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A Roundup of a Dozen Improvements in the New AAA Rules for Construction Arbitration and Mediation

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The American Arbitration Association (AAA) has amended its standard [Construction Industry Arbitration Rules and Mediation Procedures](#). Rules were revised for Regular Track Cases (R), Fast Track Cases (F) and Large Cases (L), and became effective on October 1, 2009. A summary of significant changes as well as the revised rules and procedures can be viewed and obtained at the AAA website, www.adr.org. While no new revisions have been made to the [Commercial Arbitration Rules and Mediation Procedures](#), those practitioners who use them should be aware that changes to the fee schedules, including the addition of a new Pilot Flexible Fee Schedule, were made effective on June 1, 2009. A summary of just 12 positive changes—in the view of the author—to the Construction Industry Arbitration Rules and Mediation Procedures is presented below.

1. R-24—Exchange of Information

The date of submission of hearing exhibits prior to the start of hearings has been slightly altered from five business days to seven calendar days. The significant change, however, is the addition of subparagraph (d), which provides that there shall be no other discovery, except as indicated in R-24, unless "so ordered by the arbitrator in exceptional cases," rather than "in extraordinary cases when the demands of justice require it." While this seems to loosen the restriction on paper discovery, it is questionable whether this nuance has any practical impact.

2. R-44—Form of Award

The former R-44 was revised to require the award to provide a "concise written financial breakdown of any monetary awards" and a disposition of each nonmonetary component of claims and counterclaims. A new paragraph (c) has been included that expands upon the form and content of the award. Provided there is agreement between the parties, the parties can require the arbitrator to provide a reasoned opinion, an abbreviated opinion, findings of fact or conclusions of law. The form of the award is to be determined at the conclusion of the Preliminary Management Hearing.

3. R-54—Neutral Arbitrator's Compensation

Multiple parties may now be considered a single party for purposes of allocating arbitrator compensation, provided the parties participate through "a single representative." This is a common occurrence in construction arbitrations and is likely to provide welcome relief for parties such as guarantors, sureties and insurance carriers.

4. R-55—Deposit Calculations

Deposits are now specifically required to be determined based on estimates by the arbitrator, using information provided by the parties regarding length and complexity of the case. In addition, a party is entitled to an itemization or explanation of the arbitrator's request for deposits.

5. R-56—Remedies for Nonpayment

The available options in the event of nonpayment of administrative charges or arbitrator's fees has been expanded. Procedurally, when informed that a party has not made required payments, a party may request an order by the arbitrator directing what measures might be taken in light of such nonpayment, to the extent the law allows. Such measures may include limiting a party's ability to assert or pursue a claim, but in no event shall a party be barred from defending a claim or counterclaim. The nonpaying party shall have an opportunity to be heard prior to any such determination.

6. F-2—Answer and Counterclaim Response Time

Answers and counterclaims in Fast Track cases must now be filed in seven calendar days after notice of the filing of the demand is sent by the AAA, rather than the 15 calendar days of the Regular Track cases.

7. F-3—Limited Extensions

Short of extraordinary circumstances, the AAA may grant no more than one seven-calendar-day extension of time to respond to a claim or counterclaim.

8. F-5—Appointment and Qualification of Arbitrator

The parties will be provided a list of five proposed arbitrators from the AAA Construction Panel. The parties are encouraged to agree upon an arbitrator from the list; however, without such agreement, the parties may now each strike two names from the list and return it to the AAA. The AAA will then make a selection from the reduced list of proposed names.

9. F-7—Preliminary Telephone Management Hearing

This Preliminary Telephone Management Hearing is to occur within 10 business days of appointment of the arbitrator, rather than "promptly" thereafter.

10. F-9—Limited Discovery

Discovery was restricted in prior rules to "extraordinary cases when the demands of justice require it." Like the change to discovery limitations in Regular Track Cases (R-24 above), contemplation of "justice" was apparently too difficult or unpredictable. Discovery is now allowed only in "exceptional cases."

11. F-12—Closing of Hearings

The hearing now shall be closed within 45 calendar days of the Preliminary Telephone Management Hearing, rather than within 60 calendar days of appointment of the arbitrator. Agreement to extend the period is permitted, provided it is made during the initial 45-day period and is memorialized in a written report that includes the reason for the extension.

12. L-1—Large-Case Threshold

The Procedures for Large, Complex Construction Disputes are now applied directly to cases involving claims or counterclaims of \$1 million or more, up from \$500,000.

Richard P. Dyer practices in the area of construction law, including both contentious and noncontentious matters. Mr. Dyer has extensive experience in a broad range of construction, transactional and dispute resolution matters, including: preparation and negotiation of construction contracts, turnkey/design-build contracts, EPC contracts, construction management contracts, architect and engineer agreements, and trade contracts/subcontracts; contract administration; EEO and OSHA matters; surety bonding, mechanic's lien and insurance matters. He advises on the resolution of construction,

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