



**FEDERAL ARBITRATION, INC.**

**RULES**

**FOR**

**ARBITRATION**

**AND**

**MEDIATION**

Effective August 8, 2019

## FedArb Rules

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## **I. FEDARB ARBITRATION RULES**

### **Introduction**

Federal Arbitration, Inc. (FedArb) is a private Alternative Dispute Resolution (ADR) service providing high quality, efficient arbitrations, mediations, and other ADR and related litigation services based on party-agreed legal principles in civil disputes of significant complexity. Arbitrations administered by FedArb seek to satisfy all applicable international, federal and state law, including the Federal Arbitration Act (FAA) and state laws pertaining to arbitration. Accordingly, awards issued through FedArb are screened to help ensure enforceability through judicial proceedings within the United States and in all other States that are parties to the New York Convention of 1958 and any other applicable international agreements to which the United States is a party.

FedArb Rules incorporate the best of federal litigation procedures and protections together with the advantages of ADR, and require respect for mandated deadlines and other measures that ensure efficiency. FedArb's default procedures are those used in the federal courts of the United States, developed over time by expert and experienced judges and practitioners, and familiar to parties and counsel. Parties may, however, vary these procedures as they choose, and arbitrators (and mediators) are required to adhere to lawful party-agreed options.

FedArb may adopt supplemental rules for specific purposes or substantive fields, and those rules, as adopted, are made part of this single set of rules.

### **Rule 1: General Principles**

#### **Rule 1.01 – Authority of FedArb**

When parties agree to refer a dispute to FedArb for arbitration or mediation, or to arbitration or mediation in accordance with FedArb Rules, they thereby authorize FedArb to administer the arbitration or mediation involved. The authority and duties of FedArb shall be as prescribed in the agreement of the parties and in these Rules, and may be carried out through such of FedArb's representatives as the parties or Rules may direct. FedArb may, in its discretion, assign the administration of an arbitration or mediation to any of its offices. FedArb may amend these Rules from time to time as it sees fit.

#### **Rule 1.02 – Compliance with Mandatory Law**

No rule, practice or decision of FedArb shall be construed or applied to conflict with any applicable, governing law. To the extent these Rules conflict with a mandatory provision of applicable law, the applicable law shall prevail.



### **Rule 1.03 – Rules Governed by Parties**

Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect at the time of the commencement of arbitration as defined in Rule 3.03, unless the parties agree otherwise.

Subject to all legally required limitations, and consistent with these Rules, the parties, by written agreement, may vary the procedures set forth in these Rules. After appointment of the Tribunal, such modifications may be made only with the consent of the Tribunal.

### **Rule 1.04 – Default Rules of Procedure and Evidence**

Unless otherwise agreed by the parties, the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE) shall be applied in all FedArb proceedings to the extent their application is consistent with these Rules and is feasible in the judgment of the Tribunal.

### **Rule 1.05 – Extensions and Deadlines**

The Tribunal may not vary any applicable time limit agreed upon by the parties, and may not seek any extension of a time period from the parties to any FedArb proceeding except through the FedArb administrator. Any party may decline any request for extension of agreed time limitations, and such decisions will be conclusive unless an extension is determined to be necessary by FedArb in the interests of justice.

## **Rule 2: Notice and Calculation of Time**

### **Rule 2.01 – Delivery of Notice**

For the purposes of these Rules, any notice, communication or proposal shall be in writing. Any such notice, communication or proposal may be delivered by hand, registered post or courier service, or transmitted by any form of electronic communication (including electronic mail and facsimile), or delivered by any other appropriate means that provides a record of its delivery. Any notice, communication or proposal shall be deemed to have been received if it is delivered: (i) to the addressee personally or to its authorized representative; (ii) to the addressee's habitual residence, place of business or designated address; (iii) to any address agreed by the parties; (iv) according to the practice of the parties in prior dealings; or (v) if, after reasonable efforts, none of these can be found, then at the addressee's last-known residence or place of business.

### **Rule 2.02 – Time of Notice Received**

Any notice, communication or proposal shall be deemed to have been received on the day it was delivered in accordance with Rule 2.01.



### **Rule 2.03 – Calculation of Time**

For the purpose of calculating any period of time under these Rules, such period shall begin to run on the day following the day when a notice, communication or proposal was received or is deemed to have been received.

### **Rule 2.04 – Calendar Days**

All calendar days shall be included in calculating any period of time under these Rules. If the last day of any period of time under these Rules is not a business day at the place of receipt in accordance with Rule 2.01, the period is extended until the first, following business day.

## **Rule 3: Commencement of Arbitration**

### **Rule 3.01 – Submitting a Claim**

A party or parties may initiate an arbitration by submitting to FedArb a Notice of Arbitration which shall include the following:

- (a) the full names, descriptions, and addresses of the parties and their representatives, including telephone numbers and email addresses;
- (b) a brief description of the facts giving rise to the dispute;
- (c) the relief sought;
- (d) a request that the dispute be administered by FedArb;
- (e) identification of the agreement pursuant to which arbitration is demanded, with a copy of the relevant portions of such agreement attached to each copy of the Notice of Arbitration;
- (f) a statement of Claimant’s position as to the place of arbitration and the applicable law and the reasons therefore;
- (g) a request for either a single arbitrator or a panel of three arbitrators;
- (h) the fee for initiating the arbitration specified in the FedArb fee schedule in effect at the time of the filing; and
- (i) such other relevant information as the party or parties giving notice deem necessary.

Materials should be submitted by email to [filings@fedarb.com](mailto:filings@fedarb.com). The filing party or parties should call FedArb at 650-328-9500 to confirm receipt of materials.

### **Rule 3.02 – Notice to Respondent**

Upon determining that a Claimant has satisfied all the requirements for commencing an arbitration under these rules, including payment of the required deposit, FedArb will send a copy of the Notice of Arbitration to the Respondent or Respondents named therein.



### **Rule 3.03 – Commencement of Arbitration**

An arbitration proceeding shall be deemed to commence upon the execution by the parties and FedArb of an agreement to arbitrate under the auspices of FedArb, or in the case of a demand to arbitrate, when FedArb receives a Notice of Arbitration.

### **Rule 3.04 – Answer and Counterclaims**

Within twenty (20) days from receipt from FedArb of a Notice of Arbitration, each Respondent named therein shall file with FedArb an Answer containing the following information:

- (a) Respondent’s full name, description, and address;
- (b) A statement of Respondent’s position with regard to the claims advanced in the Notice of Arbitration, including the arbitrability of such claims;
- (c) A statement of Respondent’s position with regard to the place of arbitration and the applicable law, and the reasons therefor;
- (d) Any Notice of Counterclaim or Responsive Pleading that Respondent wishes to file, which shall include the information required for the filing of a Notice of Arbitration; and

Upon determining that a Respondent has satisfied all the foregoing requirements, FedArb shall send a copy of such Respondent’s Answer and other pleadings to the Claimant or Claimants named therein. Failure to deliver a notice of defense shall not delay the arbitration; in the event of such failure, all claims set forth in the Notice of Arbitration shall be deemed denied.

### **Rule 3.05 – Changing Claims**

A party may amend or supplement a claim, counterclaim, or defense to the extent allowed by the FRCP and applicable law, except that no amendment shall be allowed that would fall outside the scope of the agreement to arbitrate unless agreed to by all the parties thereto in writing.

### **Rule 3.06 – Reply**

Claimants may file a Reply to the Answer, or to the Answer and Counterclaim and/or Responsive Pleading, within 20 days of its service.

## **Rule 4: Emergency Relief**

These Emergency Relief provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to these Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Moreover, it is not necessary for the parties to have complied with any requirement to engage in mandatory mediation to seek Emergency Relief.



#### **Rule 4.01 – Pre-Tribunal Emergency Relief**

- (a) A party in need of emergency relief prior to the appointment of a Tribunal may seek such relief after notifying FedArb and all other parties in writing of the relief sought and the basis for an Award of such relief. This application shall contain:
- i) the name in full, description, address and other contact details of each of the parties;
  - ii) the name in full, address and other contact details of any person(s) representing the applicant;
  - iii) a statement certifying that all other parties have been notified. If all other parties have not been notified, the Application shall include an explanation of the efforts made to effect such notification
  - iv) a description of the circumstances giving rise to the application and of the underlying dispute referred or to be referred to arbitration;
  - v) a statement of the emergency measures sought;
  - vi) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal;
  - vii) any relevant agreements and, in particular, the arbitration agreement;
  - viii) any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration;
  - ix) proof of payment of the amount set forth in Rule 4.03;

The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.

- (b) FedArb shall terminate the emergency relief proceedings if a Notice for Arbitration and related documents has not been received by FedArb from the applicant within 5 days of FedArb's receipt of the application for Emergency Relief, unless FedArb determines that a longer period of time is necessary.
- (c) Upon receipt of the Application, FedArb shall promptly appoint an Emergency Arbitrator to rule on the emergency request. When practicable, appointment of an Emergency Arbitrator will be initiated by FedArb within 24 hours of receipt of the request with preference to FedArb's panel of former Article III judges who have agreed to act as Emergency Arbitrators. Within 36 hours the Emergency Arbitrator shall disclose any circumstance likely, on the basis disclosed in the application, to affect the Arbitrator's ability to be impartial or independent. Any challenge to the appointment of the Emergency Arbitrator shall be made within 24 hours of the disclosures by the Emergency Arbitrator. FedArb will promptly review and decide any such challenge.
- (d) Within two business days after appointment, or as soon as practicable thereafter, the Emergency Arbitrator shall establish a schedule for the consideration of the request for emergency relief. The Emergency Arbitrator will have the authority to rule on their own jurisdiction and shall resolve any disputes with respect to the request for emergency

relief. The Emergency Arbitrator may conduct the emergency proceedings in any manner determined by the Emergency Arbitrator to be appropriate in the circumstances, taking account of the nature of such emergency proceedings, the need to afford to each party, if possible, an opportunity to be consulted on the claim for emergency relief (whether or not it avails itself of such opportunity), the claim and reasons for emergency relief and the parties' further submissions (if any). The Emergency Arbitrator is not required to hold any hearing with the parties (whether in person, by telephone or otherwise) and may decide the claim for emergency relief on available documentation.

- (e) The Emergency Arbitrator shall determine whether the party seeking emergency relief has shown that immediate and irreparable loss or damage will result in the absence of emergency relief and whether the requesting party is entitled to such relief under applicable law. The Emergency Arbitrator shall enter an order or award granting or denying relief, as the case may be, and stating the reasons therefor.
- (f) Any request to modify the Emergency Arbitrator's order or award must be based on changed circumstances and may be made to the Emergency Arbitrator until such time as the Tribunal is appointed in accordance with the parties' Agreement and FedArb's usual procedures. Thereafter, any request related to the relief granted or denied by the Emergency Arbitrator shall be determined by the Tribunal appointed in accordance with the parties' Agreement and applicable FedArb procedures.
- (g) The Emergency Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. At the Emergency Arbitrator's discretion, any interim award or order for emergency relief may be conditioned on the provision of adequate security by the party seeking such relief.
- (h) The Emergency Arbitrator may modify or vacate the interim award or order. Any interim award or order shall be binding on the parties when rendered. The parties shall undertake to comply with such an interim award or order without delay.
- (i) The emergency arbitrator shall have no further power to act after the arbitral Tribunal is constituted. Once the Tribunal has been constituted it may modify or vacate the interim award or order of emergency relief issued by the Emergency Arbitrator. The Emergency Arbitrator may not serve as a member of the Tribunal unless all the parties agree otherwise.

#### **Rule 4.02 – Post-Tribunal Emergency Relief**

The Emergency Arbitrator shall have no further power to act after the Tribunal is constituted. Once the Tribunal has been constituted, it may reconsider and adopt such interim measures as it deems necessary, including measures for the preservation of assets, the conservation of goods, or the sale of perishable goods. The Tribunal may require appropriate security as a condition of ordering such measures.



### **Rule 4.03 – Costs of Emergency Arbitrator**

To invoke this process the applicant must deposit an amount determined by FedArb; for 2020, the rate is \$50,000, consisting of US \$15,000 for FedArb’s administrative expenses and US \$35,000 for the Emergency Arbitrator’s fees and expenses. It is preferred that the payment for this amount be made by wire transfer contact FedArb at 650.328.9500 for information.

FedArb may, at any time during the Emergency Arbitrator proceedings, decide to increase the Emergency Arbitrator’s fees or FedArb’s administrative expenses taking into account, inter alia, the nature of the case and the amount of work performed by the Emergency Arbitrator and FedArb. If the party which submitted the application fails to pay the increased costs within the time limit fixed by FedArb, the application shall be considered as withdrawn. In the event that the emergency relief proceedings do not take place or are otherwise terminated prior to the making of an order or award, FedArb shall determine the amount to be reimbursed to the applicant, if any. An amount of US \$15,000 for FedArb’s administrative expenses is non-refundable in all cases.

## **Rule 5: Jurisdiction of the Arbitral Tribunal**

### **Rule 5.01 – Timeliness of Jurisdictional Challenge**

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 Tribunal may rule on such objections as a preliminary matter or as part of the final award.

### **Rule 5.02 – Challenges to Jurisdiction**

The Tribunal shall have the power to hear and determine challenges to its jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration clause or other agreement invoked as the basis of jurisdiction. This authority extends to jurisdictional challenges with respect to both the subject matter of the dispute and the parties to the arbitration.

### **Rule 5.03 – Failure to Appear**

If any party fails to take part in an arbitration proceeding commenced under these Rules, at any stage, the arbitration shall proceed notwithstanding such failure so long as sufficient funds are provided by the participating party or parties to cover all the costs, expenses and fees of the proceeding.

### **Rule 5.04 – Determination of Valid Agreement**

The Tribunal shall have the power to determine the existence, scope and validity of the contract of which an arbitration clause forms a part unless otherwise specified by the parties. A valid agreement to arbitrate will confer jurisdiction upon FedArb to process the dispute to final resolution under its Rules, regardless of any claim that the underlying contract is invalid.



### **Rule 5.05 – Severability**

For the purpose of challenges to the jurisdiction of the Tribunal, the arbitration clause shall be considered as separable from any contract of which it forms a part.

### **Rule 5.06 – Class Action**

An arbitration agreement to have all or part of any dispute handled in the form of a class action, or a judicial order to that effect, shall be sufficient to confer jurisdiction on any FedArb tribunal to handle the matter in the manner requested by the parties, subject to state or federal law. Where no such agreement exists, or where class action procedures are precluded by the parties to an agreement, FedArb Tribunals shall lack jurisdiction to apply class action procedures in the absence of an authoritative judicial ruling requiring or authorizing otherwise. Except to the extent modified by the parties, class actions over which the Tribunal has jurisdiction will be handled by FedArb tribunals in the same manner as they are handled under FRCP 23, including certification, notice, and settlement. The obligation of confidentiality will be modified during this process to the extent necessary for class action procedures to be properly implemented under the circumstances; the parties may maintain as high a level of confidentiality of such proceedings as they consider desirable, consistent with applicable law. The costs of class action certification, notice, and other related procedures will be treated in the same manner as they are by U.S. federal courts under the FRCP, and all anticipated charges shall be collected by FedArb in advance of a tribunal permitting each stage of such processes to commence.

### **Rule 5.07 – Consolidation of Claims**

Consolidation of claims shall be permitted where agreed to or authorized by all parties, and in accordance with FRCP standards and applicable federal or state law.

### **Rule 5.08 – Attorneys’ Fees in Class or Consolidated Actions**

The parties shall be free to agree on limitations on the fees to be paid class-action counsel, or counsel in consolidated proceedings, beyond lodestar levels calculated on the basis of actual work performed.

## **Rule 6: Representation**

### **Rule 6.01 – Choice of Representative**

Each party may be represented or assisted in any FedArb proceeding or appeal by persons of the party’s choice, unless such choice is prohibited by applicable law.

### **Rule 6.02 – Providing Notice of Representation**

Each party shall notify all other parties and FedArb in writing of the name, address, and function of each person it chooses as a representative or assistant.



### **Rule 6.03 – Applicability of FedArb Rules to Representatives**

Every representative or assistant of a party, by accepting such assignment, agrees to comply with the FedArb Rules and all applicable legal and ethical requirements for representatives and assistants in arbitrations or mediations.

## **Rule 7: Selection of Arbitrators**

### **Rule 7.01 – Nomination of Arbitrators**

Unless the parties agree otherwise in writing, arbitrations under the FedArb Rules shall be decided by a sole Arbitrator. Where the parties designate a panel of three arbitrators, the arbitrators shall be selected in the manner provided by these Rules from FedArb's list of Participating Arbitrators. FedArb may permit any qualified person to act as an arbitrator in a FedArb administered proceeding on an ad hoc basis.

### **Rule 7.02 – Appointment of Arbitrators**

Unless the parties have agreed otherwise, the parties shall attempt to agree on an arbitrator or Panel of three arbitrators to serve as the Tribunal in the following manner:

- (a) Where a single Arbitrator is to be selected, the parties will have twenty days from the time an Answer or an Answer and Counterclaim and/or Responsive Pleading is filed to agree on any Participating Arbitrator or other qualified person to hear and decide their claims.
- (b) Where a Panel is to be selected, the party or parties on each side of the dispute shall each designate an arbitrator within twenty days from the time an Answer or an Answer and Counterclaim and/or Responsive Pleading is filed to serve as a neutral, party-appointed Arbitrator; the parties shall thereafter attempt to agree on a third Arbitrator during the next twenty (20) days to serve as Chair, or shall authorize the party-appointed arbitrators to do so.
- (c) In the event the parties to an arbitration cannot agree on a single Arbitrator, or on the third member of a Panel, within the time required or otherwise agreed, the Arbitrator or third Panel member shall be selected by FedArb within twenty (20) days from the time it is notified of the parties' inability to agree from among Participating Arbitrators eligible for appointment, taking into account the views of the parties with regard to particular qualifications or experience.
- (d) Upon the request or agreement of all the parties to a dispute, FedArb will administer a process by which the parties collectively select the Arbitrator, the Chair of the Panel, or all three members of the Panel.

### **Rule 7.03 – Resolving Impasse on Arbitrator Appointment**

Where multiple parties are involved in a matter, the multiple Claimants, and/or multiple Respondents, shall jointly propose or reject arbitrators. In the event that multiple Claimants or



Respondents are unable to agree on the choice or acceptability of arbitrators within the applicable time periods, FedArb shall attempt for a period no longer than ten days to arrange a method acceptable to them, failing which FedArb will choose the Arbitrator or Arbitrators after appropriate consultation with the parties.

#### **Rule 7.04 – Rank Selection of Arbitrators**

The parties may agree upon the selection of a Tribunal through “ranking” in which case the parties shall proceed as follows (“the Procedure”):

- (a) To initiate the Procedure, the parties will jointly notify FedArb in writing that they have elected to resolve their dispute before a Tribunal chosen by “rank selection.” The parties will indicate whether the Tribunal shall be a sole arbitrator or a three-arbitrator panel.
- (b) Upon receipt of this notification, FedArb will make a random selection of qualified candidates (excluding those arbitrators who are ineligible or unavailable) and will forward the names to counsel for the parties. If the parties request a three-arbitrator panel, FedArb will select ten (10) qualified candidates. If the parties request a single arbitrator, FedArb will select five (5) qualified candidates.
- (c) Within ten (10) days of receipt of the list, each party may strike up to three (3) names from the list of ten and notify FedArb of the same. After removing the names stricken by the parties, FedArb will forward the remaining names to counsel for the parties. Each party shall rank the remaining arbitrator candidates in order of preference, with a ranking of “1” indicating a party’s number one choice to serve on the Tribunal. Within ten (10) days of receipt of the list, the parties shall submit their respective orders of preference to FedArb and may agree to exchange their orders of preference with each other.
- (d) If the parties request a sole arbitrator, the arbitrator candidate with the lowest composite ranking derived from the Procedure be appointed sole arbitrator. If the parties request a three-arbitrator panel, the candidate with the lowest composite ranking shall be appointed Chair. The remaining two arbitrators on the panel shall be appointed in accordance with the designated order of mutual preferences. If any arbitrator candidate withdraws from consideration or is unable to serve, FedArb will proceed to the next candidate with the lowest ranking to assemble the Tribunal and, in the case of a three-arbitrator panel, the person with the lowest composite rank shall serve as the Chair. In the event of a composite ranking tie, FedArb will choose between the tied candidates by random lot.
- (e) If the Procedure does not yield a Tribunal, FedArb shall notify counsel for the parties. Within fifteen (15) days of such notification, FedArb will make a random selection of six (6) additional qualified and available candidate arbitrators from its panel and will forward the names to counsel for the parties. Within ten (10) days of receipt of the list, each of the parties may strike up to two (2) names. After removing the names stricken by the parties, FedArb will forward the remaining names to counsel for the parties. Each party





shall rank the remaining arbitrator candidates in order of preference. Within ten (10) days of receipt of the list, the parties shall submit their respective orders of preference to FedArb and may agree to exchange their orders of preference with each other. FedArb will repeat the Procedure as necessary until a complete Tribunal is selected.

#### **Rule 7.05 – Ex Parte Communication**

A party to a FedArb proceeding may consult unilaterally in advance with any potential Arbitrator to ascertain the individual’s qualifications and availability to serve as a party-appointed Arbitrator in the matter. A party may also consult with its party-appointed Arbitrator to discuss the selection of the Chair of an arbitration Panel. All communications allowed under this Rule shall be strictly restricted to discussions of suitability and availability, and to a general description of the controversy and the issues presented. No substantive discussion of the merits of the issues is permitted in such exchanges. No party may contact, directly or indirectly, an individual the party or parties wish to consider appointing as sole Arbitrator or as Chair of an Arbitration Panel or as a member of an Appellate Panel; FedArb will undertake all necessary contacts with such individuals at the request of one or more of the parties.

### **Rule 8: Arbitrator Ethics and Conduct**

#### **Rule 8.01 – Independence and Impartiality**

Each person appointed to act as an Arbitrator in a proceeding or an appeal under these Rules must be, and must remain throughout the arbitration or appeal, independent of the parties involved, and must act impartially on all issues.

#### **Rule 8.02 -Disclosure Form and Acceptance of Arbitrators**

Before accepting appointment as an Arbitrator in any matter under the FedArb Rules, each person shall sign the FedArb Disclosure Form, and shall make reasonable inquiries so as to disclose in writing to the parties any facts or circumstances of such a nature as reasonably to call into question the person’s independence or impartiality.

#### **Rule 8.03 – Challenges to Arbitrators**

A party shall have ten (10) days from receipt of the Disclosure Form to submit a challenge to the appointment of an Arbitrator if it believes that circumstances exist, or at any later point have arisen, that give rise to justifiable doubt regarding that Arbitrator’s independence or impartiality. A party may challenge the appointment of an Arbitrator; provided, however, that a party may challenge an Arbitrator whom it has designated only for reasons of which it becomes aware after the designation has been made.

A party may challenge an appointed Arbitrator only by a notice in writing to FedArb, with a copy to the Tribunal and the other party, given no later than 10 days after the challenging party (i) receives notification of the appointment of that Arbitrator, or (ii) becomes aware of the circumstances that give rise to justifiable doubt regarding the Arbitrator’s independence and



impartiality, whichever shall last occur. The notice shall state the reasons for the challenge with specificity.

When an Arbitrator is challenged by a party, the other party may agree to the challenge or the Arbitrator may voluntarily withdraw. Neither of these actions shall imply acceptance of the validity of the challenge.

If neither agreed disqualification nor voluntary withdrawal occurs, FedArb will determine as expeditiously as possible whether the Arbitrator should be disqualified, on the basis of such submissions and proceedings as FedArb considers necessary. FedArb shall inform the parties and the Arbitrator of FedArb's decision on challenges in writing no later than ten days after all evidence and argument on such matter is submitted, which decision shall be final and not appealable within FedArb or to any court, except to the extent required by controlling law.

#### **Rule 8.04 – Ongoing Duty to Disclose**

If an Arbitrator appointed under the Rules learns of any facts or circumstances during an arbitration or an appeal conducted under the Rules which a prospective Arbitrator would be required to disclose before appointment, the Arbitrator, within ten (10) days of learning of such facts or circumstances, shall disclose them in writing to FedArb and the parties. A party may object for cause to an Arbitrator on the basis of such disclosure, or upon the discovery at any time during the proceeding of facts or circumstances warranting disqualification of the Arbitrator, in the manner provided by these Rules.

#### **Rule 8.05 – Applicable Ethical Standards**

Persons serving as FedArb Arbitrators must agree to abide by the ethical rules for arbitrators promulgated by applicable law and relevant ethical codes, which would specifically include the ABA Model Code of Judicial Conduct for arbitrations taking place in the United States. The parties to a proceeding shall disclose to all prospective arbitrators the companies and other persons or organizations having an interest in the outcome, including counsel. A person selected to serve as an Arbitrator must reveal in writing to FedArb and the parties any interest he/she has in, or relationship with, any of the entities or persons disclosed.

#### **Rule 8.06 – Exclusive Remedy for Delay**

In the event a proceeding under the auspices of FedArb administration is delayed, or is authoritatively determined to have been invalid, due to an ethical violation by FedArb personnel or any FedArb-appointed Arbitrator or Tribunal, the sole and exclusive remedy for such delay or invalidity will be to require FedArb to provide arbitration services at its own expense that substitute for any delayed or invalid hearing in the matter.

#### **Rule 8.07 – Settlement and Mediation During Arbitration**

A Tribunal may suggest that the parties explore settlement, but may not do so repeatedly and may not insist upon such discussions. All exchanges between parties concerning mediation shall be confidential, and shall be subject to the Federal Rules of Evidence provisions governing





settlement discussions and other applicable legal requirements. Any request by a party or parties for assistance in exploring settlement and/or the appointment of a mediator shall be made to FedArb, and not to the Tribunal serving in the matter. FedArb will attempt to assist the party or parties in securing mediation services on separate terms.

## **Rule 9: Vacancies**

### **Rule 9.01 – Filling a Vacancy**

A vacancy resulting from resignation, recusal, incapacity, death, or challenge of an Arbitrator in an arbitration shall be promptly filled in the same manner by which the appointment was made in said arbitration.

### **Rule 9.02 – Proceeding After Vacancy is Filled**

As soon as a vacancy is filled, the proceeding shall continue to the extent practicable from the point it had reached at the time the vacancy occurred. Any party may, however, in such a situation, suggest that reconsideration or rehearing of any issue or issues is necessary for good cause. In that event, the Tribunal will determine within 10 days of such request whether and to what extent reconsideration or rehearing is necessary to ensure a full and fair hearing.

## **Rule 10: Conduct of Proceedings**

### **Rule 10.01 – Ex Parte Communication During Proceedings**

No party to a FedArb arbitration, and no witness or representative of or assistant to any party, shall have any ex parte communication with any Arbitrator serving in that proceeding with respect to any matter related to the proceeding.

### **Rule 10.02 – Place of Arbitration**

Unless the parties otherwise agree, the place of arbitration shall be fixed by the Tribunal. The Award shall be deemed made at the agreed or designated place of arbitration, though hearings or meetings, including conferences via telecommunications or the Internet, and the signing and issuance of the final Award, may take place wherever convenient.

### **Rule 10.03 – Language and Translation**

Unless the parties agree otherwise, all arbitrations supervised by FedArb will be conducted in English. In the event the parties desire that an arbitration under FedArb Rules and administration be conducted in a language other than English, the Tribunal may order that the parties provide any necessary translation and interpretation services.

### **Rule 10.04 – Confidentiality**

Unless all the parties otherwise agree, all papers, exchanges, hearings, and decisions in any FedArb proceeding shall be and shall remain confidential and may not be disclosed to any third



parties, except to the extent that the information has been previously disclosed, or disclosure is necessary in connection with a judicial challenge to or enforcement of an Award, or disclosure is required by law.

#### **Rule 10.05 – Pre-Hearing Conference**

Within ten days of appointment to a dispute, the Tribunal shall confer with the parties and establish a schedule for the conduct of the proceeding.

#### **Rule 10.06 – Streamlined Three Arbitrator Pre-Hearing Option**

In cases where the parties have agreed on a three-person panel to serve as the Tribunal, the parties may elect to follow a streamlined procedure where the preliminary and discovery stages of a case are managed by the Chair, acting as a single Arbitrator. The procedure for the streamlined option is as follows:

- (a) The Chair will be empowered to hear and decide all discovery and dispositive motions that may be filed. The two other Arbitrators will remain in an inactive status on the case but will become active and participate in the evidentiary hearing, if one is held, and in approving and issuing the Final Award when an evidentiary hearing is required.
- (b) As part of the preliminary scheduling order, the parties and Chair shall agree on what process, if any, would be used to keep the two inactive Arbitrators informed about the case and about any issues that the Chair has resolved. The inactive Arbitrators shall be notified by the Chair regarding their active status as soon as practicable, and at least 30 days prior to the evidentiary hearing.
- (c) Hearing Availability – The two, inactive Arbitrators shall be consulted regarding their availability for the scheduling of any hearings prior to the finalization of the preliminary scheduling order.
- (d) Dispositive Motions – The Chair will be empowered to hear and decide any dispositive motion that may be filed. However, if either side requests that a dispositive motion be heard and decided by the full panel, the full panel shall be made available to hear and decide the motion.
- (e) Opt Out – A party may withdraw its consent to the streamlined option. Such withdrawal must be made in writing. The inactive Arbitrators shall, in such event, immediately become active and will participate in any future proceedings for the case; the Chair will cease any activity on the case until the full panel is engaged. However, the withdrawal shall not apply to any dispositive motion that has been fully briefed and argued before the withdrawal is issued.

#### **Rule 10.07 – Discovery and Special Master**

The Tribunal shall closely supervise discovery, and if necessary may appoint a Discovery Master for that purpose, on terms acceptable to the parties and FedArb. Arbitration Masters must be approved as qualified by FedArb before being appointed to a matter, and must be acceptable to



the parties. A Discovery Master shall have authority to convene the parties, to hear discovery disputes and pre-trial motions, and to recommend to the Tribunal the resolution of such disputes or motions in writing. The parties shall receive notice of and shall be permitted to monitor all exchanges between a Discovery Master and the Tribunal.

#### **Rule 10.08 – Adherence to Deadlines**

The Tribunal will decide any motion submitted by the parties no later than thirty (30) days after submission, and will render an award on the merits of proceedings within thirty (30) days of the closing of the record in the case, which shall not be delayed beyond the filing of the final post-trial brief and any argument that is sought and agreed to by the parties. The parties may vary any deadline by written agreement. **The Tribunal may seek an extension of any deadline only through FedArb, and may not seek any extension of time directly from the parties.** FedArb will authorize extensions of time only upon the consent of all parties to the arbitration, or if FedArb finds an extension is in the interests of justice to the extent necessary under the circumstances.

#### **Rule 10.09 – Authority of the Tribunal**

Unless otherwise agreed by the parties, the Tribunal shall have authority to manage the prehearing process and the hearing, including the authority to issue preliminary injunctions and other forms of interim measures, and to consider and decide motions to dismiss and for summary judgment, subject to jurisdictional or other limitations imposed by these Rules or the parties.

Nothing in these Rules shall be construed to give the Tribunal the authority to compel the production of documents by third parties not subject to the arbitration, unless the Tribunal is so authorized by applicable law.

The Tribunal may issue orders or make arrangements to extend special protection for the confidentiality of proprietary information, trade secrets, or other sensitive information disclosed in discovery or otherwise.

#### **Rule 10.10 – Sanctions**

The Tribunal shall have the powers to sanction any party or counsel that are conferred upon the federal courts by the FRCP, including FRCP Rule 11, unless modified by the parties. Any party or attorney upon whom a sanction is imposed may seek review of its legal propriety by FedArb within 10 days of its imposition. FedArb will review the legal propriety of the sanction in accordance with applicable law, and issue its decision within 10 days of the filing of all papers related to the request for review. FedArb's decision will be final and not appealable within FedArb or to any court, except to the extent required by law.

## **Rule 11: The Award**

### **Rule 11.01 – Specifications of the Award**

The Award shall be in writing and shall describe the relief, if any, granted, and the decisions on the issues presented. The parties to any arbitration under the FedArb Rules agree that, upon application of any party, judgment shall be entered upon the Award by any court having jurisdiction to do so. Unless the parties agree otherwise, the Tribunal shall also issue an opinion in writing that may be incorporated into the Award by reference, and that should include the findings, reasons, and conclusions upon which the Award is based. The Award shall state the date upon which it is made, which will be the date signed by the Arbitrator or the last of the three Arbitrators if issued by a Panel. The Award shall also state the place of the arbitration, though that need not be the place at which the Award is signed.

### **Rule 11.02 – Award with Separate Confidential Memorandum**

In situations where the arbitration proceedings require the parties to disclose confidential or highly sensitive trade secrets or other information, the parties may require the Tribunal to issue an award sufficient to be enforceable, isolating any confidential or sensitive information to a separate memorandum. The parties shall not file this separate memorandum with the Court unless otherwise required by law. If disclosure of the separate memorandum is required, the parties shall undertake to file such memorandum under seal, or to otherwise take advantage of any procedural mechanisms that will further confidentiality, including redaction of confidential information. Any determination as to whether information is confidential or protected shall be made by the Tribunal after consultation with the parties.

### **Rule 11.03 – Signatures**

The Award shall be signed by the Arbitrator, or if issued by a Panel shall be signed by at least two of the three Arbitrators on the Panel. Awards issued by a Panel may be accompanied by a dissenting opinion, which may be filed with or after the filing of the Award, but which shall not constitute part of the Award.

### **Rule 11.04 – Time Limit for Final Award**

Draft copies of the proposed Award shall be provided to FedArb through the FedArb Case Manager for review no later than seven (7) days in advance of the deadline for rendering an award in the case, which shall be thirty (30) days after the closing of the record, unless an extension of time is granted by the parties through FedArb.

### **Rule 11.05 – Review of Award by FedArb**

After a draft copy of the proposed award is submitted to FedArb, FedArb shall review the draft and suggest any changes that may be necessary or desirable as to its form. The draft shall then be returned to the Tribunal. The Tribunal shall then deliver executed copies of the Award and of



any dissenting opinion to FedArb by the applicable deadline. FedArb shall then send copies of the executed award to the parties.

#### **Rule 11.06 – Correction of Errors**

Within ten days of receipt of the Award, or of the discovery within one year of the Award of facts necessary to ascertain errors in the Award, any party may request the Tribunal or FedArb Case Manager to correct any ministerial errors in the Award, such as typographical or computational mistakes. Any dispute concerning the propriety of any correction to an Award shall be presented to the original Tribunal for final decision, or if any member of the Tribunal is unavailable, to FedArb. The parties to FedArb proceedings agree that FedArb and its appointed Arbitrators shall have continuing jurisdiction to correct ministerial errors in Awards, and to perform such other tasks as may be required or permitted to be performed under governing law.

#### **Rule 11.07 – Registration of Awards**

If applicable law requires an Award to be filed or registered, the Tribunal shall cause such requirement to be satisfied. It is the responsibility of the parties to bring such requirements or any other procedural requirements of the place of arbitration to the attention of the Tribunal.

#### **Rule 11.08 – Allocation of Fees**

The Award of the Tribunal may allocate Arbitration fees and Arbitrator compensation and expenses, unless such an allocation is expressly prohibited by the parties' Agreement.

#### **Rule 11.09 – Rule of Decision**

When the Tribunal is composed of more than one Arbitrator, an Award is made by a majority decision. If there is no majority, the Award shall be made by the Chair alone.

### **Rule 12: Arbitration Appeals**

#### **Rule 12.01 – Agreement to Appeal**

Prior to the commencement of arbitration, the parties may agree to an appeal under the FedArb rules. Where such agreement has been reached, a party may commence an appeal from the Award by filing with FedArb a notice of appeal in accordance with the Federal Rules of Appellate Procedure (FRAP). The FRAP and applicable law shall govern the FedArb appellate process unless the Appellate Panel appointed to decide the appeal determines the FRAP cannot practically be applied in a particular situation, or all the parties agree on another rule.

#### **Rule 12.02 – Appointment of the Appellate Panel**

The Appellate Panel shall be chosen from the FedArb list of Participating Arbitrators in the same manner provided in these Rules for the selection of the Tribunal in the applicable arbitration.



### **Rule 12.03 – Time Periods on Appeal**

The Appellate Panel shall, within ten days of being formed, establish time periods for the filing of briefs by the Appellant and Respondent, and for oral argument, consistent with any schedule agreed to by the parties. If the parties cannot agree on a schedule for briefing and oral argument, the Appellate Panel’s schedule shall provide for the filing of all briefs within ninety days of its scheduling order. Appeals will be decided in an opinion issued no later than thirty days after oral argument, or after the final brief submitted, whichever is later.

### **Rule 12.04 – Results on Appeal**

The Appellate Panel may approve the Award issued by the Tribunal, or may correct any aspect of the Award that would be within the power of a U.S. Court of Appeals to correct decisions of a U.S. District Court. Unless otherwise agreed, errors of law will be subject to correction to the same extent as in the federal courts of the U.S., and findings of fact will be subject to correction when found to be clearly erroneous. The Appellate Panel may instruct the Tribunal as to corrections that should be made in the original Award, if any, or as to further proceedings that are necessary on remand.

### **Rule 12.05 – Implementation of Appellate Decision**

The Tribunal shall implement the instructions of the Appellate Panel as soon as practicable after the issuance of the appellate decision, but unless otherwise agreed by the parties not more than thirty (30) days thereafter. An Award issued pursuant to such instructions shall be submitted to FedArb for its approval as to matters of form, and shall become final as soon as it is issued in the form approved by FedArb. FedArb shall provide the Award to the parties only after receipt by FedArb of all amounts due for fees and services.

## **Rule 13: Failure to Comply and Default**

### **Rule 13.01 – Failure to Comply**

If a party fails to comply with any order issued pursuant to these Rules, the entity making the order may fix a period for compliance, and thereafter in the event of noncompliance shall impose appropriate remedies, including costs, attorneys’ fees, and/or an Award on default. Absent good cause, a party that fails to comply with any order issued pursuant to these Rules agrees to pay and shall be required to pay all the costs, fees, and damages caused by its failure to comply.

## **Rule 14: Immunity**

### **Rule 14.01 – Limitation of Liability**

Unless otherwise mandated by governing law, Participating Arbitrators, FedArb and its personnel including its Board of Directors, shall have the same immunity on account of acts or omissions related to FedArb proceedings and appeals that the law provides to federal judges of the United States and their administrative personnel.



## **Rule 14.02 – Deliberate Misconduct**

No immunity shall be afforded to any individual with regard to deliberate and knowing misconduct.

## **Rule 15: Fees, Costs, & Expenses**

### **Rule 15.01 – Allocation of Fees**

Each party shall pay its pro rata share of FedArb’s fees and expenses as set forth in the FedArb fee schedule in effect at the time of the commencement of the Arbitration, unless the parties agree on a different allocation of fees and expenses. FedArb’s agreement to render services is jointly with the party and the attorney or other representative of the party in the Arbitration.

### **Rule 15.02 – Failure to Pay Fees**

If, at any time, any party has failed to pay fees or expenses in full, FedArb may order the suspension or termination of the proceedings. FedArb may so inform the parties in order that one of them may advance the required payment. If one party advances the payment owed by a non-paying party, the Arbitration shall proceed, and the Arbitrator may allocate the non-paying party's share of such costs. An administrative suspension shall toll any other time limits contained in these Rules or the parties' Agreement.

### **Rule 15.03 – Payment During Course of Proceedings**

FedArb requires that the parties deposit the fees and expenses for the Arbitration from time to time during the course of the proceedings and prior to the Hearing. The Tribunal may preclude a party that has failed to deposit its pro rata or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing. The parties shall also be responsible for the expenses reasonably incurred by the Tribunal.

### **Rule 15.04 – Liability of Parties**

The parties are jointly and severally liable for the payment of FedArb Arbitration fees and Arbitrator compensation and expenses. In the event that one party has paid more than its share of such fees, compensation and expenses, the Tribunal may award against any other party any such fees, compensation and expenses that such party owes with respect to the arbitration.

### **Rule 15.05 – Combination of Entities for Purposes of Fees**

Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single party for purposes of FedArb’s assessment of fees. FedArb shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions.



### **Rule 15.06 – Allocation of Costs**

To the extent the allocation of costs and/or fees is necessary, the Tribunal shall determine the costs, expenses and attorneys' fees incurred by the parties. Tribunal costs, expenses, and attorneys' fees shall be allocated in accordance with any applicable agreement of the parties. To the extent the parties provide that costs, expenses or fees shall be allocated to the prevailing party, the Tribunal shall allocate all such costs, expenses and fees they determine to have been properly incurred against the losing party (or in appropriate proportion based on the outcome of all the issues considered), or as agreed by the parties. The Tribunal shall allocate such costs, expenses and fees by exercising discretion according to the standards and practices followed in the U.S. federal courts on such issues. In the event the parties fail to specify how the costs, expenses and/or fees shall be allocated, each party shall bear its own costs, expenses and fees.

### **Rule 15.07 – Summary of Fees & Expenses**

- (a) **Filing Fee.** FedArb will charge a filing fee in accordance with its Arbitration Price Schedule. The filing fee is nonrefundable after an Arbitrator or Mediator is appointed, unless otherwise stated in the FedArb contract.
- (b) **Administration Fee.** FedArb will charge an administration fee in accordance with its Arbitration Price Schedule, unless otherwise stated in the FedArb contract.
- (c) **Arbitrator Fees & Expenses.** The fees of Participating Arbitrators shall be based upon the hourly rate set by each Participating Arbitrator. Fee information will be available to the parties before the arbitrators are selected for possible appointment. The parties will be deemed to have accepted responsibility for the fees of the Participating Arbitrators appointed to serve in their matters, at the rates specified by them, unless some other rate is agreed.
- (d) **Collection of Fees and Expenses.** FedArb may, in the event any party fails to pay any fees and/or expenses in a timely manner, suspend proceedings in the matter involved until all amounts due have been paid or adequately secured. If any party fails to pay its share of charges due, another party may do so. In such cases, the Award shall, in FedArb's sole judgment, be modified to give full credit for the amount paid on behalf of the defaulting party, with interest from the time of payment, calculated at LIBOR (or equivalent) plus 3%, compounded on a monthly basis. Additional charges for late payments may be assessed as per contract agreements with FedArb.
- (e) **Deposits.** The parties shall at the time of filing a case or within 30 days of the filing of an Answer, submit to FedArb an initial deposit calculated to cover the costs, fees, and administrative expenses expected to be incurred in the course of the arbitration or mediation, or such amount as FedArb and the parties agree is sufficient for an initial deposit. Parties pursuing an appeal within the FedArb system will be required to make deposits to cover the costs of the appeal.





## **Rule 16: Expedited Disposition**

### **Rule 16.01**

Parties to any arbitration may jointly seek to agree with FedArb on the terms of an expedited disposition in accordance with the rules outlined in Appendix C. In the event a matter is filed for processing under the auspices of FedArb, pursuant to the terms of an agreement by which the parties and FedArb arrange for an expedited disposition, FedArb's obligation to perform will depend on the parties' compliance with the terms to which they agree. The fees for an expedited disposition shall be agreed in advance and paid in accordance with the agreement with FedArb.

### **Rule 16.02**

The sole remedy for a failure of performance by a party or parties, or by FedArb, of an agreement for expedited disposition shall be as follows:

- (a) If the failure of performance is by a party or parties, the remedy shall be payment of the costs of arbitration and other services improperly caused to be provided beyond those originally agreed.
- (b) If the failure of performance is by FedArb, or its Tribunal, the remedy shall be the provision without charge of such additional services as are found to be required by the agreement in order to complete the arbitration.

## **Rule 17: Fixed Price Arbitration™**

Parties seeking FedArb services may obtain agreement on both the cost and duration of the arbitration process by entering into an agreement for Fixed Price Arbitration™. This service is provided by FedArb on a case-by-case basis, or by contract for groups of similar cases.

### **Rule 17.01 – Terms of Fixed Price Arbitration™ Engagement**

Each Fixed Price Arbitration™ Contract entered into between parties and FedArb will specify the payment to be made, the date upon which the Award is due, and the services to be provided, including: number of arbitrators; names of arbitrators where chosen; place of arbitration and services or facilities to be provided by FedArb; pre-hearing activities covered by the agreement; number of hearing days required; post-hearing activities covered by the agreement, including form of Award and/or findings to be issued; and cost of appeal if utilized.

### **Rule 17.02 - Alterations**

Alterations sought by the parties in the schedule established in a Fixed Price Arbitration™ contract, or in the services to be provided by FedArb pursuant to such contract, will be permitted as requested for additional charges agreed upon between the parties and FedArb. Any alteration in schedule or change in services must be in writing to be considered enforceable in the event of any dispute.



### **Rule 17.03 – Refunds**

Refunds on Fixed Price Arbitration™ contracts that are not completed due to settlement or other change brought about by the parties will not be made, unless the parties and FedArb otherwise agree.

### **Rule 18: Waiver**

A party knowing of a failure to comply with any provision of these Rules, or of any requirement of the arbitration agreement or any direction of the Tribunal, shall be deemed to have waived any objection thereto that it fails promptly to raise.



## **II. RULES SPECIFIC TO SUBJECT MATTER**

### **CONSTRUCTION ARBITRATION RULES**

#### **Rule C-1: Application of Construction Rules**

Unless otherwise agreed by the parties, this Rule supplements all other FedArb Rules, and will apply to any dispute concerning the alleged violation of any agreement or duty related to construction activities. Dispute resolution in construction takes many informal forms, including on-site participation of neutral experts and highly informal, non-binding expert intervention. FedArb is prepared to assist parties in developing plans that include such activities. These rules, however, and FedArb's established processes are designed to satisfy the need for mediation and arbitration of relatively sizable and intractable controversies. In the case of any inconsistency between these Supplemental Rules and other FedArb Rules, these Supplemental Rules shall control.

#### **Rule C-2: Model Pre-Dispute Construction Arbitration Clause**

Parties wishing to agree in advance to arbitrate disputes that may arise between them under the FedArb Rules, including the Supplemental Rules on Construction Arbitration, with FedArb administration, may do so by including the following language in their written agreements (or other language to the same effect):

*“The parties to this contract agree that all disputes arising out of or in connection with, or in the application of, any of its provisions shall be fully and finally resolved through arbitration under the administration of Federal Arbitration, Inc. and in accordance with its Rules for Arbitration, including its Supplemental Rules on Construction Arbitration.”*

#### **Rule C-3: Model Post-Dispute Construction Arbitration Clause**

Parties wishing to agree to arbitrate any dispute that has already arisen between them under the FedArb Rules, including the Supplemental Rules on Construction Arbitration, and with FedArb administration, may do so in writing by using the following language (or other language to the same effect):

*“The parties to this agreement acknowledge that the dispute described below has arisen between them and they agree to have the dispute, and all issues related to it, fully and finally resolved through arbitration under the administration of Federal Arbitration, Inc. and in accordance with its Rules for Arbitration including its Supplemental Rules on Construction Arbitration.”*

#### **Rule C-4: Qualified Construction Neutrals**

FedArb shall maintain a list of qualified Construction Arbitrators and Mediators, from among whom parties may choose to make appointments. In the event FedArb is required to prepare lists

of, or to appoint, Arbitrators or Mediators in a construction arbitration, they will do so from such list.

#### **Rule C-5: Participation of Mediator in Arbitration Process**

Parties to a FedArb administered Construction Arbitration may choose to have a Mediator present at any time during the entire course of the arbitration process in order to identify and facilitate the resolution of any part or aspect of the dispute being arbitrated. Mediations during such arbitrations shall be kept separate from the arbitration process and the tribunal shall take no part in such activities absent a waiver of any related rights by all parties, in writing, permitting any member of the tribunal to take part without prejudice to being permitted to complete the arbitration. The tribunal shall continue its activities during a mediation undertaken while the arbitration is in progress, unless all the parties agree to a suspension of the arbitration process.

#### **Rule C-6: Consolidation of Disputes**

Parties and tribunals in Construction Arbitration should consolidate all disputes related to the same construction project, or involving the same parties or identical issues, before the same tribunal, unless consolidation would fail to enhance efficiency or would significantly delay one or more such proceedings. Parties to a FedArb Construction Arbitration must file all their existing disputes related to the same construction project before the same tribunal absent a showing of good cause.

#### **Rule C-7: Powers of Tribunal**

Tribunals in FedArb Construction Arbitrations shall have the following powers, unless all the parties provide otherwise:

- To repeal or revise orders related to consolidation issues;
- To manage consolidated cases jointly on some issues and separately on others, as fairness and efficiency warrant;
- To appoint experts, including assessors, to conduct site visits, to order testing, and to take measures to preserve evidence, with notice to the parties, input from them, and full disclosure and participation by them in such activities; and
- To adjust the pace and order of specific claims in order to minimize disruption of ongoing construction activities.

#### **Rule C-8: Preliminary Relief**

In addition to the full range of remedial powers vested in FedArb tribunals under these Rules, Construction arbitrators shall have authority to grant preliminary relief, upon request and a proper showing and after affording a reasonable opportunity of parties to respond, in the form of payments due to contractors or subcontractors of amounts that the tribunal concludes are not materially in dispute. The tribunal shall retain power to adjust the amounts awarded as preliminary relief in its final Award.



### **Rule C-9: Preliminary Notifications of Award Contents**

Tribunals in FedArb Construction Arbitration may issue preliminary indications of the contents of their intended Award in order to minimize any delays in work, and to provide the reasons for their conclusions thereafter, within the time the Final Award is due.

### **Rule C-10: Specific Performance**

Tribunals in FedArb Construction Arbitration may order as part of their Award the completion of work, or other forms of specific performance, if they determine that monetary relief is an inadequate substitute. The Tribunal may continue in force to supervise the completion of such work only with the consent and approval of all parties that would be responsible for paying the costs of such supervision. The Tribunal may recommend a person or company to perform and/or supervise such work, on specified terms, and such recommendation and terms would become binding on the parties if they fail to agree on another candidate or terms for the work to be performed.



## **EMPLOYMENT ARBITRATION RULES**

### **Rule E-1: Application of Employment Rules**

Unless otherwise agreed by the parties, these Employment Arbitration Rules supplement all other FedArb Rules, and will apply to any Qualifying Agreement to arbitrate a dispute concerning the alleged violation of any employment agreement or of any employment-related duty based on such an agreement or on a federal, state or local statute or legal requirement, other than disputes required by law to be resolved by other means, such as workmen's compensation, unemployment insurance, and securities industry claims. A Qualifying Agreement to arbitrate an employment dispute shall be one that meets the mandatory requirements of the FedArb Rules and of applicable federal and state laws; FedArb reserves the right to decline to administer agreements to arbitrate that FedArb concludes fail to meet any such requirement. In the case of any inconsistency between the Supplemental Employment Arbitration Rules and other FedArb Rules, the Supplemental Rules shall control.

### **Rule E-2: Model Pre-Dispute Employment Arbitration Clause**

Parties wishing to agree in advance to arbitrate disputes that may arise between them under the FedArb Rules, including the Supplemental Rules on Employment Arbitration, with FedArb administration, may do so by including the following language in their written agreements (or other language to the same effect):

*“The parties to this contract agree that all disputes arising out of or in connection with, or in the application of, any of its provisions shall be fully and finally resolved through arbitration under the administration of Federal Arbitration, Inc. and in accordance with its Rules for Arbitration, including its Supplemental Rules on Employment Arbitration.”*

### **Rule E-3: Model Post-Dispute Employment Arbitration Clause**

Parties wishing to agree to arbitrate any dispute that has already arisen between them under the FedArb Rules, including the Supplemental Rules on Employment Arbitration, and with FedArb administration may do so by using the following language in a writing (or other language to the same effect):

*“The parties to this agreement acknowledge that the dispute described below has arisen between them and they agree to have the dispute, and all issues related to it, fully and finally resolved through arbitration under the administration of Federal Arbitration, Inc. and in accordance with its Rules for Arbitration including its Supplemental Rules on Employment Arbitration.”*

### **Rule E-4: Qualified Employment Neutrals**

FedArb shall maintain a list of qualified Employment Arbitrators and Mediators, from among whom parties may choose to make appointments. In the event FedArb is required to prepare lists

of, or to appoint, Arbitrators or Mediators in an Employment arbitration, they will do so from such list.

#### **Rule E-5: Fairness of Proceedings**

To constitute a Qualifying Agreement to arbitrate Employment disputes, the administration of which FedArb would be prepared to undertake, the agreement must not include any provision that renders the arbitration contemplated fundamentally unfair. The parties should be guided in this regard by the following principles related to critical stages of arbitration proceedings: time limitations on claims should be no more restrictive than those applied in analogous federal and state proceedings; each party should be free to choose any representative prepared to comply with the tribunal's rulings; the process for appointing Employment Arbitrators or Mediators should be designed to choose persons likely to make fair decisions based on the evidence and applicable rules; each party should be allowed sufficient discovery to permit a reasonable opportunity to establish any legally sufficient claim or defense; each party must be accorded a fair opportunity to present its evidence and legal arguments; and Awards must be equally enforceable against any participating party. Fee shifting requirements in such agreements must comply with applicable law.

#### **Rule E-6: Recommended Employment Arbitration Provisions**

Parties to agreements to arbitrate or mediate Employment disputes under FedArb administration are encouraged to adopt the following measures:

- the costs and fees incurred in such arbitrations and mediations should be borne by the employer to the extent possible, especially in matters initiated by the employer;
- the parties should minimize such costs in all appropriate ways, including by the use of single-arbitrator tribunals;
- the parties should consider permitting class actions and the consolidation of claims in appropriate cases to facilitate the efficient disposition of similar claims and defenses on the basis of agreements based on consent and that limit the costs of such processes, including the fees of class counsel;
- the place of arbitration and hearing should be convenient to both parties, and should normally be the place of the employee's work;
- the employee should have access to his/her personnel records kept in the ordinary course of business;
- both parties should normally be required to advance all their claims against each other in a single proceeding;
- each party should have access to all the documentary evidence any other party plans to introduce no less than thirty days before the hearing.



**Rule E-7: Form of Award**

Unless both parties agree otherwise, the form of Award in Employment Arbitrations shall be a reasoned decision, and shall be final and not subject to appeal other than as provided by law.





## **PATENT ARBITRATION RULES**

### **Rule P-1: Application of Patent Rules**

Unless otherwise agreed by the parties, these Rules supplement all other FedArb Rules, and will apply to any dispute concerning the alleged infringement or validity of a patent issued in the United States or by any foreign government. In the case of any inconsistency between this Supplemental Rule and other FedArb Rules, this Supplemental Rule shall control. Patent arbitrations include claims of patent interference, and claims of innocent infringement of semiconductor chip products, as authorized by 35 U.S.C. 135 and 17 U.S.C. 907, or any other law of the United States.

### **Rule P-2: Model Pre-Dispute Patent Arbitration Clause**

Parties wishing to agree in advance to arbitrate disputes that may arise between them under the FedArb Rules, including the Supplemental Rules on Patent Arbitration, with FedArb administration, may do so by including the following language in their written agreements (or other language to the same effect):

*“The parties to this contract agree that all disputes arising out of or in connection with, or in the application of, any of its provisions shall be fully and finally resolved through arbitration under the administration of Federal Arbitration, Inc. and in accordance with its Rules for Arbitration, including its Supplemental Rules on Patent Arbitration.”*

### **Rule P-3: Model Post-Dispute Patent Arbitration Clause**

Parties wishing to agree to arbitrate any dispute that has already arisen between them under the FedArb Rules, including the Supplemental Rules on Patent Arbitration, and with FedArb administration, may do so in writing by using the following language (or other language to the same effect):

*“The parties to this agreement acknowledge that the dispute described below has arisen between them and they agree to have the dispute, and all issues related to it, fully and finally resolved through arbitration under the administration of Federal Arbitration, Inc. and in accordance with its Rules for Arbitration including its Supplemental Rules on Patent Arbitration.”*

### **Rule P-4: Qualified Patent Neutrals**

FedArb shall maintain a list of qualified Patent Arbitrators and Mediators, from among whom parties may choose to make appointments. In the event FedArb is required to prepare lists of, or to appoint, Arbitrators or Mediators in a patent arbitration, they will do so from such list.



#### **Rule P-5: Recommended Patent Arbitration Provisions**

The parties should consider adopting specific discovery requirements that reflect the well-established parameters of discovery needs and practices in patent arbitration, including: disclosure by the Claimant of all infringement claims, identifying the patents and claims at issue, and providing file histories, claim charts, and all documents on which the claimant plans to rely; and disclosure by the Respondent of all patents and claims reflecting prior art claimed to render the claims asserted as anticipated, obvious, or invalid for any other reason, and all documents on which the Respondent plans to rely.

#### **Rule P-6: Flexibility of Tribunal**

Parties and Arbitrators in Patent Arbitrations may take into account the flexibility afforded them by the absence of juries. Among the measures that could be adopted are, for example, utilizing the claim construction process as a method for educating the Tribunal to relevant technical details, and for clarifying the issues prior to permitting discovery beyond the initial disclosures required by the FRCP or by party agreement; treating the Tribunal's consideration of expert testimony as satisfying, without any separate hearing, the requirement that such testimony be scientifically credible to warrant consideration, and by agreeing that such consideration will be deemed to satisfy the requirements of FAA, Section 10.

#### **Rule P-7: Independent Experts**

The Tribunal shall have authority, when it considers it necessary, to retain at the parties' expense an independent expert to assist in evaluating technical or scientific issues on which the parties' experts disagree. The independent expert's terms of reference shall be determined by the Tribunal, after notice to and input from the parties. The independent expert will report to the Tribunal in writing, and the parties will be afforded an opportunity to introduce evidence or present argument on the contents of the expert's reports. The parties will be permitted to witness and to participate in any oral exchanges between the independent expert and the Tribunal.

#### **Rule P-8: Enforceability of Awards**

FedArb administered Awards in Patent Arbitrations must comply with applicable law, including 35 U.S.C. 294 and 35 C.F.R. 1.335. The Tribunal must consider all defenses provided for under 9 U.S.C. 282. In accordance with applicable law, such Awards (including patent validity and infringement determinations) shall be final and binding between the parties, but shall have no force or effect on any other person. The parties may agree that the Award will be modified if the patent that is the subject of the arbitration is subsequently determined to be invalid or unenforceable. Notice of any patent-related Award must be given to the Director of the Office of the Commissioner of Patents and Trademarks in accordance with 35 U.S.C. 294(d & e) before the Award may be enforced.



### **Rule P-9: Interlocutory Appeal**

In light of the potential impact of the claim construction process on the scope and results of the claims presented, the parties may agree to allow either party to take an interlocutory appeal to a FedArb Appellate Panel concerning the merits of any claim construction made, in addition to the appeal provided for in Rule 12.

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## **Appendix A: Sample Arbitration Clauses**

Parties wishing to agree in advance to arbitrate disputes that may arise between them under the FedArb Rules with FedArb administration may do so by including the following language in their written agreements (or other language to the same effect):

### **Model Short-Form Clause:**

*“The parties to this contract agree that all disputes arising out of or in connection with this contract, or in the application of any of its provisions (including the arbitrability of the dispute), shall be fully and finally resolved through confidential arbitration in [select venue] conducted in [English] under the administration of Federal Arbitration, Inc. and in accordance with its Rules for Arbitration.”*

### **Model Long-Form Clause:**

*“The parties to this contract agree that all disputes arising out of or in connection with this contract, or in the application of any of its provisions (including the arbitrability of the dispute and any interim relief), if not resolved by mediation, shall be fully and finally resolved by confidential arbitration proceedings by (select 1 or 3) arbitrator(s) who [are former Federal Court Judges – or other qualifications or expertise] under the administration and Rules of Federal Arbitration, Inc., in the [English] language, and which will take place in [select venue] and will be governed by the law of [select venue]; provided, however, that if the amount in controversy is less than \$[1mm], then the dispute shall be governed by Federal Arbitration’s Rules for Expedited Arbitration.”*

Parties should consider adding language prescribing mediation step procedures; method of arbitrator selection; duration of arbitration proceedings; time limits; confidentiality; appeal; and discovery, including the IBA Rules on the Taking of Evidence in International Arbitration.

Parties wishing to agree to expedited arbitration may do so by using the following language:

*“The parties to this contract agree that all disputes arising out of any of its provisions shall be finally resolved through arbitration, under the administration of Federal Arbitration, Inc., in accordance with its Rules for Arbitration; provided, however, that if the amount in controversy is less than [\$1mm], then the dispute shall be governed by Federal Arbitration’s Rules for Expedited Arbitration.”*

Parties wishing to agree to arbitrate any dispute that has arisen between them on an ad hoc basis under the FedArb Rules and with FedArb administration may do so by using language identical or similar to the following:

*“The parties to this agreement acknowledge that the dispute described below has arisen between them, and that they agree to have the dispute, and all issues related to it, finally resolved through arbitration under the administration of Federal Arbitration, Inc. and in accordance with its Rules for Arbitration.”*

## **Appendix B: Guidelines for Independent Factual Research by Arbitrator Via the Internet**

When deciding whether to independently investigate facts on the Internet, the arbitrator should consider:

1. Is additional information necessary to decide the case? If so, this type of information generally must be provided by counsel or the parties, or must be subject to proper judicial notice.
2. Is the purpose of the arbitrator's inquiry to corroborate facts, discredit facts, or fill a factual gap in the record? If the facts are adjudicative, it is improper for an arbitrator to do so.
3. Is the arbitrator seeking general or educational information that is useful to provide the arbitrator with a better understanding of a subject unrelated to a pending or impending case? If so, the inquiry is appropriate. Arbitrators may use the Internet as they would other educational sources, like judicial seminars and books.
4. Is the arbitrator seeking background information about a party or about the subject matter of a pending or impending case? If so, the information may represent adjudicative facts or legislative facts, depending on the circumstances. The key inquiry here is whether the information to be gathered is of factual consequence in determining the case. If it is, it must be subject to testing through the adversary process.



## Appendix C: Expedited Arbitration Agreement

If the parties select expedited arbitration as outlined in Rule 16, they may add the following language to their arbitration agreement:

*The parties hereby agree that any dispute arising out of or related to any aspect of the performance of this contract shall be resolved through an ADR process under the Federal Arbitration, Inc. (“FedArb”) Rules for Arbitration and Mediation and in particular Rule 16 (Expedited Disposition), with administration by FedArb, provided, however, that such rules shall be modified as follows:*

### INFORMAL DISCUSSION

The parties agree to attempt to resolve their disputes in good faith through informal discussions.

### MEDIATION

Any party to a dispute may request mediation at any time. The parties will engage in mediation as promptly as possible after a written request, based on an exchange of all relevant information necessary to evaluate the issues and to determine a reasonable value for the claims advanced. The parties agree to resolve as many aspects of their disputes as possible by mediation, leaving to more formal procedures only those that cannot be resolved through discussion and mediation. They agree also to utilize mediation during the arbitration process to narrow their differences.

### ARBITRATION

Any party to a dispute may commence arbitration after attempting for at least 30 days to settle the dispute through informal discussion and/or mediation. The parties agree on the following terms:

**Tribunal.** The tribunal shall consist of a single arbitrator selected from FedArb’s list of panelist, unless the parties agree on three arbitrators, selected in accordance with the FedArb Rules.

**Deadlines.** No party may ask the tribunal, and no arbitrator may ask the parties, for an adjournment of any deadline; adjournments may only be implemented as agreed by all parties, or for good cause as determined by the FedArb administrator.

**Place of Arbitration.** Arbitrations shall be held at a venue that minimizes costs; telephonic or video hearings will be utilized whenever possible.

**Applicable Law.** All disputes shall be resolved in accordance with the law of the State of [California], without regard to its rules regarding conflicts of law.

**Procedural Order and Timetable.** As soon as practicable, and no later than 30 days after Respondent's Answer is filed, the tribunal shall confer with the parties and issue a procedural order and timetable that reserves agreed dates for the hearing on the merits and such preliminary deadlines as may be appropriate. There are to be no motions to enforce discovery requests, to dismiss, for summary judgment, or for any other form of relief except (1) by agreement of all parties, or (2) upon a determination by the tribunal that the motion is necessary and likely to enhance efficiency.

**Documentary Discovery.** All parties shall provide full discovery of all documents discoverable under federal discovery standards within 45 days of the final pleading; only documents produced in discovery shall be permitted to be introduced into evidence absent a showing that the document was unavailable for earlier production.

**Requests for Admissions Prohibited.** The parties shall submit an Agreed Statement of Facts at least thirty days before the hearing.

**Depositions.** No depositions shall be held except by agreement of the parties, or upon a showing that the interests of justice require the pre-hearing testimony of a particular witness.

**Expert Discovery.** Experts shall be used only on issues requiring expert testimony, and only upon agreement; expert testimony shall be provided in writing, at least 30 days in advance of the hearing, and an expert's oral testimony shall be limited to the scope of the expert's written testimony.

**Pre-hearing Briefs.** The parties shall file pre-hearing briefs only if they agree such briefs are necessary, and with the tribunal's approval on such conditions as to scope and length as the tribunal considers appropriate.

**Exhibits.** The parties shall file a single set of all the exhibits they agree should be admitted into evidence. All other exhibits shall be party-designated. Paper copies shall be filed only as required by the tribunal, which shall be provided with digital versions of all papers and exhibits in a convenient format.

**Hearing.** The hearing shall be recorded in an economical manner, and transcripts will be ordered only as required by the parties or tribunal. Hearing time shall be divided equitably among the parties, unless otherwise agreed.

**Post-hearing Briefs & Oral Argument.** Post-hearing briefs shall be filed only on agreement by the parties and with the tribunal's consent; they shall generally be considered unnecessary where the parties have filed pre-hearing briefs. Oral argument shall be held whenever possible as a substitute for briefing and as promptly after the close of the hearing as possible.

**Award.** The parties shall agree on the form of award no later than the completion of the hearing. An Award may be formal (including findings of fact and conclusions of law), reasoned (setting out the tribunal's reasoning in a logical but informal manner, or conclusory (setting out the tribunal's conclusions without reasoning). In the



absence of agreement, the Award shall be reasoned. The tribunal may issue partial final awards where necessary.

**Finality.** The parties agree that the Award (or awards) shall be final, except as provided in the Federal Arbitration Act and other governing authorities, and that they waive any right to a trial by jury. The parties may agree at any time during the arbitration process on a right to appeal to a panel of FedArb arbitrators as provided in FedArb Rule 12.





### **III. FEDARB MEDIATION RULES**

FedArb provides parties with the services of experienced mediators from its list of Participating Mediators, or as recommended to FedArb by the parties. Mediators will be selected by agreement of all the parties, or designated by FedArb with the consent of all the parties.

#### **Rule M-1: Good Faith Mediation**

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.

#### **Rule M-2: Confidentiality and Privacy**

Unless otherwise agreed by the parties, the following procedures shall be adopted in order to ensure confidentiality of mediation proceedings:

- (a) All mediation sessions shall be private, and shall be attended only by the Mediator, the parties, and authorized representatives of the parties.
- (b) The mediation process and all negotiations, and statements and documents prepared for the purposes of the mediation, shall be confidential and covered by "without prejudice" or negotiation privilege.
- (c) The mediation shall be confidential. Unless otherwise agreed among the parties, or required by law, neither the Mediator nor the parties may disclose to any person any information regarding the mediation or any settlement terms, or the outcome of the mediation.
- (d) All documents or other information produced for or arising in relation to the mediation will be privileged and will not be admissible in evidence or otherwise discoverable in any litigation or arbitration, except for any documents or other information which would in any event be admissible or discoverable in any such litigation or arbitration.
- (e) No formal record or transcript shall be made of any mediation.
- (f) The parties shall not rely upon, or introduce as evidence in any arbitral or judicial proceedings, any admissions, proposals or views expressed by the parties or by the Mediator during the course of the mediation.

#### **Rule M-3: Ethical Requirements for Mediation**

FedArb mediations will be conducted in accordance with the ethical rules for mediators promulgated by applicable law, ethical codes, and by FedArb, including requirements concerning disclosure and actual or apparent conflict.



#### **Rule M-4: Default Mediation Terms**

Unless otherwise agreed:

- (a) mediations will be conducted by a single Mediator acceptable to the parties;
- (b) each party will pay its own fees and expenses, and the parties will share equally the common expenses, including those of FedArb; and
- (c) Mediators may consider and utilize appropriately all relevant information conveyed to them by the parties regardless of admissibility of such information as evidence.

#### **Rule M-5: Mediation Arising During Arbitration Proceedings**

- (a) Parties to FedArb arbitration contracts may utilize mediation services at any point in the arbitral process, and thereafter. The parties should inform the Tribunal that they plan simultaneously or intermittently to engage in mediation. Members of the Tribunal may not participate in any manner or to any extent in the mediation process without a written request signed by all the parties, and approved by FedArb, seeking the member's participation, specifying the scope of such involvement, and confirming that such involvement will not prevent the member from completing the arbitration in accordance with the FedArb Rules and/or any agreement between the parties and FedArb.
- (b) Parties who engage in mediation during the course of a FedArb arbitration shall inform the Tribunal conducting the arbitration of any partial or complete settlement reached by or among any of the parties. The Tribunal shall implement any such settlement in accordance with its terms, and shall continue conducting the arbitration with regard to issues not settled by the parties. Parties who reach partial or complete settlements through mediation may obtain from the Tribunal a partial or final Award incorporating the terms of the settlement.

#### **Rule M-6: Mediation Fees**

Each party to a mediation will pay its own fees and expenses, and the parties will share equally the common expenses, including those of FedArb. Such fees, costs, and expenses for mediations shall be set forth in the agreement to mediate between FedArb and the parties. Costs shall include the filing fee, fees of Participating Mediators, the FedArb administrative fee, and reimbursable expenses incurred by Participating Mediators and FedArb, unless otherwise stated in the FedArb contract.

#### **Rule M-7: Mediation Deposits**

The parties shall, at the time of filing an agreement to mediate, submit to FedArb an initial deposit calculated to cover the costs, fees, and administrative expenses expected to be incurred in the course of the mediation, or such amount as FedArb and the parties agree is sufficient for an initial deposit. FedArb will charge, and the parties will pay, such additional amounts as FedArb concludes will be necessary to cover all such costs at any later stage in the proceeding. Additional charges for late payments may be assessed as per contract agreements with FedArb.