



**RULES FOR ARBITRATION**

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## **RULES FOR ARBITRATION OF DISPUTES**

*Arbitration is the most formal of alternate dispute resolution procedures typically adopted in construction disputes. The law governs its essential elements, lawyers are often present and bring a degree of formality to the process. The award is binding on the parties and enforceable in the courts. The role of the arbitrator is to weigh and assess evidence presented by the parties. The arbitrator has the ability to call witnesses and to retain experts. The rules of evidence do not necessarily apply but the arbitrator cannot usually exclude evidence that a court would otherwise admit.*

Accordingly, the Parties agree to submit Disputes arising under the Contract which are not resolved by amicable negotiations to arbitration for final determination in accordance with the Rules set out below.

### **PART I GENERAL**

#### **Interpretation**

- 1.1 **Definition** of terms used in these Rules:
- (a) words have the same meanings attributed to them under:
    - (i) *The Arbitration Act of Manitoba*, C.C.S.M. c. A120 (herein referred to as the "Act"), and
    - (ii) the Contract;
  - (b) "the Court" means the Manitoba Court of Queen's Bench, Winnipeg Division.
- 1.2 **Time** - In these Rules, time shall be calculated in the same manner as time is calculated in the Contract.

#### **Application of Rules**

- 2.1 **Application** - These Rules apply to arbitrations conducted under the Contract.
- 2.2 **Variation of Rules** - The Parties may, by agreement in writing, change or make additions to these Rules.
- 2.3 **Conflicting of Provisions** - If any provision of these Rules is inconsistent with or contrary to a mandatory provision of the Act, the mandatory provision in the Act governs.

#### **Communications**

- 3.1 **Written** - All written communications under these Rules shall be given in the same manner as written notices are to be given in the Articles of Agreement.
- 3.2 **Copies to Arbitrator** - A copy of all written communications between the arbitrator and a Party

shall be given to the other Party at the same time.

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

### **Objections to Process**

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

### **Location of Arbitration**

- 5.1 **Location** - Arbitrations shall be conducted in the City of Winnipeg, Manitoba, Canada at a location to be determined by agreement of the Parties.

## **PART II PRE-ARBITRATION CONSIDERATIONS**

### **Notice to Arbitrate**

- 6.1 **Contents of Notice** - Either Party (the 'Claimant') shall submit a Dispute to arbitration, as permitted under the Contract, by delivering to the other Party (the 'Respondent') a written notice containing the following:
- (a) the clause(s) in the Contract relied upon to advance the Claimant's position in the Dispute;
  - (b) a statement of the issue(s) in Dispute;
  - (c) a request that the Dispute be referred to arbitration;
  - (d) particulars of the claim being made;
  - (e) the name of a proposed appointee to act as the sole arbitrator, along with his or her resume as described in clause 8.4.

### **Commencement of Arbitration**

- 7.1 **Deemed to Commence** - For purposes of the calculation of time under these Rules, the arbitration shall be deemed to have commenced on the date the Respondent receives the notice to arbitrate under clause 6.1.

### **Appointment of Arbitrator**

- 8.1 **Single Arbitrator** - Each arbitration shall be conducted before a single arbitrator who possesses the qualifications specified in clause 8.3. Unless circumstances require otherwise, the Parties agree to use the same arbitrator for each arbitration if more than one arbitration is commenced under the Contract.
- 8.2 **Appointment of Single Arbitrator** - The Parties shall make every reasonable effort to reach agreement on a single arbitrator within 30 days after the first arbitration commencing under the Contract.

- 8.3 **Qualifications** - An arbitrator must be impartial and independent of the Parties and be an experienced and skilled commercial arbitrator and shall have knowledge of relevant construction industry issues and preferably shall reside in and conduct his or her profession in Canada.
- 8.4 **Resume** - If a person proposes an individual as an arbitrator, the person shall provide a written resume of that individual's work background, qualifications and arbitration experience.
- 8.5 **No Agreement Possible** – If the Parties cannot agree on the appointment of an arbitrator under clause 8.2 within the time provided, either Party may make an application under the Act to the Court to appoint an arbitrator as soon as possible.
- 8.6 **Considerations** - In making an appointment under clause 8.5, the Court shall give due consideration to the nature of the Contract, the issue(s) in dispute, the required qualifications of the arbitrator and any other aspects which will help to identify an appropriately knowledgeable, experienced, qualified, independent and impartial arbitrator.
- 8.7 **Party Suggestions** - The Parties may make written suggestions to the Court respecting individuals whom they believe would be suitable for appointment, but the Court shall not be restricted to appointing only an individual suggested.
- 8.8 **Arbitrator's Statement** - Before accepting an appointment, an arbitrator shall provide the Parties with a written statement declaring that there are no circumstances likely to give rise to a reasonable apprehension of bias or justifiable doubts as to the arbitrator's independence or impartiality and that the arbitrator will promptly disclose any such circumstances to the Parties if they should arise before the arbitration is concluded.
- 8.9 **Replacement** - An arbitrator who resigns for any reason, is unable or refuses to act or is removed from office, shall be replaced by another arbitrator under these Rules. All interim orders and procedural determinations on record, as contemplated by clause 9.2, prior to replacement of an arbitrator shall continue in effect, subject to any further determinations which may be made by the replacement arbitrator. Any procedural meetings or oral hearings held but not concluded and resulting in a written order or decision by the replaced arbitrator shall be rescheduled and re-heard.
- 8.10 **Court Order** - If the Parties do not agree that an arbitrator has resigned, is unable to act or refuses to act or has been removed from office as contemplated by clause 8.9, either Party may apply to the Court for an order that the arbitrator should be replaced.

### **Procedural Meetings**

- 9.1 **Agenda of Initial Procedural Meeting** - Within 5 days after being appointed, the arbitrator shall convene a procedural meeting of the Parties to reach a consensus, if possible, and to make orders, if necessary, on
- (a) the procedure to be followed in the arbitration,
  - (b) the time periods for taking steps in the proceedings,
  - (c) the scheduling of any oral hearings or meetings,
  - (d) any preliminary applications or objections a Party may have, and
  - (e) any other matter which will assist the arbitration to proceed in an efficient and expeditious

manner taking into account the complexity and numbers of issues in dispute.

- 9.2 **Record of Procedural Meetings** - The arbitrator shall prepare and promptly distribute to the Parties a written record of all the business transacted and decisions and orders made at the initial procedural meeting referred to in clause 9.1 and at any subsequent procedural meetings of the arbitrator with the Parties.
- 9.3 **Conference Call** - The initial procedural meeting referred to in clause 9.1 and any subsequent procedural meetings of the arbitrator and the Parties may be conducted by conference call.
- 9.4 **Subsequent Procedural Meetings** – The arbitrator may convene procedural meetings after the initial procedural meeting as required to advance the proceedings. Either Party shall be entitled to serve notice on the arbitrator and the other Party calling for a procedural meeting to address one or more matters identified in the notice, and the arbitrator shall determine whether and when to convene such a meeting.

### **Powers of the Arbitrator**

- 10.1 **Conduct of Proceedings** - Subject to any limitations in these Rules or any agreement reached by the Parties, the arbitrator may conduct the arbitration in any manner the arbitrator considers appropriate but each Party shall be treated fairly and shall be given full opportunity to present its case.
- 10.2 **Ruling on Jurisdiction** - The arbitrator may rule on his or her own jurisdiction under these Rules.
- 10.3 **Discretion** - The arbitrator may:
- (a) adjourn the proceedings from time to time to facilitate settlement discussions between the Parties or for any other reasonable purpose,
  - (b) make an interim order on any matter with respect to which a final award may be made, including an interim order for preservation of property which is subject matter of the Dispute,
  - (c) order inspection of documents, exhibits or other property at any location,
  - (d) order the recording of any oral hearing or meeting,
  - (e) inspect or order the inspection of any component of or the entirety of the Work at any location after giving the Parties 7 days written notice of the intention to do so, and
  - (f) if the arbitrator considers it just and appropriate in the circumstances, extend or abridge a period of time:
    - (i) required in these Rules, except a period of time specified under clause 18.2,
    - (ii) fixed or determined by the arbitrator, or
    - (iii) previously agreed to by the Parties.

## **PART III PROCEEDINGS**

### **Exchange of Statements**

- 11.1 **Time Limits** - The Parties shall exchange written statements of their respective positions in the

Dispute in the following manner:

- (a) the Claimant shall give a statement outlining the facts, the matters in issue and the relief or remedy requested not later than 14 days after the initial procedural meeting is held pursuant to clause 9.1;
- (b) the Respondent shall give a statement outlining the response to the Claimant's statement and the Respondent's Counterclaim, if any, not later than 14 days after receiving the Claimant's statement;
- (c) the Respondent to the Counterclaim shall give a statement outlining the defence to the Counterclaim not later than 14 days after receiving the Counterclaim.

11.2 **Copies to Arbitrator** - The Parties shall provide the arbitrator with copies of the statements exchanged pursuant to clause 11.1.

11.3 **List of Documents** - Each Party shall attach to each statement provided in clause 11.1 a list of documents:

- (a) upon which the Party intends to rely, and
- (b) which describes each document by kind, date, author, addressee and subject matter.

11.4 **Amendment of Statement** - During the proceedings the arbitrator may allow a Party to amend or add to any statement made pursuant to clause 11.1, including the list of documents provided, unless the other Party would be prejudiced by the delay in making the amendment or addition.

## **Disclosure**

12.1 **Production of Documents** - The arbitrator may order a Party to produce, within a specified time, any documents which:

- (a) have not been listed under clause 11.3, or
- (b) only one Party has in its care, custody or control, and
- (c) the arbitrator considers to be relevant.

12.2 **Access to Documents** - Each Party shall provide to the other Party copies of any documents listed under clause 11.3 or clause 12.1 upon request and, further, shall allow the other Party the necessary access at reasonable times to inspect and take copies of all documents that the former Party has listed in clause 11.3 or that the arbitrator has ordered to be produced in clause 12.1.

12.3 **Agreed Statement of Facts** - The Parties shall prepare and send to the arbitrator an agreed statement of facts within the time specified by the arbitrator.

12.4 **Witness Statements/Summaries** - Not later than 21 days before any oral hearing commences, each Party shall give the other Party:

- (a) the name and address of any witness to be called and a written summary of the witness's evidence, and
- (b) in the case of an expert witness, a written statement or report prepared by the expert witness which sets out the substance of the expert's evidence to be given at the hearing.

12.5 **Assembly of Documents** - Not later than 15 days before the oral hearing commences, each Party shall give to the other Party and to the arbitrator an assembly of all documents to be introduced

at the hearing.

### **Hearings and Meetings**

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

### **Evidence**

- 14.1 **Rules of Evidence Not Required** - The arbitrator shall not be required to apply the legal rules of evidence and shall determine the relevance and materiality of the evidence presented.
- 14.2 **Taking Oral Evidence** - All oral evidence shall be taken in the presence of the arbitrator and of both Parties, unless a Party is absent by default or has waived the right to be present.
- 14.3 **Oath/Affirmation** - The arbitrator may order any individual to be examined by the arbitrator under oath or on affirmation in relation to the issues in dispute and to produce before the arbitrator all relevant documents within the individual's care, custody or control.
- 14.4 **Document Assemblies** - The document assemblies delivered under clause 12.5 shall be deemed to have been entered into evidence at the oral hearing without further proof and without being read out at the hearing but a Party may challenge the admissibility and the weight of the evidence contained in any document so introduced.
- 14.5 **Discretion** - If the arbitrator considers it just and reasonable to do so, the arbitrator may permit a document to be introduced at the oral hearing which was not previously listed under clause 11.3 or produced pursuant to clause 12.1 or 12.5, but the arbitrator may take that failure into account when fixing the costs to be awarded in the arbitration.
- 14.6 **Cross Examination** - If the arbitrator permits the evidence of a witness to be presented as a written statement, the other Party may require that witness to be made available for cross examination at the oral hearing.
- 14.7 **Arbitrator called Witness** - The arbitrator may order a witness to appear and give evidence, and, in that event, the Parties may cross examine that witness and call evidence in rebuttal.

### **Arbitrator Retained Experts**

- 15.1 **Experts Retained** - After consultation with the Parties, the arbitrator may:
- (a) retain one or more experts to give the arbitrator a written report on specific issues, and

- (b) for that purpose, require a Party to make available relevant documents, goods or other property for the expert's inspection at any location specified by the arbitrator.
- 15.2 **Copies of Report** - The arbitrator shall give a copy of the expert's report to the Parties who shall have the opportunity to reply to it.
- 15.3 **Production/Inspection of Information** - On a request of a Party, an expert retained under clause 15.1 shall:
- (a) make available to the Party for inspection all documents, goods or other property in the expert's possession which were provided to the expert, and
  - (b) provide the Party with a list of all documents, goods or other property not in the expert's possession, but which were provided to the expert, and a description of the location of those documents, goods or other property.
- 15.4 **Right to Cross Examine** - The Parties may cross examine an expert on the report prepared under clause 15.1 and may call evidence in rebuttal including expert evidence.

#### **Default of Parties**

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

#### **Close of Hearings**

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



## PART IV THE AWARD

### Final Award

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

### Costs

- 19.1 **Fixing Costs** - The arbitrator shall fix the costs of the arbitration in the final award, which costs may include, but are not limited to, the following:
- (a) the fees of the arbitrator;
  - (b) any necessary and reasonable expenses incurred by the arbitrator to fulfill the arbitrator's functions;
  - (c) the fees and other necessary and reasonable expenses of:
    - (i) the experts appointed by the arbitrator, and
    - (ii) the witnesses, as approved by the arbitrator;
  - (d) any necessary and reasonable fees, charges or expenses for providing services to the arbitrator or the Parties in connection with the arbitration.
- 19.2 **Costs to Successful Party** - Except for the costs of legal fees and legal expenses of the successful Party, the costs of the arbitration shall be borne by the unsuccessful Party unless the arbitrator considers it appropriate in the circumstances to apportion them between the Parties.
- 19.3 **Legal Costs** - The arbitrator:
- (a) may decide which Party shall bear the costs of legal fees and legal expenses of the successful Party, if they were claimed during the arbitration,
  - (b) may apportion those costs if the arbitrator considers it just and reasonable to do so, and
  - (c) in either event, shall specify the amounts of those costs or the manner of determining those costs.

- 19.4 **Legal Fees not Restricted** - In making a decision under clause 19.3, the arbitrator is not limited to awarding the legal fees and legal expenses which a court may award to a successful party in a civil judicial proceeding.
- 19.5 **Reasonable Fees** - Subject to any agreement entered into between the Parties and the arbitrator, the fees of the arbitrator shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrator and any other relevant circumstances.

#### **Amendments and Corrections to the Award**

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

### **PART V PROJECT DISPUTES**

#### **Consolidation**

- 21.1 **Criteria for Consideration** – If:
- (a) a common question of law or fact arises in more than one arbitration arising in respect of the Project,
  - (b) the relief claimed in such arbitrations is in respect of or arises out of substantially the same factual situation, and
  - (c) the arbitrations at issue are all being conducted under rules identical or very similar to these Rules,
- a party to any such arbitration may, by written notice given to each of the parties to the arbitrations, request that the arbitrations be consolidated.
- 21.2 **Objection to Consolidation** - If a party objects to consolidation of arbitrations, the party may refer such a procedural dispute to the Court by giving written notice within 7 days of receiving

the notice for consolidation.

- 21.3 **Deemed Consent** - If none of the parties objects to the notice for consolidations given under clause 21.1, within the time permitted or the procedure contemplated in clause 21.2, each of the parties to the arbitrations shall be conclusively deemed to have consented to the consolidation of the arbitrations.
- 21.4 **Procedural Issues** - If the parties to the consolidated arbitration are unable to agree on any of the procedural issues arising out of consolidation of the arbitrations, including selection of the arbitrator, any party to the consolidated arbitration may refer outstanding issues to the Court.