

CONSTRUCTION ARBITRATION



Rules & Procedures



5775 Glenridge Drive, NE | Suite E100 | Atlanta, Georgia 30328
678-222-0248 main | www.bayadr.com

GENERAL RULES

BAY Mediation & Arbitration Services, LLC (also known as "BAY") has compiled the following Rules and Procedures which model the Georgia Arbitration Code, codified at Official Code of Georgia Annotated section 9-9-1 through 9-9-18. To assist the parties, a copy of the Georgia Arbitration Code can be found at BAY's website. The procedures are designed to make for an efficient arbitration process. The parties are free to enter into a written agreement modifying the procedures set forth herein. Any mutual modification should be submitted to the Arbitrator as soon as possible. If either party desires to amend the process and the opposing party does not consent, the party seeking the amendment shall submit his or her request to the Arbitrator in writing serving a copy on opposing counsel. The objecting party shall be afforded an opportunity to respond. A conference call will be initiated by the Arbitrator to resolve any conflicts regarding modifications of the procedures.

EXCLUSION OF LIABILITY

BAY and its agents, officers, directors, employees, contractors, representatives, or arbitrators (herein after collectively referred to as "BAY") shall not be liable for any act or omission in connection with any Arbitration conducted under these Rules or any other rules and procedures mutually agreed upon by the parties. The parties agree that BAY and its agents, officers, directors, employees, contractors, representatives or arbitrators are not a necessary party in any further alternative dispute resolution or judicial proceeding and may not be called to testify at any subsequent proceeding. The parties agree not to make any claims against BAY for damage, loss or injury and hereby waive any cause of action or other remedy against BAY.

CONFIDENTIALITY

All materials submitted to or filed with the Arbitrator and/or BAY shall not be made public and shall remain confidential. At the outset of the case, the parties shall determine whether all communications, whether oral or written, and all testimony will remain

confidential and inadmissible in any other judicial or alternative dispute resolution proceeding. If so, the parties are encouraged to enter into a limited confidentiality agreement of their mutual acceptance.

PARTICIPANTS

The parties may act on their own (pro se) or may be represented by an attorney or another person with authorization to act on their behalf. All parties shall provide the name, address, e-mail address, telephone number and contact information of any person representing their interests to BAY and to all other parties as soon as possible but no later than thirty (30) days prior to any scheduled hearing or conference.

CONTINUANCES

The Arbitrator(s), in his or her discretion, may grant a party's request for a continuance of a scheduled conference, arbitration hearing, or the due date for the exchange of discovery or documentary evidence. The request for a continuance shall be made in writing, filed with BAY and served on the opposing party. An oral hearing will be scheduled to resolve any conflicts.

FILING FEES AND HEARING FEES

The parties shall pay the fees set forth in the current Fee Schedule published by BAY, in effect at the time of the filing of the claim. BAY may, in its sole discretion, modify these fees for specific cases. If a change is made by BAY, the parties will be notified accordingly.

ENFORCEMENT OF THE RULES

If any provisions of the BAY rules are held invalid or unenforceable by a court of competent jurisdiction, the parties have not waived any of their rights, privileges or remedies to submit their claims, counter-claims and cross-claims to the applicable court of law or to avail themselves of any other legal rights, privileges or remedies.

PROCEDURE FOR FILING FOR ARBITRATION

Parties shall initiate Arbitration by one of the following methods:

1. The parties may send a jointly executed ***Demand for Arbitration*** form to BAY MEDIATION & ARBITRATION SERVICES, LLC at 5775 Glenridge Drive NE, Suite E100, Atlanta, Georgia 30328, e-mail to info@bayadr.com, or by Facsimile to 404-252-3376. The submission form should include the names, addresses, telephone and fax numbers of each party to the case, a brief description of the nature of the claim, the amount in controversy, the remedy sought, the number of Arbitrator(s) agreed upon by the parties and a copy of the contract or agreement, if any, upon which the dispute is based and the filing fee; ***or***
2. Pursuant to an agreement or contract, the initiating party shall serve a written ***Demand for Arbitration*** to BAY MEDIATION & ARBITRATION SERVICES, LLC at 5775 Glenridge Drive NE, Suite E100, Atlanta, Georgia 30328, e-mail to info@bayadr.com, or by Facsimile to 404-252-3376. And to the Respondent. The ***Demand for Arbitration*** shall set forth the names, addresses, telephone and fax numbers of each party to the case, a brief description of the nature of the claim, the amount in controversy and the remedy sought. A copy of the contract Court Order or evidence of an agreement to arbitrate shall be attached to the ***Demand for Arbitration***. The ***Demand for Arbitration*** shall provide that if the Respondent fails to respond in writing within 30 days of Service, the Arbitrator(s) may enter an award against the Respondent. In his/her sole discretion, the BAY Arbitrator may extend the time limit for the Respondent to file defensive pleadings. The initiating party must show valid proof of mailing or delivery on the respondent.

RESPONSE AND COUNTERCLAIM

The Respondent shall file a Response to the ***Demand for Arbitration*** with BAY Mediation & Arbitration Services, LLC, at 5775 Glenridge Drive NE, Suite E100 Atlanta, Georgia 30328, e-mail to info@bayadr.com or by Facsimile to 404-252-3376. The Response shall include a statement of the basis for Respondent's defenses to the claim including any counter or cross claims. Respondent shall also serve its Response upon the Claimant within 30 days of service of the Demand for Arbitration. The responding party must show valid

proof of mailing or delivery on the initiating party. A party receiving a cross claim or counterclaim shall file a response to the cross claim or counterclaim within 15 days of service of the cross claim or counterclaim. Failure to respond to a claim, cross claim or counterclaim in the time prescribed shall subject the non-responding party to an award of default.

THIRD PARTY CLAIMS

Third party claims shall be filed with 10 days of the date that the respondent's Answer or Response to the claim is due. Third party claims shall be filed under the same procedures for initiating a claim as set forth above. The third party respondent is governed by the rules set forth above for response and counterclaim and shall have 30 days in which to file a response.

COMMUNICATION

Electronic communication is encouraged to promote speed and efficiency. The parties are encouraged to communicate with BAY, the Mediator or Arbitrator, and each other via e-mail. Any party using e-mail as the sole means of service or communication shall maintain proof of delivery showing the time and date the email and any attachments were sent and proof it was sent to a valid e-mail address of record.

CONSENT TO ARBITRATE OR COURT ORDER REQUIREMENTS

The parties to the Arbitration must provide written consent and agreement to arbitrate with BAY and to comply with these Arbitrations Rule and Procedures or provide a written Order from a court of competent jurisdiction to arbitrate at BAY.

FILING OF EVIDENCE

The parties shall submit a pre-hearing brief to the Arbitrator no less than 10 business days prior to the scheduled hearing or as set forth in an Order by the Arbitrator. The pre-hearing brief shall contain:

1. A Statement of Facts;
2. A Statement of Each Claim Being Asserted;
3. A Brief Summary of the Testimony of Any Witness Expected to Testify at the Hearing;

4. The Amount of Time Required for that Party's Portion of the Claim.

In addition to the Brief, each side shall provide the Arbitrator and the opposing party with a list of exhibits and witnesses at least 10 business days before the hearing. Any document or witness not listed on the submission to the Arbitrator and opposing counsel shall only testify or be submitted at the hearing at the sole discretion of the Arbitrator(s), except those required in rebuttal to any claim or defense.

GOVERNING LAW

The Arbitrator(s) shall apply the law of the state, if any, referenced in the contract. Conflicts of law shall be briefed by the parties and decided by the Arbitrator.

SINGLE ARBITRATOR OR PANEL OF THREE ARBITRATORS

Unless specified in the contracts or these Rules, the parties are free to select one Arbitrator or a panel of three Arbitrators. If the parties cannot agree, one arbitrator shall be used on all matters with a claim value of less than \$1,000,000.00. In matters over \$3,000,000.00, a three Arbitrator panel shall be used. The number of Arbitrators in claims between \$1,000,000.00 and \$3,000,000.00 will be based upon the complexity of the issues and will be assigned by BAY, if not previously decided by the parties.

COLLABORATIVE EXPERTS

The Arbitrator(s), where necessary to adequately consider a claim, may seek the assistance of a third party expert with whom the Arbitrator(s) may collaborate. This most often occurs in claims where the parties' experts are providing contradictory information. The collaborative expert shall be of the Arbitrators choosing. BAY may keep a list of qualified neutral construction professionals to assist in the collaborative process. At the discretion of the Arbitrator, he or she may solicit names from the parties of appropriate collaborative experts. If the Arbitrator solicits names, the Arbitrator is not bound by or limited to selecting from the submitted names. The costs of the collaborative expert shall be billed to the parties as part of the Arbitration billing process and procedure.

SELECTION OF ARBITRATOR

The parties are free to mutually agree upon a BAY Arbitrator. If they cannot agree, BAY shall appoint the Arbitrator(s) as promptly as possible. BAY will exercise discretion in appointing the Arbitrator(s). The selected Arbitrator(s) shall be independent and impartial. A party may challenge the selection of an Arbitrator on the grounds of the Arbitrator's impartiality or independence. Such a challenge shall be made in writing to BAY and served upon all parties.

FEES AND EXPENSES

Fees and expenses are to be paid in full by all the parties prior to the issuance of an Award. The parties shall be billed monthly for fees, expenses and time spent in association with the claim. The parties shall pay an amount equal to the estimated time for the hearing of the case three weeks prior to the hearing date. For example, if the hearing is estimated to last five days, the parties shall each pay their portion of the fee for a five day hearing. Should the hearing take less time, the unearned time will be credited to the final bill for the claim or refunded 30 days after the Final Order. All fees are to be paid to BAY Mediation & Arbitration Services, LLC, tax ID58-2429903.

EX PARTE COMMUNICATION

The parties shall have direct access to the Arbitrator. If an issue arises, any party may contact the Arbitrator directly, but may not discuss his or her position regarding the dispute. The Arbitrator shall set a conference call with the parties so the issue can be discussed. The Arbitrator may request briefs on the disputed topic and absent mutual agreement between the parties, the Arbitrator shall issue an Order on the matter in dispute. All emailed or written communications should be provided simultaneously to all parties or their counsel.

PREHEARING CONFERENCE AND DISCOVERY

The Arbitrator, or lead Arbitrator (in an arbitration involving a panel), will conduct a telephone conference call no later than ten (10) days after the Arbitrator has been appointed. Additional conferences may be held at anytime throughout the process. The parties are encouraged to have issues resolved early by conference if possible. This will assist the

parties in moving the case towards a timely resolution. The following issues will be address during the initial conference:

1. The scheduling and completion of discovery;
2. The laws, rules of evidence and burdens of proof that the Arbitrator(s) will apply at the hearing;
3. The scheduling and procedure of the Arbitration;
4. The approximate duration of the Arbitration;
5. The timing and filing of any documents the Arbitrator(s) considers necessary;
6. The filing of pre-hearing briefs;
7. The filing of stipulations of uncontested facts;
8. The filing of witness lists, and expert reports;
9. Whether oral hearing is necessary;
10. Whether the Arbitrator will issue Rulings on predetermined issues prior to the issuance of the Final Award.
11. Whether the Arbitrator shall issue a reasoned or non-reasoned Final Award.
12. The Arbitration shall be conducted in accordance with the BAY Construction Arbitration Rules and Procedures set forth herein.
13. Whether there are any objections to the Arbitrator or Panel of Arbitrators.
14. A date and time shall be set for the final scheduling conference.
15. Whether a court reporter will take down the evidence and who will arrange and pay for the service.
16. Any other matters that the Parties or Arbitrator(s) consider necessary.

At the initial conference between the parties and the Arbitrator, the parties shall discuss what discovery is necessary in order to adequately prepare the claim for hearing. **Ten days after the initial conference and after counsel has discussed the discovery schedule with their client, the parties shall have a final scheduling conference at which time discovery dates shall be set forth, including where necessary, the order in which discovery will take place, limitations on the number of deposition, limitations on third party discovery, etc.** The purpose of the ten day delay is to allow the attorneys enough time to discuss the proposed discovery with their client so that when the scheduling conference

is completed, deadlines will be understood by the parties and their counsel. The parties shall mutually agree in writing on the type of discovery to be conducted. The Arbitrator shall enter an Order formalizing the discovery scheduling. In the event that the parties cannot so agree, the Arbitrator shall enter a Discovery Order to which the parties and counsel shall comply.

Every 30 days following the issuance of the Discovery Order, each party shall submit a discovery update to the Arbitrator with a copy to all parties of record. The Arbitrator shall have a conference call with the parties following receipt of each side's 30 day discovery update to address any discovery issues and to ensure that the parties meet the discovery deadline as set forth in the Scheduling Order.

ARBITRATION HEARING

Subject to the provisions of the underlying contract or other written agreement, the Arbitrator(s) will hold a hearing in which the parties will present their evidence. The Arbitrator will fix the date(s), time and location for the hearing. The Award of the Arbitration is binding upon the parties. Parties shall present their case as if they were trying a bench trial. Evidentiary matters will be ruled upon by the Arbitrator. Rule of evidence will either be in accordance with Georgia law or relaxed as agreed to by the parties in writing and as approved by the Arbitrator. Parties and witnesses shall testify under oath. The Arbitrator has the power to issue subpoenas for production and for attendance to a deposition or Hearing. The Arbitrator has the power to leave the record open for a limited time and purpose or to close the record at the conclusion of the hearing. The Arbitrator may suspend the proceedings and set a time for the proceeding to recommence at the Arbitrator's sole discretion. Unless agreed to by the parties, the hearing shall not be recorded in any way. At the conclusion of the Hearing, the Arbitrator shall allow the parties to submit post hearing briefs. The Arbitrator shall set the deadline for post hearing brief submissions with the assistance of the parties. The Arbitrator will attempt to render the final Award within thirty (30) days from the date the Arbitration is declared closed by the Arbitrator.

PAPER ARBITRATIONS

The parties may request that all or some of the issues be handled and ruled upon without an oral hearing. During the prehearing conference, or at any earlier date as agreed

upon by the Arbitrator, the parties may request that all or some of the issues be handled through paper filings only. The Arbitrator will work with the parties in setting rules, guidelines and dates for submission of the materials for consideration.

DEFAULTING PARTIES

If the Respondent fails to file a Response to the Arbitration Demand and when a party fails to participate in the process and fails to appear at the Hearing or meet evidentiary deadlines after receiving due notice thereof, then the Arbitrator shall conduct the Arbitration in that party's absence. The Arbitrator shall not base the Award solely on the failure of the defaulting party to comply in the above circumstances. The Arbitrator shall require the submitting or attending party to present such evidence, in an abbreviated form if the Arbitrator deems it appropriate and as the Arbitrator deems necessary for the making of the Award. The Claimant must demonstrate that the Respondents were properly served with the Arbitration Notice.

SETTLEMENT

If the parties agree on a settlement of the dispute before the Arbitrator renders an award, the Arbitrator(s) shall either issue an order for the termination of the Arbitration proceedings or, if requested by both parties, indicate that a settlement has been reached.

NOTICE OF PENDING OF AN AWARD POST HEARING

No later than 10 days before the Arbitrator issues an Award, the Arbitrator shall advise the parties that the Award is forthcoming. This is designed to provide a time frame for the parties to try and resolve their differences among themselves prior to the issuance of the Award. The parties may also request that the Arbitrator issue the Award in predetermined stages. This request, when made jointly by the parties, can be requested at any time prior to the issuance of the final Award. The parties may designate the issues for early determination by the Arbitrator and may re-evaluate settlement during a

predetermined waiting period following the Ruling on one or more of the predetermined issues.

THE AWARD

The Arbitrator Award shall be made in writing and shall be final and binding on the parties. The parties shall carry out the Award without delay. The Award may award the total costs of the Arbitration to one party or may apportion such costs between the parties if the Arbitrator determines that apportionment is appropriate. The Award may contemplate the cost of legal representation to one party or may apportion such costs between the parties if the Arbitrator determines that apportionment is appropriate. The obligation of the parties as stated in the Award shall be binding upon each such party, his/her heirs or its successors or those who are its assigns. The Award shall be signed and dated by the Arbitrator. For Arbitrations involving a Three Arbitrator Panel, the Award shall represent the opinions of the majority of Arbitrators on the Panel.

MOTION FOR MODIFICATION OF THE AWARD OR AWARD CORRECTIONS

Within 15 days after the receipt of the Award, either party, with notice to the other party, may request that the Arbitrator correct the Award regarding any clerical, typographical or mathematical error in the computation of the Award. The Arbitrator(s) may make such corrections on his/her own initiative within 30 days after rendering the Award. Such correction shall form part of the Award and shall be in writing.

INDEMNIFICATION AND HOLD HARMLESS

The parties and attorneys to the Arbitration agree to hold BAY Mediation & Arbitration Services, LLC and its Arbitrators and Mediators harmless from any claim, dispute or litigation by any party or attorney arising from the services provided by BAY Mediation & Arbitration Services, LLC and its Arbitrators and Mediators. This includes both direct and indirect claims, litigation and disputes. The parties also agree to indemnify BAY Mediation & Arbitration Services, LLC and its Arbitrators and Mediators for all costs and expenses

which arise directly or indirectly from the services provided by BAY Mediation & Arbitration Services, LLC and its Arbitrators and Mediators, including but not limited to costs of defense, attorney's fees and, expenses.