71,450.71) and this invoice is attached to the Complaint as Exhibit B. Despite repeated demands, Defendant has refused to pay for the Plaintiff’s labor, equipment, and materials necessary for the installation of the interior and exterior work at Defendant’s residence.

Article 11 of the Contract is entitled in bold “**ARBITRATION OF DISPUTES**” and states in as follows:

ARTICLE 11. ARBITRATION OF DISPUTES

11.1 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.

ARTICLE 12. WARRANTY

12.1 At the completion of this project, Contractor shall execute an instrument to Owner warranting the project for one year against defects in workmanship or materials utilized. The manufacturer's warranty will prevail. No legal action of any kind relating to the project, project performance or this contract shall be initiated by either party against the other party after (one years) beyond the completion of the project or cessation of work.

Initiated by: Owner Contractor



B. Argument

- FEDERAL ARBITRATION ACT (9 U.S.C.A. §1 *et seq.*)

The arbitration clause listed above is clear and unambiguous. “Any controversy or claim” relating to the Contract shall be settled by “arbitration administered by the American Arbitration Association.” However, Defendant seeks a jury trial and has refused to arbitrate. Thus, the Defendant is improperly trying to evade this mandatory arbitration language she knowingly agreed to in the Contract.

The arbitration provision in question is valid under Federal law because the contract implicates interstate commerce. As per the Complaint, Plaintiff’s “claim” concerns construction work on a residential home in Charleston County. To repair the Defendant’s home the required building materials and supplies traveled interstate highways and crossed state lines into South Carolina. Due to the fact that the contract involves interstate this Court must examine the Federal Arbitration Act (9 U.S.C.A. §1 *et seq.*). Specifically, 9 U.S.C.A. §2, states that:

[a] written provision in any... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (Emphasis supplied.)

Based on this federal statutory supremacy language, the arbitration clause in the contract is valid and enforceable on the parties pursuant to the Federal Arbitration Act because both the Plaintiff and Defendant were involved in interstate commerce.

The South Carolina Supreme Court has opined on the supremacy of the Federal Arbitration Act over the South Carolina Uniform Arbitration Act (S.C. Code Ann. §15-48-10 *et seq.*) when it ruled in *Osteen v. T.E. Cuttino Const. Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993) that an arbitration clause in a construction contract was not invalid for failing to comply with §15-48-10 *et seq.*

because the contract involved interstate commerce; consequently, federal substantive law supplanted state law regarding arbitration (emphasis supplied by Dow). Of course, the present matter also involves a construction contract.

Also, in *Godwin v. Stanley Smith & Sons*, 300 S.C. 90, 386 S.E.2d 464 (Ct.App. 1989), the South Carolina Court of Appeals held that an arbitration provision in a contract was enforceable under the Federal Arbitration Act, even if it was not enforceable under the South Carolina Uniform Arbitration Act since the Federal Arbitration Act supersedes the South Carolina Uniform Arbitration Act.

Consequently, any argument by the Defendant that the contract fails to meet the standards required by the South Carolina Uniform Arbitration Act are null and void because the parties were involved in interstate commerce and because their contract requires arbitration. Thus, the Federal Arbitration Act pre-empts state law governing the enforceability of the arbitration clause in question because interstate commerce is implicated and the parties agreed in writing to arbitration.

- PUBLIC POLICY

In addition, Federal Courts have opined that the basic purpose of the Federal Arbitration Act is to promote the speedy disposition of disputes without the expense and delay of extended court proceedings. *U.S. for Use of Duo Metal and Iron Works, Inc. vs. S.T.C. Const. Co.*, E.D. Pa. 1979, 472 F.Supp. 1023. South Carolina courts also have an unbending public policy which favors arbitration which has been supported in a legion of cases for the past thirty years. In 2002, the South Carolina Supreme Court directed the lower courts to resolve any doubts concerning the scope of arbitrable issues “in favor of arbitration”. *Bazzel v. Green Tree Financial Corp.*, 351 S.C. 244, 569 S.E.2d 349 (2002). The South Carolina Court of Appeals followed suit in 2003 when it

stated that it is the policy of the State to favor arbitration of disputes. *MailSource, LLC v. M.A. Bailey & Associates, Inc.*, 356 S.C. 370, 588 S.E.2d 639 (Ct.App. 2003).

Both Dow and the over worked, underfunded South Carolina court system have the same goal of a speedy resolution to this matter and arbitration assists that goal. Based on the federal and state public policy this Court should require the parties to arbitrate.

CONCLUSION

In light of the foregoing facts and fully established case law, Dow is entitled to an Order staying this matter and compelling all parties to **immediately** submit this matter into binding arbitration to be heard in accordance with the rules of the American Arbitration Association.

Charleston, South Carolina
November 20, 2023

BLAND RICHTER, LLP
Attorneys for the Plaintiff

s/Ronald L. Richter, Jr.

Ronald L. Richter, Jr. (SC Bar No. 66377)

s/Scott M. Mongillo

Scott M. Mongillo (SC Bar No. 16574)

18 Broad Street, Mezzanine

Charleston, South Carolina 29401

Telephone: 843.573.9900

Facsimile: 843.573.0200

ronnie@blandrichter.com (email)

scott@blandrichter.com (email)

s/Eric S. Bland

Eric S. Bland (SC Bar No. 64132)

105 West Main Street, Suite D

Lexington, South Carolina 29072

Telephone: 803.256.9664

Facsimile: 803.256.3056

ericbland@blandrichter.com (email)

DOW INCORPORATED

◆ LICENSED GENERAL & RESIDENTIAL

CONSTRUCTION CONTRACT

THIS AGREEMENT FINAL REVISED, Made as of August 17th, In the Year of 2022

Between the Owner: **Beth Bartolini**
759 Lake Frances Drive
Charleston, SC 29412

And the Contractor: **Dow Incorporated**
P.O. Box 727
Mt. Pleasant, S.C. 29465

For the Project: **Miscellaneous Interior and Exterior Work**

Construction Lending Institution : **None**

ARTICLE 1. CONTRACT DOCUMENTS

1.1 The contract documents consist of this agreement, General Conditions, Project Scope, Construction Documents, Specifications, Allowances, Finish Schedules, Construction Draw Schedule, all Addenda issued prior to execution of this agreement and all Change Orders or modifications issued and agreed to by both parties. All documents noted herein shall be provided to the Contractor by the Owner. These contract documents represent the entire agreement of both parties and supersede any prior oral or written agreement. Documents will be added to agreement, as they are developed and approved by both parties.

ARTICLE 2. SCOPE OF WORK

2.1 The Contractor agrees to repair the above mentioned structure and fixtures attached thereto in Charleston, South Carolina according to the Construction Documents, Allowances, Finish schedules, all addenda, change orders, modifications and specifications set forth in the specification booklet. The Project Scope is outlined below in Exhibit "A" Any additions or deletions will be added by mutual consent, as they are defined. The terms of this agreement shall endure for all succeeding Phases.

The total scope of the overall project will be defined as work progresses, as documented by approved plans, specs, and directives.

ARTICLE 3. TIME OF COMPLETION

3.1 The approximate commencement date of the project shall be execution of agreement. The approximate and estimated completion of work will be **180 working days from issuance of permit**. However, any change orders and/or unusual weather might delay or otherwise affect the completion date. The contract execution date shall be (August 15th 2022).

ARTICLE 4. THE CONTRACT PRICE

Initialed by: Owner  Contractor 

General Conditions

Project Name: 759 Lake Frances Drive

4.1 The construction contract shall be calculated on a cost plus basis, with all Labor, Materials, Subcontractor, Permits and Insurance figured as costs. Construction coordination services shall be charged at Cost plus (percent) 27% of costs.

4.2 Pre-construction estimates for this work and coordination are approximately (estimated only owners final decisions could exceed the estimated cost show) This estimate is to be evaluated after work as begun. Monthly cost analysis will be completed on where are expenditures are on a regular basis for owners review and consideration. **One hundred and fifty thousand to Two hundred and twenty five thousand Dollars, (\$150,000.00 to \$225,000.00)** pending owners final selections and selections and approvals of the scope of work. (note there are so many hidden unknowns hidden costs may vary, owner will need to be available on decisions of final scope and week to seek agenda review and pricing.

4.3 The Owner and the Contractor acknowledge that the Owner will pay a sum of (seventy eight thousand Dollars, (\$78,000.00), upon signing of this contract and before construction begins as a deposit and part of the of the project cost. The deposit will be exhausted prior to any additional draw request. Monthly accounting will be provided to the owner upon each draw request. Quick books Word docs or excel spread sheets will be used as a form of invoicing and back up accounting methods.

ARTICLE 5. PROGRESS PAYMENTS

5.1 The Owner will make payments to the contractor every 3.5 weeks or 25 days based on invoices for labor and materials submitted. Construction coordination fees shall also be paid with those draws. Owner shall make payments to contractor within (5 days) after request by contractor. Should the owner fail to make payment, contractor may charge a penalty of 1.5% monthly upon the unpaid amount until paid.

5.2 If payment is not received by the Contractor within (10 days) days after delivery of payment demand for work satisfactorily completed, contractor shall have the right to stop work or terminate the contract at his option. Termination by Contractor under the provisions of this paragraph shall not relieve the Owner of the obligations of payments to Contractor for that part of the work performed prior to such termination. Termination by Owner under the provisions of this paragraph shall not relieve the Owner of the obligations of payments to Contractor for that part of the work performed prior to such termination.

ARTICLE 6. DUTIES OF THE CONTRACTOR

6.1 All work shall be in accordance to the provisions of the plans and specifications. All systems shall be in good working order.

6.2 All work shall be completed in a workman like manner, and shall comply with all applicable national, state and local building codes and laws.

6.3 All work shall be performed by licensed individuals to perform their said work, as outlined by law.

6.4 Contractor shall obtain all permits necessary for the work to be completed.

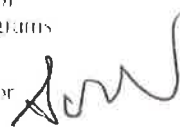
6.5 Contractor shall remove all construction debris and leave the project in a broom clean condition

6.6 Upon satisfactory payment being made for any portion of the work performed, Contractor shall furnish a full and unconditional release from any claim or mechanics' lien for that portion of the work for which payment has been made.

ARTICLE 7. OWNER

7.1 The Owner shall communicate with subcontractors only through the Contractor.

7.2 The Owner will not assume any liability or responsibility, nor have control over or charge of construction means, methods, techniques, sequences, procedures, or for safety precautions and programs in connection with the project, since these are solely the Contractor's responsibility.

Initialed by: Owner  Contractor 

General Conditions

Project Name: 759 Lake Frances Drive

ARTICLE 8. FINISH SCHEDULES

8.1 A Change Order is any change to the original plans and/or specifications. All change orders need to be agreed upon in writing, including cost, additional time considerations, approximate dates when the work will begin and be completed, a legal description of the location where the work will be done and signed by both parties or approved through email if parties are not present. 50% of the cost of each change order will be paid prior to the change, with the final 50% paid upon completion of the change order. A 27% fee shall be added to all change orders and overages in excess of initial allowances. Additional time needed to complete change orders shall be taken into consideration in the project completion date.

8.2 Completed Finish Selection Schedules shall be submitted to the Contractor and Owner as follows:

8.2.1 Schedule #1 at contract signing. Schedule to match the existing finish schedule provided prior to contract. Architect of record will provide as built and finish drawings where needed by the owner and contractor.

8.3 Any delays or changes in finish selection schedules will delay the projected completion date.

ARTICLE 9. INSURANCE

9.1 The Owner will keep in force a Builder's Risk Insurance Policy on the said property to protect both owner's and contractor's interests until construction is completed.

9.2 The Owner will purchase and maintain property insurance to the full and insurable value of the project, in case of a fire, vandalism, malicious mischief or other instances that may occur. Owner will fully insure all personal property and effect, whether on site or in storage.

9.3 The Contractor shall purchase and maintain needed Workman's Compensation and Liability insurance coverage as required by law and deemed necessary for his own protection.

ARTICLE 10. HAZARDOUS MATERIALS, WASTE AND ASBESTOS

10.1 Both parties agree that dealing with hazardous materials, waste or asbestos requires specialized training, processes, precautions and licenses. Therefore, unless the scope of this agreement includes the specific handling, disturbance, removal or transportation of hazardous materials, waste or asbestos, upon discovery of such hazardous materials the Contractor shall notify the Owner immediately and allow the Owner/Contractor to contract with a properly licensed and qualified hazardous material contractor. Any such work shall be treated as a Change Order resulting in additional costs and time considerations.

ARTICLE 11. ARBITRATION OF DISPUTES

11.1 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.

ARTICLE 12. WARRANTY

12.1 At the completion of this project, Contractor shall execute an instrument to Owner warranting the project for one year against defects in workmanship or materials utilized. The manufacturers warranty will prevail. No legal action of any kind relating to the project, project performance or this contract shall be initiated by either party against the other party after (one years) beyond the completion of the project or cessation of work.

Initialed by: Owner

Contractor

General Conditions

Project Name: 759 Lake Frances Drive

ARTICLE 13. TERMINATION OF THE CONTRACT

13.1 Should the Owner or Contractor fail to carry out this contract, with all of its provisions, the following options and stipulations shall apply:

13.1.1 The Contractor will be paid for all unpaid invoices and all pending invoices to the date of termination. The Contractor will furnish final release of lien concurrent with final payment. The Owner may terminate this agreement at any time, with written notice and final payment of invoices, as stated above.

ARTICLE 14. ATTORNEY FEES

14.1 In the event of any arbitration or litigation relating to the project, project performance or this contract, the prevailing party shall be entitled to reasonable attorney fees, costs and expenses.

ARTICLE 15. ACCEPTANCE AND OCCUPANCY

15.1 Upon completion, the project shall be inspected by the Owner and the Contractor, and any repairs necessary to comply with the contract documents shall be made by the Contractor.

15.2 The Owner shall occupy the property with the understanding the owner will make available the scheduled work areas. It is understood this will include, but not limited to Kitchen, Dining Room, Living Room, Pool and Pool Deck, Exterior Decks and areas of the ground floor where structural supports are located. Owner will be using portions of the residence as needed and will be cognizant of safety needs during construction. Every effort will be taken to ensure easy access to the entire house and kitchen. The pool deck will be blocked off once stone has been removed.

WITNESS our hand and seal on this 9th day of Sept, 2022

Signed in the presence of:

Kim Saldana
Witness

Kim Saldana
Witness

[Signature]
Contractor Signature

[Signature] President
Owner Signature

Preliminary Scope:

Attachment "A"

KIM M. SALDANA
Notary Public
State of South Carolina
My Commission Expires Jun 7, 2032

1. Provide General Conditions and Supervision for the complete project. Provide Permitting and Business License as required for the project. Sanitation and debris removal will be provided on a daily basis.
2. Assess and provide pricing for repairing and/or replacing HVAC units and ductwork throughout.
3. Repair loose gable end brace and rotten HVAC stand in Attic
4. Replace undersized drop girder at second floor, expose and repair undersized floor joists and level second floor
5. Remove and reinstall or replace windows to confirm proper installation, waterproofing and flashing
6. Repair/replace all deteriorated floor joists, replace undersized drop girder and add additional drop girder or floor joists to support stairs at first floor

Initialed by: Owner

Contractor

ROA-0058

General Conditions

Project Name: 759 Lake Frances Drive

7. Install new sheathing and flooring throughout first floor
8. Monitor cracking at CMU walls under house and repair walls and piers as needed
9. Properly attach deck ledger to rim joist and install proper hangers at joists under house

***** Please note that this contract only outlines items presented in provided Engineer's report. Additional items to include, but not limited to interior and exterior finishes, may be added throughout the project based on Owner's approval. ***** See additional scope of work below.

Cost for labor as follows for typical working hours 7:30 AM to 5 PM M-Thurs and 7:30 to noon on Fridays; (night and off hour working will be billed at time and a half plus O&P as described.

- (a) General Conditions dumpsters, toilets, fees, fuel, vehicles and other general costs plus
- (b) Carpentry repairs will require @ a rate of \$65/hr. and assisting carpentry laborer and or helpers @ \$42/hr. Over time costs will increase from 27% O&P to time and a half plus 27% O&P.
- (c) Project managers will be invoiced on an as needed basis at \$85.00 per hour, Supervisor rate on site or off site - \$68.00 hr. plus 27%
- (d) Carpentry repair labor will be billed in 30 minute increments
- (e) Carpentry repairs include demolition as needed, corrective action and clean up
- (f) Supplies used will be calculated in complete unit increments, i.e. if 1/2 of one 2 X 4 is used the cost of one complete unit 2 X 4 will be invoiced to the process.
- (g) All supplies associated with a carpentry repair will be invoiced at Contractor's cost plus 27%. Cost of most commonly used materials will be provided to the project on a monthly basis by copy of Contractor's selected vendor price sheet.
- (h) Intermediate touch up and or protective priming and painting will be performed by a qualified painter selected by Contractor at a rate of \$55/hr. plus the cost of paint plus 27%. Fixed bids will be acquired and shared with owners
- (i) All costs associated with the project will be billed on a time and materials bases until a clear scope of work is defined and priced and a signed contract / confirmation agreement executed
- (j) All work will be documented and costs will be itemized for each invoice

Subtotal \$ Cost plus 27 %

Project Expenses:

Disks & Photo's - \$15.50 per disk
 Printing color photos - \$.65 per copy one side
 Binding - estimated \$ 14.00 per book under fifty pages
 Folder's, note books, files and documents cost plus 27%
 Building Materials cost plus 27%
 Permits and licensing - cost plus 27%
 Clark Ferguson - Paul Curry - Chris Constantine - see quoted cost attached cost plus 0.00 pd invoices direct by client
 Travel (Auto or Truck) - \$00.57 per mile cost plus 27%
 Gate passes - cost plus 0.00 if required

Initialed by: Owner Contractor



ROA-0059

General Conditions

Project Name: 759 Lake Frances Drive

ROOF and ATTIC:

Repair loose gable end brace. Rebuild rotten HVAC stand. Service or replace air handler in Attic. When turned on pan is full and appears to have overflowed at some point.



Photo 3. Attic overview. (1) loose gable end brace, (2) chimney, (3) over-framed portion of roof.



Photo 4. AHU catch pan. Note fungal hyphae and evidence of deterioration to AHU platform.

SECOND FLOOR:

Replace under-sized drop girder. Expose and repair improperly installed and under-sized floor joists. Floor is very out of level. Need to determine and repair cause.

Initialed by: Owner

[Signature]

Contractor

[Signature]

General Conditions

Project Name: 759 Lake Frances Drive



6. Floor slope 2.8% at stair landing.



Photo 8. Second floor drop girder over dining area (red arrow).

FIRST FLOOR:

Replace/repair deteriorated floor joists. Replace under-sized drop girder and add additional drop girder or floor joists to properly support stairs at first floor. Install new sheathing and flooring.

Initialed by: Owner

Contractor

ROA-0061

General Conditions

Project Name: 759 Lake Frances Drive



Photo 17. Deteriorated 2x10 floor joists (typical).



Photo 24. Drop girder in kitchen area.

CRAWL SPACE:

Monitor cracking at CMU block walls. Properly attach deck ledger to rim joist. Install proper hangers at joists. Option to encapsulate crawl space or clean and install moisture barrier.



Initialed by: Owner  Contractor 

General Conditions

Project Name: 759 Lake Frances Drive



23. Drop girder in crawl space. The girder does not contact the joists and, therefore, does not support the floor framing.



Photo 25. Drop girder under kitchen area.

Initialed by: Owner _____ Contractor _____

[Handwritten signature]

[Handwritten signature]

General Conditions

Project Name: 759 Lake Frances Drive



Photo 27. Deck ledger (no lag screws observed).

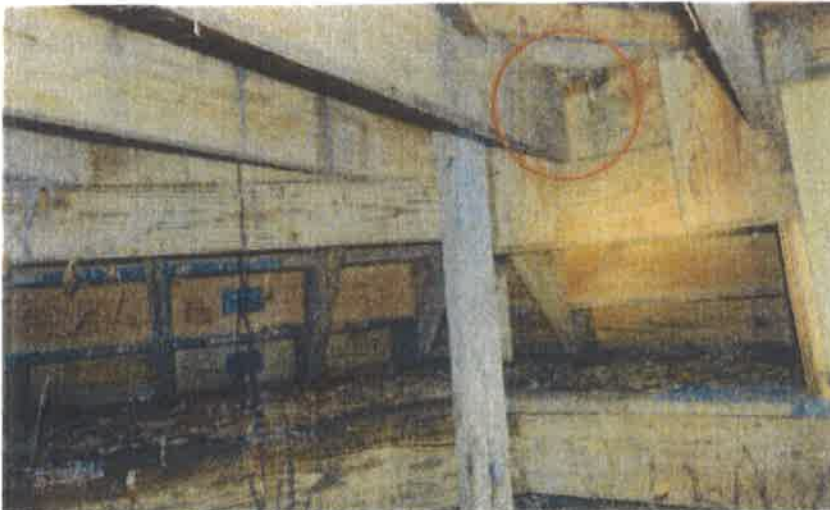


Photo 28. Deck joists not attached with framing connector or supported by deck ledgers.

Basic in Process Scope of Work

1. Remove and replace all rotted and damaged framing at the first level to include the under sized beam at the kitchen to dining area previously a porch
2. Drop all electrical and plumbing attached to the present floor system
3. Remove and replace all exposed Polly piping under the residence - this will not include plumbing hidden in the walls
4. Remove all duct at the first floor and debris left under the residence and in crawl space and perimeter of the property. Remove drywall and trim where applicable to accomplish the new floor framing installation
5. Kitchen to remain at this time until pricing and drawings are completed

Initialed by: Owner  Contractor 

ROA-0064

General Conditions

Project Name: 759 Lake Frances Drive

6. Floor layout will be provided for the kitchen and first floor bath ~ alternate entry into the future office and bathroom will be provided. No additional architectural or engineering has been allowed at this time.
7. Scrape all ceilings throughout the residence creating a smooth ceiling surface throughout.
8. Frame the structural beam between kitchen and living reducing columns and size of header where applicable and meets engineers report.
9. First floor bath will be gutted and re-constructed to include a relocation of the entry door layout for hallway access. The future office may be reduced to increase the size of the bathroom.
10. The wood floors at the second floor will be replaced with a laminate flooring. First floor will be a combination of tile and lamenent flooring. Stairs will be sanded and sanded dark and clear coated.
11. Supply and install a new glass door at the new first floor office.
12. Supply and install new wall at the exterior of the breakfast area deleting the full height sheets of glass. Build a half wall at the base of the three existing openings and frame for three new window units. Three new window units assumed to be single or double hung to be approved by the owner – Anderson, Integrity or equal.
13. Repair and or replace some of the masonry foundation under the existing floor system
14. Plumbing labor and supplies **allowance - \$ 3,800.00**
15. Electrical wiring and labor **allowance - \$ 4,500.00**
16. Inspect and review both heating and air units in the residence – price a repair and replacement for the owner's consideration – **allowance \$15,000.00**
17. Supply and install a new tankless water heater – **allowance - \$ 2,800.00**
18. Supply and install new light fixtures at the first-floor - **allowance - \$ 2,300.00**
19. Supply and install new plumbing fixtures at the first-floor bathroom – **allowance - \$ 1,500.00**
20. Window and door allowance for the above listed work is – **allowance - \$ 9,500.00**

Options to be priced but NOT included in this proposal until pricing has been completed and approved by owner:

Pricing will be on going:

1. New windows and doors throughout out the residence
2. Fencing and gates around the property
3. New garage door and overhead door
4. Replace bottom place of garage – damaged sheathing – rotted siding and missing flashing
5. New kitchen cabinets and counter tops
6. Appliances by owner
7. Owner to open an account with a gas utility company to supply proper fuel to the new water heater
8. Supply and install ventless logs into the existing fireplace and utilize the existing equipment to accomplish the change from wood to gas fireplace
9. Install moisture barrier under house with option to encapsulate and dehumidify crawl space
10. Install sod, plantings, mulch, and irrigation system (recommended)
11. Deck and dock repairs and upgrades

Initialed by: Owner Contractor

ROA-0065

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2023-CP-10-04865
 Dow, Inc.,	)	
	)	
Plaintiff,	)	Defendant Beth Bartolini's Memorandum
	)	in Opposition to Plaintiff's Motion to
vs.	)	Compel Arbitration
	)	
Beth Bartolini,	)	
	)	
Defendant.	)	
_____	)	

COMES NOW, Defendant Beth Bartolini (hereinafter "Bartolini"), by and through her undersigned counsel, and hereby submits the following Memorandum in Opposition to Dow, Inc.'s s Motion to Compel Arbitration filed (and in response to the November 20, 2023 Memorandum) and respectfully state as follows:

SUMMARY OF ARGUMENT

Plaintiff's Motion to Compel Arbitration based on an arbitration clause found in the purported contract between the parties, fails for numerous reasons, including:

1. The arbitration clause does not comply with South Carolina's Arbitration Act.
2. There is no evidence before the Court to show that Federal Arbitration Act applies to this contract;
3. The alleged contract was procured by fraud and as such is invalid and unenforceable. As such, the arbitration clause contained within is also invalid; and
4. The arbitration agreement is unenforceable because there was no meeting of the minds as to essential and material terms to the same.

BACKGROUND

This case arises out of the negligent construction repairs of Defendant's residence by the Plaintiff, Dow, Inc. The Plaintiff has filed a motion to compel arbitration based on a purported contract to which the Federal Arbitration Act ("FAA") does not apply and does not comply with the South Carolina Uniform Arbitration Act. The Plaintiff filed a complaint in this matter in October of 2023 seeking to have its claims heard in arbitration pursuant to the Federal Arbitration Act 9 U.S.C. §4. Defendant Bartolini filed her Answer on November 11, 2023 denying Plaintiff's were entitled to arbitrate asserting numerous affirmative defenses and asserting counterclaims for breach of contract, breach of warranty, negligence, fraud, negligent misrepresentation, unfair trade practices, conversion, and accounting. Plaintiff filed its Motion to Compel Arbitration on November 20, 2023. In support of its Motion the Plaintiff cites Article 11 of the Contract which it alleges requires this dispute to be "settled by arbitration administered by the American Arbitration Association ("AAA") under its Construction Industry Arbitration Rules..." Upon information and belief, as of this date the Plaintiff has failed to file a Demand for Arbitration with the AAA.

Factual History

Scott Dow, the principal Owner of Dow, Inc. holds himself out as an expert in the repair of construction defects and cost estimating and has served as an expert witness in numerous construction cases throughout the State of South Carolina. In August of 2022 Bartolini hired the Plaintiff to undertake repairs to her home. To induce her to enter into the contract, the Plaintiff represented that the repairs would cost between \$150,000.00 and \$225,000.00 (Article 4). In reliance on the Plaintiff's representations Beth Bartolini signed the contract and the Plaintiff proceeded with the work. Throughout the course of the work the Plaintiff billed Beth Bartolini

for the work completed but continued to add more and more costs to the contract price ultimately raising the claimed construction cost to \$507,453.49. Despite the fact that the construction costs more than doubled the amount represented by the Plaintiff to complete the repairs, Bartolini paid the Plaintiff \$434,943.36. She did so even though much of the work was incomplete or defective. The Plaintiff filed a Mechanic's lien in the Charleston County Register of Deeds office on September 29, 2023.

LEGAL STANDARDS

Trial courts decide whether claims should be resolved through arbitration. See, e.g., *Oxford Health Plans, LLC v. Sutter*, 569 U.S. 564, 569, n. 2 (2013) (noting questions of arbitrability are presumptively left for the court to decide); *Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) ("The question of arbitrability of a claim is an issue for the courts."). This determination involves a two-step inquiry: (1) whether a valid arbitration agreement exists; and, (2) whether the specific dispute falls within the substantive scope of the arbitration agreement. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007).

When deciding a motion to compel arbitration, the court is not to rule on the potential merits of the underlying claims. *AT & T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (citations omitted). Rather, the court should look to the state law that ordinarily governs the formation and construction of contracts.

ARGUMENT

I. The purported Agreement relied upon by Dow does not comply with South Carolina law.

The Agreement relied upon by Dow is unenforceable because it does not comply with South Carolina law. “Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters . . . on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.” S.C. Code Ann. 15-48-10(a). Based on the language of the statute, all three conditions (underlined, capital letters, and first page) must exist for the notice to comply with the law in order to require arbitration. This statute is strictly interpreted by our courts. See *Smith v. DR Horton, Inc.*, 417 S.C. 42 (2016). Here, the contract contains no such notice and as such is not subject to arbitration under the South Carolina Arbitration Act.

2. The Federal Arbitration Act does not apply in this case because there is no evidence before the Court that the work involves interstate commerce.

In determining whether the FAA applies to a particular arbitration agreement, a court considers whether the contract concerns a transaction involving interstate commerce. Hicks Unlimited, Inc., Petitioner, v. UniFirst Corporation, A Massachusetts Corporation, Respondent. Appellate Case No. 2021-001042 Opinion No. 28158 Heard March 29, 2023 – Filed June 14, 2023. A party seeking to compel arbitration “must prove the contract involves ‘commerce in fact.’” *Id* at p. 22 citing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995).

The phrase "involving commerce" as used in the FAA is "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.

Id at p. 22-23 citing *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

Under the reach of the Commerce Clause, Congress has authority to regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce and (3) those activities having a substantial

relation to interstate commerce... Channels of commerce are ‘the interstate transportation routes through which persons and goods move. Instrumentalities of interstate commerce, by contrast, are the people and things themselves moving in commerce.

Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121–22, 747 S.E.2d 461, 464 (2013) (internal citations and quotations omitted).

“To ascertain whether a contract involves interstate commerce, the court examines ‘the agreement, the complaint, and the surrounding facts,’ **including any affidavits submitted (emphasis added)**. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380, 759 S.E.2d 727, 732 (2014) (quoting *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) (“Both the United States Supreme Court and this Court have relied on affidavits when determining whether a transaction involves interstate commerce.”). The inquiry is fact dependent and focuses on what the specific contract terms require for performance.

Hicks at p. 23.

See, e.g., *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626–27, 667 S.E.2d 1, 4 (Ct.App.2008) (finding construction contract involved interstate commerce “due to the nature of the construction project” and the **builders' affidavit swearing the project involved businesses and supplies from outside of South Carolina**);

In this case, however, the contract was not for the construction of a new home but for structural repairs to the home. The repairs included structural repairs to floor joists, the removal and reinstallation of windows to confirm proper installation, the repair or replacement of floor joists, monitoring cracking at CMU walls under house and repair walls and piers as needed, properly attaching deck ledger to rim joists. The Plaintiff has submitted no affidavit swearing the project involved interstate commerce. There is no evidence before this Court to suggest that any of those repairs involved interstate commerce and as such there is no evidence before the Court to support the Plaintiff’s allegation that the case is subject to the Federal Arbitration Act.

3. Arbitrability and Unconscionability

Contract defenses such as fraud, duress and unconscionability apply to a court's evaluation of the enforceability of an arbitration clause governed under either the SCUAA or the FAA. 9

This is a suit filed by Dow, Inc., the general contractor hired by Bartolini to preform structural repairs on her home. The principal owner of Dow, Inc. is Scott Dow. Mr. Dow is a general contractor and consulting expert in the construction industry. Among the services he offers to clients is Prior to entering into the contract, Mr. Dow represented to the Defendant that the cost to perform the repairs to her home would be between \$150,000.00 and \$225,000.00 as set forth in Article 4.2 of the contract. At the time Dow made said representations, he knew, or should have known that the cost of the work would be significantly higher than that. In fact, Ms. Bartolini has made payment to Dow of \$\$434,943.36 and he now is demanding an additional \$72,510.02

U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."); S.C. Code § 15-48-10(a) (containing similar language to that of the FAA). Thus, if this Court finds an arbitration clause unconscionable, the Court may refuse to enforce the clause or otherwise limit its application so as to avoid an unconscionable result. S.C. Code § 36-3-302(1).

4. The arbitration agreement is unenforceable because there was no meeting of the minds as to essential and material terms to the same.

The Arbitration agreement contained in the contract fails and is unenforceable because it

lacks essential and material terms. The genesis for such an argument is the case of Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009), in which the court refused to enforce an arbitration provision in a personal injury action against a nursing home because the court found the provision lacked essential and material terms to establish a meeting of the minds, because the arbitration provision did not state how the arbitration would be administered.

In this case, there are numerous essential and material terms missing from the agreement and the arbitration clause. The only terms of the arbitration clause are that any dispute “shall be settled by arbitration administer by the American Arbitration Association under its Construction Industry Arbitration Rules”

The AAA made significant changes to its Construction Industry Arbitration Rules in 2024. Those rule changes include the removal of dispositive motions under certain circumstances, new limitations on a parties objection to the appointment of particular arbitrators. There can be no argument that the parties had a meeting of the minds about substantive rule changes which did not occur until 2 years after they entered into a contract.

Next, the arbitration clause contained in the contract is silent as to which set of AAA Rules (or even which process in those rules to use). The AAA currently has several paths under its Construction Rules. Those include Regular Track Procedures, Fast Track Procedures, Procedures for Large, Complex Construction Disputes, and Home Construction Arbitration Rules. The contract in this case contains no terms which would require the parties to use any of the particular formats for arbitration.

The arbitration clause at issue also fails to state what law applies to the case, where the arbitration is to be held, how long the arbitration should take, etc. Based on the lack of specificity and broad range of arbitration paths, the parties could not have had a meeting of the minds and as such the arbitration clause is unenforceable.

CONCLUSION

Based on the foregoing, the Court should deny the Plaintiff's Motion to Compel Arbitration.

**ROBERTSON HOLLINGSWORTH MANOS &
RAHN, LLC**

40 Calhoun Street, Suite 330

Charleston, South Carolina 29401

T: (843) 723-6470

Email: PRR@roblaw.net

BY: s/Paul R. Rahn

PAUL R. RAHN (SC Bar No. 15977)

Attorneys for Beth Bartolini

Jul 17, 2024

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2023-CP-10-04865
	)	
Dow, Inc.,	)	
	)	
Plaintiff,	)	Defendant's Notice of Motion
	)	and Motion to Dismiss
v.	)	
	)	
Beth Bartolini,	)	
	)	
Defendant.	)	
	)	

YOU WILL PLEASE TAKE NOTICE that within ten (10) days of the date hereof, or as soon thereafter as it may be heard, Defendant, Beth Bartolini will move before this Court pursuant to Rules 12(b)(6), SCRCF, for an Order of Dismissal, of the Plaintiff's Complaint on the grounds that the Plaintiff has failed to state a claim upon which relief may be granted and that the Plaintiff's mechanic's lien is invalid because the Plaintiff has further failed to comply with the statutory requirements of S.C. Code Ann. § 29-5-15, § 29-5-90, § 29-5-120, § 29-5-160 and § 29-5-230 (1976).

This Motion is supported by applicable common law and statutory law and by any Memorandum of Law as may be filed with the Court. For the foregoing reasons, Defendant respectfully requests that the presiding Judge enter an Order dismissing the Plaintiff's Complaint, declaring Plaintiff's mechanic's lien invalid and awarding Defendant its reasonable attorneys' fees as required by S.C. Code Ann. § 29-5-10 (1976).

PLEASE BE PRESENT IF SO MINDED.

[Signature block on following page]

ROBERTSON HOLLINGSWORTH MANOS & RAHN

40 Calhoun Street, Suite 330

Charleston, South Carolina 29401

T: (843) 723-6470

F: (843) 853-9045

Email: pr@roblaw.net

BY: s/Paul R. Rahn

PAUL R. RAHN (SC Bar No. 15977)

Attorney for the Defendant, Beth Bartolini

Charleston, South Carolina

September 6, 2024

CONSTRUCTION

Construction

Industry Arbitration Rules and Mediation Procedures

Including Procedures for Large, Complex Construction Disputes



AMERICAN ARBITRATION ASSOCIATION®

Available online at adr.org/construction

Rules Amended and Effective March 1, 2024

ROA-0076

If you would like to speak to a member of the AAA Construction Team, please visit **www.adr.org/construction-contact**.

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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 ensure 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 \$150,000,

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/constructionfeeschedule**, 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 \$150,000, 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

- (a) 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.
- (b) The AAA requires that parties and their representatives conduct themselves in accordance with the AAA's *Standards of Conduct for Parties and Representatives*

when utilizing the AAA's services. Failure to do so may result in the AAA's declining to further administer a particular case or caseload.

R-3. National Panel of Construction Arbitrators

The AAA shall establish and maintain a National Panel of Construction Arbitrators ("National Construction 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 and also shall refer to the R-7 Arbitrator, the Merits Arbitrator, or the Emergency 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 telephone and email addresses;
 - c) if applicable, the names, addresses, telephone and 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 rule, 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 telephone 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

If the parties are unable to agree to consolidate related arbitrations or to the joinder of parties to an ongoing arbitration, the AAA shall administratively appoint a single arbitrator (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 confirmation of an arbitrator pursuant to R-14 through R-17 (the Merits Arbitrator). Requests for consolidation or joinder submitted after a Merits Arbitrator is confirmed shall be considered only if the Merits Arbitrator determines that the requesting party has shown, with evidentiary support, both that there is good cause to grant the request and that prejudice will result if it is not granted.

- (a) *Consolidation:* 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 14 days after notice of receipt of the request for consolidation is sent by the AAA.
- (b) *Joinder:* 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, including email addresses, for such parties, names and contact information, including email addresses, for the parties' representatives, a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration and supporting reasons for such request and shall provide a copy to all parties and potential parties. 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 calendar days after notice of receipt of the request of joinder is sent by the AAA. Any party that another is seeking to join to an ongoing arbitration that fails to timely object to the joinder request shall be deemed to have waived its objection to the joinder request.

- (c) 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.
- (d) 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 Merits Arbitrator(s), R-59(b) or in the final arbitration award.
- (e) 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.
- (f) 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. At its discretion, the AAA may limit the number of strikes permitted by the parties.

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 appointing party shall file with the AAA, and shall provide notice to all other parties of, the selected arbitrator's name, address, telephone number and email address. All party-appointed arbitrators must be on AAA's National Roster of Arbitrators unless the parties agree otherwise or AAA determines in its sole discretion that the AAA National Roster of Arbitrators does not have the requested expertise. Upon the request of any appointing party, the AAA shall submit a list of arbitrators on the AAA National Construction Panel from which the party shall 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 Rule 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) The chairperson shall be appointed from the AAA National Construction Panel, unless the parties agree otherwise, and the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Rule R-14, a list selected from the AAA National Construction Panel, and the appointment of the chairperson shall be made as provided in that Rule.

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 Rule 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 Rule 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 Rule 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)** Rule R-21(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Rule 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 Rule 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 Rule 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, by video conference 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. Procedures 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 (self-represented), 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, 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. Official Record of Proceedings

- (a) Any party desiring a transcribed record of the hearing shall make arrangements directly with a transcriber or transcription service 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 at the direction of the arbitrator.
- (d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the transcription 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

- (a) 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.
- (b) Consistent with the goal of achieving an efficient and economical resolution of the dispute, the arbitrator shall consider the time and cost associated with the briefing of a dispositive motion in deciding whether to allow any such motion.
- (c) Fees, expenses, and compensation associated with a motion or an application to make a motion may be assessed as provided for in Rule R-49(c).

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:
 - i. any of the parties is absent, in default, or has waived the right to be present, or
 - ii. 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 Rule R-32, 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. The parties may request relief under this rule regardless of the existence of a condition precedent to the arbitration.
- (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 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) The AAA shall appoint as soon as practicable but no later than 3 business days 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 establish as soon as possible, but in any event no later than 3 business days, 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 court appointed neutral 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 court appointed neutral, except that the court appointed neutral 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 court appointed neutral, 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 Rule 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 alternative methods of communication or other platforms as directed by the AAA or as agreed by the parties or directed by the arbitrator to exchange any communication or other notice required by these Rules during the course of the arbitration.
- (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. Confidentiality

- (a)** Unless otherwise required by applicable law, court order, or the parties' agreement, the AAA and the arbitrator shall keep confidential all matters relating to the arbitration or the award.
- (b)** Upon the agreement of the parties or the request of any party, the arbitrator may issue orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

R-46. 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-47. 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-48. Form of Award

- (a)** Any award shall be in writing and signed by a majority of the arbitrators. Signatures may be executed in electronic or digital form. The award 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-48 (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-49. 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 Rules R-56, R-57, and R-58. 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-50. 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-51. 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-52. 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, through the AAA, clarify the award or correct any clerical, typographical, technical, or computational errors in the award. In clarifying the award or correcting clerical, typographical, technical, or computational errors in it, 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-53. 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-54. 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-55. 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, or injunctive or other relief, for any act or omission in connection with any arbitration administered by the AAA or conducted 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-56. 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-57. Expenses

- (a) The expenses of witnesses for either side shall be paid by the party producing such witnesses, unless the parties agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.
- (b) 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-58. 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 Rule R-7, each party shall share equally in the compensation of the arbitrator, subject to reapportionment by the Merits Arbitrator upon a party's request or 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-59. 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) If a party is joined pursuant to Rule R-7 and fails to provide the required deposits, the party that joined the non-paying party shall be responsible for that party's portion of outstanding deposits, subject to reapportionment by the Merits Arbitrator upon the paying party's request or in the final award.
- (c) 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.
- (d) 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-60. 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-61. Sanctions

- (a) The arbitrator may, upon a party's request, or upon an arbitrator's initiative, 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 potentially subject to sanctions, whether based on a party's sanction request or the arbitrator's initiative, with the opportunity to respond prior to making any determination regarding sanctions.

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 a party will seek a more detailed statement of claims, counterclaims, or defenses;
 - (iii)** whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
 - (iv)** which
 - a)** arbitration rules,
 - b)** procedural law, and
 - c)** substantive law govern the arbitration;
 - (v)** issues related to cybersecurity, privacy and data protection to provide for an appropriate level of security and compliance in connection with the proceeding;
 - (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 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-48 (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-48 (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 \$150,000.

If a claim or counterclaim is amended to exceed \$150,000, 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 Procedure F-8;
- (c) the timing of the case exceeds the Time Standards set forth in Procedure F-12; or
- (d) hearing time exceeds what is allowable under Procedure 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 Rule 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 Procedure F-2.
- (b) All other requests for extensions of time are subject to Procedure F-12 and Rule R-43, 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 Procedure 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 AAA National 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 Rule 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 Rule R-44, parties shall accept notice of hearings, including preliminary hearings, by telephone, email, AAA WebFile, 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 Procedure 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 and Discovery

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. There shall be no discovery, except as ordered by the arbitrator in exceptional cases. If the arbitrator allows additional discovery, the AAA, in consultation with the arbitrator, may remove the case from the Fast Track Procedures. There shall be no motions except as allowed by the arbitrator for good cause shown.

F-9. 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 Procedure F-12 will be satisfied. The AAA will notify the parties in advance of the hearing date.

F-10. 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 Procedure 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-11. 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-12. 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-13. Form of Award

Any award issued on Fast Track Procedure cases will be in the form of a standard award that states the arbitrator's disposition of the case but is not required to set forth the arbitrator's reasoning or other details as to how the decision was reached. If there are multiple claims, the arbitrator shall provide a concise written financial breakdown of any monetary awards. If the parties request a reasoned award, an abbreviated opinion, or findings of fact and conclusions of law, the case will be administered using the Regular Track procedures, and arbitrators will receive compensation at their standard rate.

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 (LCC) shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties do not agree upon the number of arbitrators and a claim or counterclaim involves at least \$3,000,000, then three arbitrators shall hear and determine the case; otherwise, one arbitrator shall hear and determine 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 Procedures 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 Rule 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 Rules 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 Rules R-48 (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/constructionfeeschedule.

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, or regular mail. 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, 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 (self-represented), 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 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 Rule M-5.

M-8. Duties and Responsibilities of the Mediator

- (a) 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.
- (b) 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.
- (c) 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.
- (d) 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.

- (e) 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.
- (f) The mediator is not a legal representative of any party and has no fiduciary duty to any party.
- (g) 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 advanced notice of the conference to the parties.

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 Transcription Record

There shall be no transcription 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/constructionfeeschedule.

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ROA-0130



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ROA-0131

Home Construction Arbitration Rules and Mediation Procedures



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Available online at adr.org/construction

Rules Amended and Effective August 1, 2018

ROA-0132

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Home Construction Arbitration Rules and Mediation Procedures



On June 1, 2007, the American Arbitration Association® introduced the *Home Construction Arbitration Rules and Mediation Procedures*, which replaced the *Supplementary Procedures for Residential Construction Disputes*. Please reference the *Home Construction Arbitration Rules and Mediation Procedures* in any new agreements, contracts, or warranties related to residential construction and remodeling.

Case filings that reference the *Supplementary Procedures for Residential Construction Disputes* will be administered under the *Home Construction Arbitration Rules and Mediation Procedures*.

Please also note that according to the *Home Construction Arbitration Rules and Mediation Procedures* (ARB-1), 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 under its *Home Construction Arbitration Rules*, or whenever they have provided for arbitration of a home construction dispute in a contract which does not designate a particular AAA® rule set and is dated on or after the effective date of these Rules.

The Glossary defines “home” as used in these Rules. If the parties’ agreement calls for any other AAA Rules, such as the Construction Industry Arbitration Rules, please file your dispute resolution claim in accordance with the Rules named.

Introduction

Why AAA Home Construction Arbitration Rules and Mediation Procedures?

Each year, over a million new homes are built and sold in the United States. Occasionally, disagreements develop between the homeowner and homebuilder, and it is important to resolve them quickly and cost effectively. These *Home Construction Arbitration Rules and Mediation Procedures* are suggested for mediation and arbitration provisions in homebuilding contracts because they will provide both parties with fair and cost-effective mediation or arbitration of their dispute. The AAA recommends that parties continue to attempt direct negotiations to resolve their problem and recommends using mediation under these Rules whenever possible. If, however, negotiations should fail, the AAA's *Home Construction Rules* provide the parties with a hearing by an impartial arbitrator who will make a ruling (award) that is binding.

What is mediation?

Mediation is a process in which parties submit their dispute to a neutral third party (the mediator) who works with the parties to reach a settlement of their dispute. Mediation is an extension of the negotiation process. Mediators do not have the authority to decide issues; they simply assist the parties in reaching an acceptable settlement by probing the motivations and concerns of the parties in an effort to find a basis for resolving the parties' dispute. It is the mediator's neutrality that frequently enables him or her to move beyond the posturing of the parties so that their true concerns can be addressed.

Submitting your dispute to AAA mediation will not cause delay to any pending lawsuit or arbitration you may have unless agreed to by the parties. Mediators who serve on the AAA's Roster are experts in successful negotiation. Mediators receive a fee from the parties for their services. They are also rewarded by knowing that their efforts have resulted in an amicable settlement of a dispute that would have cost substantial time and money had it been litigated through the courts.

What are the benefits of mediation?

The benefits of successfully mediating a dispute to settlement vary, depending on the needs and interests of the parties. The most common advantages are:

- > Parties are directly involved in negotiating the settlement.
- > The mediator, as a neutral third party, can view the dispute objectively and can assist the parties in exploring alternatives that they might not have considered on their own.
- > Because mediation can be scheduled early in the dispute, a settlement can be reached much more quickly than in litigation.
- > Parties generally save money through reduced legal costs, especially costs associated with discovery and trial preparation.
- > Parties enhance the possibility of continuing their business relationship with each other.
- > Creative solutions or accommodations of special needs of the parties can become a part of the settlement.

The parties might wish to try mediation before submitting their dispute to arbitration. Whether mediation is required in the contract, or whether the parties agree to mediate, mediation should always be considered as an option.

Who are the AAA's mediators?

Mediators on the AAA's Roster include lawyers, former judges and business persons who have met the qualification criteria and who have been trained in mediation techniques. Qualification criteria include:

- > a minimum of 10 or more years of professional or business experience,
- > successful completion of mediator training programs,
- > relevant academic and business/professional credentials and licenses,
- > scholarship and continuing education achievements,
- > dispute management and neutral skills,
- > reputation in the business/professional community, and
- > commitment and availability to serve as a neutral mediator.

When a case is filed with the AAA, the AAA will appoint a mediator, unless the parties' agreement specifies a different method of appointment. The parties will be notified of the mediator's qualifications, including educational institutions

attended, degrees earned, employment history, professional licenses or certifications, offices held in professional and trade associations, the individual's work experience and participation in training programs.

Mediators must disclose any relationship with the parties, their attorneys, or others involved in the case, such as witnesses; those with disqualifying relationships will not be permitted to serve on the particular case. This assures the parties that the mediator is neutral.

What is arbitration?

Arbitration is the referral of a dispute to one or more impartial persons for final and binding decision or award. It is designed to be private, informal, quick, practical and economical. Parties frequently negotiate certain aspects of the arbitration process to make for a more efficient process. The parties may also provide for expedited arbitration procedures, including expedited rendering of the award, if they anticipate a need for hearings to be scheduled on short notice.

An important feature of arbitration is its informality. Under the standard AAA rules, the procedure is relatively simple: legal rules of evidence are not applicable; there is no motion practice or court conference; there is no requirement for transcripts of the proceedings or for written opinions of the arbitrators. Although there is no formal discovery process, the AAA's rules allow the arbitrator to require production of relevant documents, the deposition of factual witnesses and an exchange of reports of expert witnesses. The standard AAA rules are flexible and may be varied by mutual agreement of the parties.

The fact that the arbitrators are trained and have professional expertise is also important. Arbitrators are selected for specific cases because of their knowledge of the subject matter. Based on that experience, arbitrators can render an award grounded on thoughtful and thorough analysis.

Most parties provide for arbitration of disputes because they are seeking a final and binding resolution of their business conflicts. Court intervention and review are limited by applicable state or federal arbitration laws; award enforcement is facilitated by those same laws.

Another important advantage of arbitration is that it is designed to be private, having no public record of the dispute or of the facts presented in resolving the dispute.

What are the benefits of arbitration?

- > *Confidentiality.* Arbitration is a private process. There is no public record of the proceedings.
- > *Limited Discovery.* Extensive discovery is avoided. Arbitrators arrange for limited exchange of documents, witness lists and depositions appropriate to the particular dispute.
- > *Speed.* There is no docket or backlog in arbitration. Hearings are scheduled as soon as the parties and the arbitrator have dates available.
- > *Expert Arbitrators.* The arbitrators have expertise in the subject matter in dispute, as well as ongoing training in the arbitration process.
- > *Cost Savings.* Because of the limited discovery and informal hearing procedures, as well as the expedited nature of the process, the parties save on legal fees and transactional costs.
- > *Preservation of Business Relationships.* In most instances, litigation between business professionals and their clients destroys the working relationship. Arbitration is less adversarial and, because of its informal nature, it is more likely that the parties will be able to continue their business relationship.

Who are the AAA's arbitrators?

Arbitrators on the AAA's Roster of Home Construction Arbitrators include lawyers and former judges who have met the qualification criteria and who have been trained by the AAA in arbitration techniques. Qualification criteria include:

- > a minimum of 10 or more years of professional or business experience,
- > successful completion of AAA arbitrator training programs,
- > relevant academic and business/professional credentials and licenses,
- > scholarship and continuing education achievements,
- > dispute management and neutral skills,
- > reputation in the business/professional community, and
- > commitment and availability to serve as a neutral arbitrator.

When a case is filed with the AAA, the parties select the arbitrator from a list prepared by the AAA. The list contains the proposed arbitrators' credentials, including educational institutions attended, degrees earned, employment history, professional licenses or certifications, offices held in professional and trade associations, the individuals' work experience and participation in arbitrator training programs.

Arbitrators must disclose any relationship with the parties, their attorneys, or others involved in the case, such as witnesses; those with disqualifying relationships will not be permitted to serve on the particular case. This assures the parties that the arbitrator is neutral.

What is the role of the AAA?

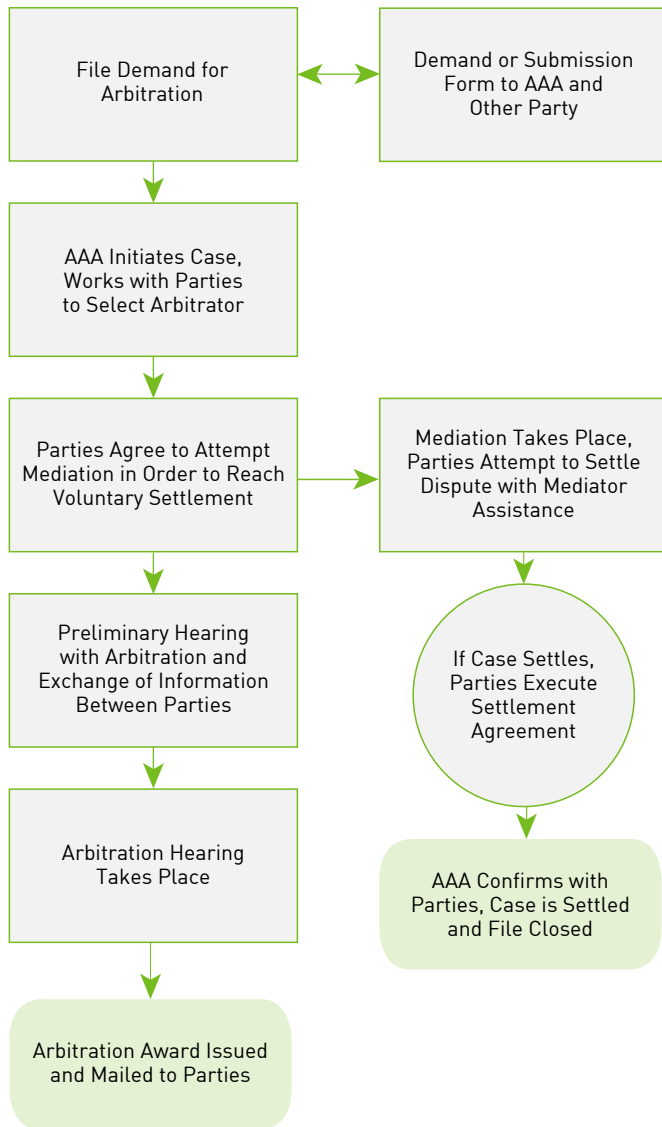
The AAA primarily serves as an arbitration and mediation administrator. To bring the matter to a prompt, fair conclusion, the AAA will provide administrative services that will include, but are not limited to:

- > receipt and acknowledgment of claims and counterclaims,
- > an administrative conference with the parties and their counsel,
- > preparation of lists of neutral arbitrators or mediators suitable to the specific dispute,
- > supervision of the neutral arbitrator or mediator selection process,
- > scheduling of meetings or hearings in AAA facilities or at other locations convenient to the parties,
- > management and facilitation of all communications between the parties and the arbitrator, including any arrangement for compensation of the arbitrator or mediator,
- > determination of whether an arbitrator or mediator has a disqualifying relationship, and
- > ensuring that the mediated settlement or decision of the arbitrator is achieved promptly and fairly.

The AAA also conducts educational programs, prepares materials that explain alternative dispute resolution (ADR) processes, maintains current data on Roster members and provides related services to the parties, both domestically and internationally.

Highlights of these Rules and Special Considerations

- > Rules are designed specifically for home construction disputes between a home owner and home builder.
- > Rules provide processes that may result in significant cost- and time-savings as compared to traditional litigation.
- > Claims and counterclaims are divided into Levels so that the process can fit the size of the claim, saving time and money for all concerned.
- > Claims filed by homeowner signatories to the contract, for purposes of the arbitration, are considered one Claimant or one Counterclaimant.
- > Arbitrators and mediators serving in these disputes are members of the AAA Roster of Arbitrators and Mediators.
- > Varied arbitration options including documents only hearings, telephone and in-person hearings are available.
- > Parties can mediate and try to resolve the claims themselves without an arbitrator deciding the issues.
- > The AAA offers fast, convenient online claim filing through AAA WebFile®. In addition to filing claims, clients can make payments, perform online case management, access rules and procedures, electronically transfer documents, select Arbitrators or Mediators, use a case-customized message board and check the status of their case.
- > *Please Note:* Rules ARB-8c and ARB-15 specify the time limits to file objections to the arbitration or objection to the locale of the arbitration.



Resources for Both Parties

At the back of the Rules is a Glossary of Terms, a checklist for mediation or preparing for arbitration, and a checklist for filing your demand for arbitration. Frequently Asked Questions (FAQ) regarding home construction arbitration, along with other valuable information, is available at **www.adr.org**.

Home Construction Arbitration Rules

ARB-1. Agreement of Parties

- (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 under its *Home Construction Arbitration Rules* or whenever they have provided for arbitration of a home construction dispute in a contract which does not designate a particular AAA rule set and is dated on or after the effective date of these Rules. The Glossary defines “home” as used in these Rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. The parties, by written agreement, may vary the procedures set forth in these Rules. After the appointment of the arbitrator, such modifications may be made only with consent of the arbitrator.
- (b) Unless the parties or the AAA determine otherwise, Expedited Hearing Procedures shall apply in any case in which the disclosed monetary claim or counterclaim is less than \$100,000 (referred to as a Level 1 or Level 2 dispute), exclusive of interest and arbitration fees and costs. Expedited Hearing Procedures are indicated throughout these Rules with italicized text. Parties may also agree to use these Expedited Hearing Procedures in larger cases.

ARB-2. Applicability

These Rules shall only apply to two-party cases involving a home owner and a home builder with claims or counterclaims less than \$1,000,000. Cases with claims or counterclaims of \$1,000,000 or greater, involving more than two parties or with issues of joinder or consolidation, shall be heard under the Construction Industry Arbitration Rules.

ARB-3. Dispute Levels

- (a) Level 1 disputes shall be those disputes in which the claim or counterclaim is less than \$25,000. The parties can also resolve their Level 1 disputes in a small claims court if the claim or counterclaim is within the jurisdictional limits of such court. This small claims court option does not extend to courts of regular jurisdiction or appellate courts.
- (b) Level 2 disputes shall be those disputes in which a claim or counterclaim is \$25,000 to less than \$100,000.

- (c) Level 3 disputes shall be those disputes in which a claim or counterclaim is \$100,000 to less than \$1,000,000 or the claim or counterclaim is non-monetary or undetermined.

ARB-4. Declining or Ceasing Arbitration

The AAA in its sole discretion may decline to accept a Demand for Arbitration or may cease the administration of an ongoing arbitration due to a party's improper conduct, including threatening or harassing behavior towards any AAA staff, an arbitrator, or a party or party's representative. In addition, the AAA may in its discretion decline to administer the case if the arbitration agreement substantially and materially deviates from these rules and the parties do not agree to remedy the material deviation. If either the arbitrator or the AAA suspend or terminate the proceedings, the parties may submit their dispute to an appropriate court.

ARB-5. Expedited Hearing Procedures

- (a) Level 1 disputes shall be resolved by submission of documents. Any party, however, may ask for a hearing. The arbitrator shall decide whether a formal hearing, via telephone or in person, is necessary (see item c, below). For disputes resolved by submission of documents, the arbitrator shall establish a fair and equitable procedure for the submission of documents.
- (b) Level 2 and Level 3 disputes shall have a hearing unless the parties agree not to have one.
- (c) The hearing may be by telephone or in person. The hearing may occur even if the other party does not attend. For Level 1 disputes, a request for a hearing should be made in writing within 10 calendar days after the AAA acknowledges receipt of a claimant's demand for arbitration. Requests received after that date will be allowed at the discretion of the arbitrator.

ARB-6. AAA and Delegation of Duties

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the AAA and 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.

ARB-7. Panel of Home Construction Arbitrators

The AAA shall establish and maintain a Panel of Home Construction Arbitrators ("Roster") and shall appoint arbitrators as provided in these Rules.

ARB-8. Initiation under an Arbitration Provision 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. If no answering statement is filed within the stated time, the respondent will be deemed to have denied 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.

ARB-9. Initiation under a Submission Agreement

Parties to any existing dispute may commence an arbitration under these Rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the nature of the dispute, the names and addresses of all parties, any claims and counterclaims, the amount involved, if any, the remedy sought and the hearing locale requested, together with the appropriate filing fee as provided in the schedule included with these Rules. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party.

ARB-10. Changes of Claim

- (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. If an increased claim or counterclaim is \$100,000 to less than \$1,000,000, the case will be administered under Level 3 Procedures, as opposed to Expedited Hearing Procedures indicated in ARB-1, unless all parties and the arbitrator agree that the case may continue to be administered under the expedited procedures.

ARB-11. 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 or to the arbitrability of any claim or counterclaim.
- (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 shall rule on such objections as a preliminary matter or as part of the final award.

ARB-12. Consolidation or Joinder

Any case in which a party seeks joinder or consolidation will be heard under the current Construction Industry Arbitration Rules. Any party seeking joinder or consolidation will be responsible for any AAA and arbitrator costs and fees greater than those that would be incurred by the parties under the *Home Construction Arbitration Rules*.

ARB-13. Mediation

At any stage of the proceedings, the parties may agree to conduct a mediation conference under the *Home Construction Mediation Procedures* in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case.

ARB-14. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, potential mediation of the dispute, potential exchange of information, a timetable for hearings, whether the parties desire a reasoned award, and any other administrative matters.

ARB-15. Fixing of Locale

Unless the parties mutually agree upon a locale post dispute, the locale shall be the city nearest to the site of the project in dispute, as determined by AAA, subject to the power of the arbitrator to finally determine the locale within 14 calendar days after the date of the preliminary hearing.

ARB-16. Appointment from Panel of Home Construction Arbitrators

Unless the parties have agreed to another method of appointment post dispute, the arbitrator shall be appointed in the following manner:

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 names of persons chosen from the Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

- (a)** For Level 1 and Level 2 disputes, the AAA will submit to each party to the dispute an identical list of no more than five names of persons chosen from the Roster. If the parties do not agree to an arbitrator, each party may strike up to two proposed arbitrators from the list and number the remaining names in order of preference. The parties must return the list, noting any stricken arbitrators and rankings to the AAA within seven days of receipt of the list.

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 power to make the appointment from among other members of the Roster without the submission of additional lists.

- (b)** For Level 3 disputes, the AAA will submit to each party an identical list of up to 10 names of persons chosen from the Roster. If the parties are unable to agree upon 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. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. 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. 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 power to make the appointment from among other members of the Roster without the submission of additional lists.

ARB-17. Number of Arbitrators

The dispute shall be heard and determined by one arbitrator. If the agreement specifies more than one arbitrator, or the parties agree that the dispute should be heard and determined by more than one arbitrator, the dispute shall be heard under the *Construction Industry Arbitration Rules*.

ARB-18. 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 ARB-39.
- (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, ARB-18, is not to be construed as an indication that the arbitrator considers that the disclosed circumstances are likely to affect impartiality or independence.

ARB-19. 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.
- (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.

ARB-20. Communication with Arbitrator

No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration or the underlying dispute.

ARB-21. Vacancies

If for any reason an arbitrator is unable 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 regarding appointment of arbitrators.

ARB-22. Preliminary Hearing

At the request of any party or at the discretion of the arbitrator or the AAA, the arbitrator may schedule as soon as practicable a preliminary hearing with the parties and/or their representatives. The preliminary hearing may be conducted by telephone at the arbitrator's discretion.

During the preliminary hearing, the parties and the arbitrator should discuss the issues to be arbitrated, including clarification of the issues and claims, a schedule for the hearings, whether the parties desire a reasoned award, and any other preliminary matters.

ARB-23. Exchange of Information

(a) *Expedited Procedures for Level 1 and Level 2 Disputes*

If one or more issues directly or indirectly relate to alleged deficiencies in design, materials, or construction, the arbitrator shall direct that all parties be allowed to inspect, document (by photograph, videotape, or otherwise) and test the alleged deficiencies. 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.

(b) *Level 3 Disputes*

If one or more issues directly or indirectly relate to alleged deficiencies in design, materials, or construction, the arbitrator shall direct that all parties be allowed to inspect, document (by photograph, videotape, or otherwise) and test the alleged deficiencies. The arbitrator shall have the authority to resolve any disputes relating to the inspection, documentation and testing of the alleged deficiencies.

Consistent with the expedited nature of arbitration, the arbitrator shall direct (i) the production of relevant documents and other information to be used in the arbitration, and (ii) the name and address of any witnesses to be called, and (iii) a brief summary of the testimony expected from each witness. At least five business days prior to the hearing, the parties shall exchange copies of all exhibits, affidavits and any other information they intend to submit at the hearing. The arbitrator is

authorized to resolve any disputes concerning the exchange of information or objections to such information. There shall be no other discovery, except as indicated below or as ordered by the arbitrator in extraordinary cases when the demands of justice require it.

Documents (applicable only to Level 3 disputes)

- > No later than 14 calendar days after the answering statement is filed or 21 calendar days after the claim is filed if no answering statement is filed, whichever is later, Claimant(s) and Respondent(s) shall produce all documents which are relevant to their claim, counterclaim, or defense. Both Claimant(s) and Respondent(s) shall have a continuing obligation to supplement the production in the event new or additional relevant documents are created or identified during the arbitration.
- > If any party believes additional documents should be produced, the arbitrator shall rule on the party's request, having heard or read the parties' arguments.
- > Absent extraordinary circumstances and a showing that the other party is not prejudiced, no party may admit or otherwise use any document or exhibit which was not produced to all other parties to the arbitration more than five days prior to the arbitration hearing, except if the parties agree or the arbitrator determines that the document or exhibit is necessary.

Interviews (applicable only to Level 3 disputes)

- > The Claimant(s) may take the recorded and transcribed interview of each Respondent. The Claimant(s) shall, at its cost, produce a copy of the recording or transcription to each Respondent. Subject to the rules governing admissibility of evidence as set forth herein, statements made by the Respondent shall be admissible in the arbitration hearing.
- > The Respondent(s) may take the recorded and transcribed interview of each Claimant. The Respondent(s) shall, at its cost, produce a copy of the recording or transcription to each Claimant. Subject to the rules governing admissibility of evidence as set forth herein, statements made by the Claimant shall be admissible in the arbitration hearing.
- > The Claimant(s) or Respondent(s) may take the recorded or transcribed interview of any witness identified by the other party. The Claimant(s) or Respondent(s) shall, at its cost, produce a copy of the recording or transcription to each party in the arbitration. No later than five business days prior to the deposition or interview of an expert witness, the party sponsoring the expert witness shall produce a written report or, if no written report will be used in the arbitration or by the expert, a written summary of the expert opinions which will be given by the expert witness in the arbitration hearing. Subject to the rules governing admissibility of evidence as set forth herein, statements made by the expert witnesses shall be admissible in the arbitration hearing.
- > Additional interviews may be agreed to by the parties or ordered by the arbitrator.
- > Disputes concerning interviews will be resolved by the arbitrator.

ARB-24. Date, Time and Place of Hearing

For Level 1 and Level 2 disputes in which a hearing is to be held, the arbitrator will set the date, time and place of the hearing, to be scheduled to take place within 30 days of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

When a hearing is scheduled for Level 3 disputes, 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 send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

ARB-25. 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 representatives.

ARB-26. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least five business 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.

ARB-27. Oaths

Before making any ruling or decisions, proceeding with the first hearing, or, where no hearing is held, before reviewing any evidence, 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.

ARB-28. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or 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.

ARB-29. Interpreters

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

ARB-30. Postponements

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

ARB-31. 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.

ARB-32. Conduct of Proceedings

- (a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support 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 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 to 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.

For Level 1 and Level 2 disputes in which a hearing is scheduled, the hearing generally shall not exceed one day. For good cause shown, the arbitrator may

schedule additional hearings within seven business days after the initial day of hearings.

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

ARB-33. 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. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.
- (b) The arbitrator shall determine the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.
- (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.

ARB-34. 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, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.
- (b) 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 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.

ARB-35. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties simultaneously and afford them an opportunity to comment.

ARB-36. 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. If it deems necessary, the AAA may appoint a different arbitrator for the sole purpose of ruling on any requests for interim measures.
- (b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.
- (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.

ARB-37. Closing of Hearing

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. If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in section ARB-34 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the closing date of the hearing. The time limit within 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.

ARB-38. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or 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 on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time.

ARB-39. 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.

ARB-40. Extensions of Time

For Level 1 and Level 2 disputes, except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the demand for arbitration or counterclaim.

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any extension.

ARB-41. 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 to the dispute is or 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.

ARB-42. Time of Award

For Level 1 and Level 2 disputes, unless otherwise agreed by the parties, the award shall be rendered no later than 14 calendar days from the date of the closing of the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

For Level 3 disputes, 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 original or reopened hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

ARB-43. Form and Scope of Award

- (a) The arbitrator may grant any legally available 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, subject to the provisions of and limitations contained in Rule 43(c).
- (c) In the final award, the arbitrator shall assess administrative and arbitrator fees as provided for in these Rules. Arbitrator compensation, expenses, and administrative fees (which include filing and hearing fees) are not subject to reallocation except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was filed for the purposes of harassment or is patently frivolous.
- (d) The award of the arbitrator may include:
 - interest as the arbitrator may deem appropriate, and to the extent authorized by law or the arbitration agreement; and
 - an award of attorneys' fees to the extent authorized by law or the arbitration agreement.
- (e) In the award, the arbitrator shall apply any pertinent contract terms, statutes and legal precedents. The arbitrator may grant any remedy, relief, or outcome the parties could have received in court. The award shall be final and binding. The award is subject to review in accordance with applicable statutes governing arbitration awards.
- (f) Any award shall be in writing and shall be executed in the manner required by law. The arbitrator shall provide a concise, written breakdown of the award. For Level 2 and Level 3 cases, if requested in writing by any party, or if the arbitrator believes it is appropriate to do so, the arbitrator shall provide a written explanation of the award, including the legal and factual basis thereof. The award of the arbitrator shall not exceed five pages, except in extraordinary cases when the demands of justice require it.

ARB-44. Award upon Settlement

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.

ARB-45. 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 addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

ARB-46. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request that the arbitrator, through the AAA, correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 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.

ARB-47. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

ARB-48. Applications to Court and Exclusions 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 an arbitration under 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 or injunctive 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.

ARB-49. Interpretation and Application of Rules

The arbitrator shall interpret and apply these Rules insofar as they relate to the arbitrator's powers and duties. 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.

ARB-50. Administrative Fees, Arbitrator Fees and Expenses and Suspension for Non-Payment

The administrative fee charged by the AAA is for its administration, handling and processing of the arbitration claim and shall be in accordance with the fee schedule available at **www.adr.org**. The amount of the administrative fee is based upon the size of the claim and counterclaim and is based only on the actual damages. Any additional damages such as punitive damages and attorneys' fees which may be claimed are not included in the calculation of the administrative fee. The parties' share of the administrative fee is indicated in the fee schedule. These amounts must be paid at the time of filing.

The final fee indicated in the chart is part of the administrative fee, but is only due if a hearing is scheduled. If the claim is settled, the final fee is not owed.

A final fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred.

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

Arbitrator Fees

The fee schedule indicates the amount due for arbitrator compensation based upon the size of the claim. These fees are paid in advance of the arbitration hearing. Any unused deposits are returned at the end of the case.

Expenses

The expenses of witnesses and experts 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.

Suspension for Nonpayment

If arbitrator compensation or administrative fees have not been paid-in-full five business days prior to commencement of the hearing, the AAA may so inform the parties in order that one of them may advance the required payment. The arbitrator may assess these costs in the final award. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend the proceedings. If either the arbitrator or the AAA suspend or terminate the proceedings, the parties may submit their dispute to an appropriate court.

If the builder does not pay its share of the administrative fees, arbitrator fees, or expenses, the AAA may elect to not administer the case and future cases in contracts involving that builder.

Administrative Fees and Arbitrator Compensation

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

Arbitration Checklist

Before you file for arbitration:

- ▶ Identify and evaluate your applicable statute of limitations.
- ▶ Complete the Demand for Arbitration.
 - ▶ Identify all parties and their contact information. Delays may occur if information is inaccurate.
 - ▶ Be specific in what you are claiming. If you are claiming monetary damages or specific performance (e.g., repairs needed), specify each claim.
 - ▶ Indicate the name of these Rules on your Demand form.
 - ▶ Sign the form.
- ▶ Review the AAA WebFile program available through **www.adr.org** to file online.
- ▶ Send the original completed Demand for Arbitration to the other party (i.e., the builder or the homeowner).
- ▶ Send two copies of the Demand for Arbitration to your American Arbitration Association (AAA) local office or Case Management Center along with the completed Demand. Also send the following items to the AAA:
 - ▶ copy of the arbitration clause or provision contained in your contract;
 - ▶ the appropriate filing fee indicated in the filing fee chart.

Arbitration Tips for Parties

1. Assemble all documents and papers that you will need for your case. A checklist of documents and exhibits will be helpful toward your orderly presentation.
2. If documents that are needed are in the possession of the other party, ask the other party to make them available to you. Under some state arbitration laws, arbitrators or attorneys have authority to subpoena documents and witnesses.
3. If you provide witness testimony by affidavit, consider using sworn statements. These sworn statements are more persuasive when they are from witnesses with direct knowledge of the facts. Hearsay testimony may be received by an arbitrator but may not be given much weight.
4. Support your allegations with proofs and make sure you identify which proofs are supporting which claims or arguments.
5. Be concise and to the point. Try not to give information to an arbitrator that is not relevant to the case. You must present them with a clear case.
6. Study the case from the other side's point of view and be prepared to respond to the opposition's evidence.
7. Types of documents or records you might use to convince an arbitrator of your position:
 - a. Invoices
 - b. Cancelled checks
 - c. Engineering or architect or expert reports
 - d. Letters or memos
 - e. Plans or blueprints that might be important
 - f. Copies of change orders
8. Be sure to ask the arbitrator to deal with preliminary issues, for example, whether the arbitration is premature pending the parties' compliance with legal or contractual notice, opportunity to repair requirements, etc.

For further information on construction arbitration and mediation, visit our website at **www.adr.org**.

Home Construction 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 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 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 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, county of the Mediation)

Unless the parties mutually agree upon a locale post dispute, the locale shall be the city nearest to the site of the project in dispute, as determined by AAA.

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. 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 timeframe 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.

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 the Mediation

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

Mediation Tips for Parties

1. Define and analyze the issues involved in the dispute.
2. Recognize the parameters of the given situation (what can realistically be expected, time constraints, available resources, legal ramifications, business or trade practices, costs, etc.).
3. Identify needs and interests in settling the dispute.
4. Prioritize the issues in light of needs.
5. Determine courses of action, positions and tradeoffs and explore a variety of possible solutions.
6. Seek to make proposals reasonable and legitimate and be willing to accommodate the needs of the other party.
7. Ascertain the strengths and weaknesses of the claim.
8. Ready facts, documents and sound reasoning to support claims.
9. Anticipate the other party's needs, demands, strengths and weaknesses, positions and version of facts.
10. Must have party with full authority to settle the claim attend the hearing.
11. Develop strategies and tactics through discussion of issues, presentation of proposals and testing of the other party's positions.
12. Recognize that mediation and arbitration are different processes.

Glossary of Terms

AAA WebFile

The AAA offers fast, convenient online claim filing through our AAA WebFile service. In addition to filing claims, clients can make payments, perform online case management, access rules and procedures, electronically transfer documents, select Arbitrators or Mediators, use a case-customized message board and check the status of their case.

Answering Statement

This is a written response, by the respondent, to the initial claim. Typically, the answering statement will be a denial of the claim.

Arbitration

In arbitration, the parties submit disputes to an impartial person (the arbitrator) for a decision. Each party can present evidence to the arbitrator. Arbitrators decide cases with written decisions or “awards.” An award is binding on the parties. A court may enforce an arbitration award, but the court’s review of arbitration awards is limited.

Arbitrator

The arbitrator, not a party to the dispute, hears and reviews evidence and testimony from the parties either in person or by document submission and also telephonic hearings. The arbitrator then renders an award, deciding the disputed issues.

Award

This is the final decision or ruling by the arbitrator on a claim and/or counterclaim submitted to arbitration, sometimes called a “Decision.”

Case Manager

The Case Manager is the AAA’s employee assigned to handle the administrative aspects of the case. He or she does not decide the case. He or she only manages the case’s administrative steps, such as exchanging documents, matching schedules and setting up hearings. The Case Manager is the parties’ contact point for almost all aspects of the case outside of any hearings.

Claim

This is the underlying basis for arbitration or mediation. The claim can be either for monetary or non-monetary damages.

Claimant

A Claimant is the party who files the claim or starts the arbitration. Either the homeowner or homebuilder may be the Claimant.

Counterclaim

More than just an answering statement, a counterclaim is an assertion that damages are owed to the Respondent by the Claimant.

Desk Arbitration

In a desk arbitration, the parties submit their arguments and evidence to the arbitrator in writing. The arbitrator then makes an award based only on the documents. No hearing is held.

Home

A home is a single family, duplex, triplex, quadplex, townhome, modular, or a unit in a multi-unit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system.

In-Person Hearing

During an in-person hearing, the parties and the arbitrator meet in a conference room or office and the parties present their evidence in a process that is similar to going to court. An in-person hearing, however, is not as formal as going to court.

Level 1 Disputes

No claim or counterclaim exceeds \$25,000. For Level 1 disputes, either party can opt to file their claim in Small Claims Court if the claim or counterclaim is within the jurisdictional limits of such court.

Level 2 Disputes

Claims or counterclaims are greater than \$25,000 but not more than \$100,000.

Level 3 Disputes

Claims or counterclaims are greater than \$100,000 or are non-monetary.

Mediation

In mediation, an impartial person (the mediator) helps the parties try to settle their dispute by facilitating an equitable solution to the problem between them. Mediation should not be confused with arbitration or litigation, in which the parties or their lawyers present their case to a third party (the arbitrator or judge) who makes a decision for them. In mediation, the mediator facilitates the dialogue between the parties, but it is the parties who decide whether there will be an agreement and what the agreement will be.

Owner

An owner means a homeowner, including a subsequent purchaser, tenant, or association, or a subrogee or assignee of the homeowner.

Respondent

A Respondent is the party against whom the claim is filed. A Respondent may, in response to the Claimant's demand, state a claim in arbitration against the Claimant. Such a claim is called a counterclaim. Either the homeowner or the homebuilder may be the Respondent.

Telephone Hearing

In a telephone hearing, the parties have the opportunity to tell the arbitrator about their case during a conference call. Often this is done after the parties have sent in documents for the arbitrator to review. A telephone hearing can be less expensive and easier than an in-person hearing.

Recognition

The American Arbitration Association wishes to recognize the contributions of the advisory committee members who assisted in the development of the *Home Construction Arbitration Rules and Mediation Procedures*.

John Bulman

Pierce Atwood LLP
Providence, RI

Tim Hoban

Vice President and Chief Litigation Counsel
Toll Brothers
Horsham, PA

Mark McQuality

Shackelford, Bowen, McKinley & Norton, LLP
Dallas, TX

The Honorable Elinor Reiner

Santa Barbara, CA

Danny Shaw

Shaw ADR LLC
Mandeville, LA

Thomas J. Stipanowich

Academic Director, Straus Institute for Dispute Resolution
Pepperdine School of Law
Malibu, CA

Heidi Storz

Benson, Kerrane, Storz & Nelson, P.C.
Golden, CO

Carol Young

Assistant Attorney General
State of Connecticut
Hartford, CT

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ROA-0175



Summary of Changes Construction Industry Arbitration Rules

Effective March 1, 2024, the American Arbitration Association® (AAA®) released its revised *Construction Industry Arbitration Rules and Mediation Procedures (Rules)*.

Spearheaded by the AAA's National Construction Dispute Resolution Committee, with extensive input gathered during nationwide roundtable discussions with advocates, in-house counsel, arbitrators, and other industry professionals, these updates exemplify a proactive approach to enhancing arbitration processes, aligning them with evolving industry demands.

These revised Rules reflect AAA's commitment to advancing arbitration and mediation efficiency within the construction industry.

Embracing Current and Emerging Technologies

The Rules have been revised to remove references to outdated technology and to embrace current and emerging technologies, without the need for further Rules changes.

The requirement for filing parties to include fax numbers has been removed from the Rules. Additionally, filing parties are now required to provide email addresses for all respondent parties, including any parties sought to be joined.

Regular Track Procedures

R-2. AAA and Delegation of Duties: A new subsection (b) has been added to this Rule confirming that the parties and their representatives shall abide by the AAA's Standards of Conduct.

R-7. Consolidation and Joinder: This Rule has been revised to better reflect the AAA's administrative process and the expectations of the parties and arbitrator. The changes are as follows:

- Requests for consolidation and joinder must now be filed before the Merits Arbitrator appointment is confirmed. The "90 days after filing" option has been removed.
- The Rule now specifies that if an R-7 Arbitrator is required, the AAA will make an administrative appointment.

Consolidation 7(a):

- Parties shall now have 14 days, increased from 10 days, to reply to consolidation requests.



Joinder 7(b):

- A party requesting leave to file a joinder request after the Merits Arbitrator has been confirmed will now need to establish not only good cause, as was required under the prior version of this Rule, but also prejudice if the request is not permitted.
- Any party's failure to reply within the required time frame shall be deemed a waiver of any objections.
- The Rule now specifies that a copy of any joinder request must be provided to all parties.

R-14. Arbitrator Appointment from National Construction Panel: AAA shall now have the authority to limit the parties' strikes.

R-15. Direct Appointment by a Party: This Rule has been revised to specify that party appointed arbitrators must be on the AAA's National Roster of Arbitrators, unless the parties agree otherwise or the AAA determines that members of the AAA Roster don't meet the requested expertise required by the parties' ADR provision.

R-16. Appointment of Chairperson by Party-Appointed Arbitrators or Parties: This Rule now specifies that the Panel Chair must be appointed from the AAA National Construction Panel, unless the parties agree otherwise.

R-23. Preliminary Management Hearing: The amended Rule specifies that preliminary hearings may be held via videoconference in addition to by telephone and in person.

R-29. Official Record of Proceedings: This Rule has been changed to allow all transcription options, and not just "stenographic" records.

R-34. Dispositive Motions: With an eye toward reducing the cost of arbitration and improving the efficiency of the process, the AAA has amended this Rule to add a requirement for arbitrators to consider the cost of a dispositive motion in determining whether to grant leave for a party to file such a motion.

R-39. Emergency Measures of Protection: This Rule has been amended to specify the AAA will appoint the Emergency Arbitrator as soon as practicable but no later than three business days instead of one. It further now allows the Emergency Arbitrator the same time frame to set a schedule to address the request for emergency relief. The amendment also clarifies that a request for emergency relief may be filed regardless of any condition precedent to arbitration that may exist in the parties' contract.

R-44. Serving of Notice: The amended Rule permits the AAA, the arbitrator, and the parties to use "alternative methods of communication or other platforms" to exchange communications or other notice during the course of the arbitration.

R-45. Confidentiality: This new Rule makes explicit the requirement for the AAA and the arbitrator to keep all matters confidential. The Rule also grants arbitrators the specific authority to issue confidentiality orders.



R-48. Form of Award: Formerly Rule R-47, the amended Rule confirms that arbitrator signatures on the Award can be electronic or digital.

R-52. Modification of Awards: Previously Rule R-51, this Rule has been amended to grant arbitrators the authority to “clarify” their awards in addition to addressing clerical, typographical, technical, or computational errors. The Rule still provides that the merits of the award may not be reconsidered and now specifies that any modification or clarification requests are to be made through the AAA, rather than to the arbitrator directly.

R-59. Deposits: Formerly Rule R-58, a newly added section (b) specifies that, if a party joined under Rule R-7 fails to make deposits required under these Rules, the party that sought their joinder shall be responsible for covering those costs, subject to later reapportionment in the award.

R-60. Sanctions: This Rule has been amended to grant the arbitrator the authority to impose sanctions on their own initiative, so long as the party against whom sanctions are to be imposed is provided an opportunity to be heard before any such order issues.

Fast Track Procedures

F-1. Fast Track Applicability: The Fast Track Procedures now apply to any case where no disclosed claim or counterclaim exceeds \$150,000, increased from \$100,000.

F-8. Exchange of Information and Discovery: Procedures F-8 and F-9 have been combined into a single Rule. The new Procedure specifies that motions are not permitted except for good cause shown. The combined Procedure retains the requirement that discovery is to be provided only in extraordinary circumstances and adds that a case may be removed from the Fast Track if discovery is permitted.

F-13. Form of Award. This new Procedure specifies the form of award for Fast Track cases, providing that, if the parties request a reasoned award, an abbreviated opinion, or findings of facts and conclusion of law, the case will be removed from the Fast Track and the arbitrator may charge their regular rates.

Numbering: Many of the Fast Track Procedures have been re-numbered, starting with Procedure F-10, which is now F-9.

Procedures For Large, Complex Construction Disputes

L-3. Arbitrators: The threshold for the appointment of a three-arbitrator panel has been increased from \$1 million to \$3 million.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO: 2023-CP-10-04865

Dow, Inc.,)
Plaintiff,)
vs.) **AFFIDAVIT OF SCOTT DOW**
Beth Bartolini,)
Defendant.)

PERSONALLY, appeared before me, the undersigned Notary Public, the Affiant, Scott Dow, who being duly sworn stated as follows:

1. I am a competent adult over the age of eighteen and can testify to the following of my own personal knowledge.
2. I reside in Charleston County, South Carolina.
3. I am the President of Dow, Inc.
4. I have been involved in the construction industry for over 40 years.
5. On or about August 17, 2022, the above name parties entered into a "Construction Contract" ("Contract") which is attached to the Complaint in this matter as **Exhibit A**.
6. On page one of the Contract, it states that the "Project" is for "Miscellaneous Interior and Exterior Work" at the Defendant's home located in Charleston, South Carolina.
7. On page three of the Contract, there is an arbitration provision that states, "Any controversy of claim 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..."
8. This arbitration provision of the Contract is a material term to the Contract.
9. That I watched and saw the Defendant read the Contract, initial under the above referenced arbitration provision as well as all pages of the Contract, and sign the Contract. In addition, the Defendant did not have any questions or issues with any section of the Contract before she executed the Contract.
10. On page ten and eleven of the Contract, under "Scope of Work" the Contract states that the following work is contemplated by the Contract:
 - a. "Remove and replace all rotted and damaged framing..."

- b. "Remove and replace all exposed Polly piping..."
- c. "Remove all duct.."
- d. "Remove drywall..."
- e. Replace wood floors on second floor with "laminate flooring..."
- f. "Supply and install a new glass door..."
- g. "Supply and install a new wall..."
- h. "Three new window units..."
- i. "Supply and install a new tankless water heater..."
- j. "Supply and install new light fixtures..."
- k. "Supply and install new plumbing fixtures..."

11. That I understand "interstate commerce" in a general sense and in its ordinary meaning refers to trade, traffic, or transportation between two States or between a State and another country, and that it could also include movements within a State that originate in, terminate in, or go through another State or country.

12. All the materials required for the scope of work listed above involved interstate commerce based on my understanding of that term.

13. Specifically, some of the materials listed were purchased at Buck Lumber in Charleston County, South Carolina.

14. That I make these true and accurate statements based on my vast experience in this business area and as the President of Dow, Inc.

15. That I make these true and accurate statements of my own free will, under the penalty of perjury, and that I am not under the influence of any medication, drugs, alcohol, or duress of any type.

FURTHERMORE, THE AFFIANT SAYETH NOT.

SIGNATURE: _____

Scott Dow

SWORN TO AND SUBSCRIBED)
Before me this 18th day)
of July 2024)
)
NOTARY PUBLIC)
STATE OF South Carolina)
My commission expires: 1/13/31)



From: Scott Mongillo <Scott@blandrichter.com>

Sent: Tuesday, November 19, 2024 9:59 AM

To: Murphy, Maite Law Clerk (Ashley Errett) <mmurphylc@sccourts.org>; Paul Rahn <pr@roblaw.net>; Ronnie Richter <Ronnie@blandrichter.com>; Richter Paralegal <RichterParalegal@blandrichter.com>; Elissa Jones <elissa@roblaw.net>; Murphy, Maite Secretary (Robin Dukes) <mmurphysc@sccourts.org>

Cc: Alexander J. Rudiak <Alexander.Rudiak@mgclaw.com>; TEAM <TEAM@blandrichter.com>; JD Smith, Jr. <jsmith@mgclaw.com>; Kassy Morrow <kassy.morrow@mgclaw.com>; Kimberly Tralies <kimberly.tralies@mgclaw.com>

Subject: RE: 2023CP1004865 - Dow, Inc. vs. Beth Bartolini / Motion to Compel Arbitration

Ashley:

Thank you for your email. A Form 4 order is fine with the Plaintiff. Will you inform Judge McCoy that the status conference scheduled for 12-5 on this matter is no longer required, thanks.



Scott M. Mongillo

Bland Richter, LLP

Attorneys at Law

Peoples Building, Mezzanine Level



18 Broad Street

Charleston, SC 29401



phone [843.573.9900](tel:843.573.9900) | fax 843.573.0200



scott@blandrichter.com



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From: Murphy, Maite Law Clerk (Ashley Errett) <mmurphylc@sccourts.org>

Sent: Tuesday, November 19, 2024 9:51 AM

To: Scott Mongillo <Scott@blandrichter.com>; Paul Rahn <pr@roblaw.net>; Ronnie Richter <Ronnie@blandrichter.com>; Richter Paralegal <RichterParalegal@blandrichter.com>; Elissa Jones <elissa@roblaw.net>; Murphy, Maite Secretary (Robin Dukes) <mmurphysc@sccourts.org>

Cc: Alexander J. Rudiak <Alexander.Rudiak@mgclaw.com>; TEAM <TEAM@blandrichter.com>; JD Smith, Jr. <jsmith@mgclaw.com>; Kassy Morrow <kassy.morrow@mgclaw.com>; Kimberly Tralies <kimberly.tralies@mgclaw.com>

Subject: RE: 2023CP1004865 - Dow, Inc. vs. Beth Bartolini / Motion to Compel Arbitration

Hello all,

After consideration of the record and relevant law, Judge Murphy has decided to DENY this Motion to Compel Arbitration. Are the parties content with a Form 4 denial, or would the Defendant prefer to submit a proposed order for Her Honor's consideration?

Thank you,

Ashley

Ashley F. Errett, Esq.

Law Clerk for the Honorable Maité Murphy

Circuit Court Judge At-Large, Seat 15

5200 East Jim Bilton Boulevard

St. George, South Carolina 29477

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