



RESOLUTION SERVICES

SPECIALIZING IN MEDIATION & ARBITRATION & DISPUTE REVIEW BOARDS

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CONSTRUCTION DISPUTE RESOLUTION SERVICES **MEDIATION RULES AND PROCEDURES**

March 15, 2016

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MEDIATION RULES AND PROCEDURES

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RULE-M1 AGREEMENT ON RULES AND PROCEDURES

The parties to the mediation shall be deemed to accept and make these “Rules and Procedures” a part of the mediation procedure that will be administered and conducted by Construction Dispute Resolution Services, LLC (CDRS) unless they have specified other rules and procedures and have written permission from CDRS to utilize those specified rules and procedures in the mediation proceedings.

- (a) Any suggested changes to these rules and procedures must be agreed upon by all of the parties to the mediation and must be presented to the mediator in writing after the mediator is appointed. Those proposed changes to the rules and procedures must receive the written consent of the mediator.
- (b) The mediator may make changes to these rules as he/she deems to be proper for the expeditious and proper handling of the mediation and to achieve a fair and equitable resolution to the dispute.
- (c) If there is a conflict between these rules and procedures and the rules and procedures of other documents, including other CDRS documents, these rules and procedures shall take precedence and govern the rules and procedures of the mediation. Any rules and procedures that exist in third party documents that are in conflict with these rules and procedures must be brought to the attention of the mediator in writing and approved by the mediator before they are implemented in the mediation proceeding.
- (d) The mediator shall have the power and authority to rule on and decide any matters that are not covered in these rules and procedures. The mediator shall also have the power and authority to change the procedures to the mediation in order to expedite the mediation process so as to provide a mediation that is fair and equitable to all of the parties.

RULE-M2 RULE OR PROCEDURE IN CONFLICT WITH LAW

If any rule or procedure, part of a rule or procedure or modification or change of a rule and procedure shall be found to be in conflict with any provision(s) or section(s) of applicable law, mediation act, etc., that applicable provision(s) or section(s) of law shall not supersede these rules and procedures unless it is deemed void by a court as specified in (a) below.

- (a) If one of these Mediation Rules and Procedures shall be declared to be void by a court of competent jurisdiction, only that rule or procedure shall be affected and all other rules or procedures shall remain in effect.

RULE-M3 INITIATION OF THE MEDIATION PROCESS

Any party may initiate the mediation process by fully executing a *Request for Dispute Resolution Services* and transmitting it to CDRS by mail, fax or e-mail along with the appropriate filing fee. The party requesting the mediation shall send a copy of the *Request for Dispute Resolution Services* to the other party(s) to the mediation by certified or registered mail, return receipt requested, unless the CDRS administrator agrees to and specifies other procedures for the notification of the other party(s).

RULE-M4 CASE ADMINISTRATOR

Upon the receipt of a *Request for Dispute Resolution Services* form, CDRS will assign a case administrator who will make all arrangements for the mediation including but not limited to: disseminating and finalizing all forms, agreements and other documents required, collecting any deposits or fees that might be due prior to, during or after the mediation, scheduling administrative conferences, scheduling the mediation session, issuing a copy of the Mediation Settlement Agreement to the Parties and any other administrative functions that may be required. The case administrator shall also be considered a neutral and shall reveal any possible conflicts that he/she might have with any of the parties, their witnesses or specialists or with any previous event that might be considered to cause a question on the neutrality and impartiality of the case administrator.

RULE-M5 PARTY REPRESENTATION AND OBSERVERS

Any party to a mediation may be represented by themselves, by their attorney(s) or any other individual(s) that the party selects. Their representative and/or attorney's name, address, phone number, fax number, e-mail and any other pertinent information about the representative's and/or attorney's firm, must be supplied in writing to the CDRS case administrator as soon as possible. As mediation sessions are private, the mediator shall have the power and authority to limit the participants in the general discussions or in the caucuses as he/she deems to be proper. CDRS shall have the authority to have up to three CDRS ADR Specialists attend the mediation and any other related meetings as observers. These observers are attending for educational purposes only and will remain neutral and in no way will be involved with the mediation unless all of the parties and the mediator(s) agree that the observer(s) shall participate because of their construction-related knowledge or expertise and/or their ADR skills.

RULE-M6 GENERAL COMMUNICATIONS

Prior to the assignment of a case administrator, all communications can be with any CDRS representative. The following rules shall govern communications with the case administrator and/or with the mediator.

- (a) After a case administrator has been assigned by CDRS, all communications by the parties with CDRS shall be made with the case administrator until a mediator has been appointed.
- (b) After the appointment of a mediator, communications may be with the case administrator and/or the mediator concerning administrative matters. If there are direct communications with the mediator, a copy of any written communication shall also be sent to CDRS.
- (c) Any substantive matters or discussions concerning the issues to the mediation may be discussed with the mediator, unless the mediation is a binding mediation.
- (d) If it is a binding mediation, all substantive matters and discussions shall be held only between the parties and the case administrator. There shall be no direct contact with the Binding Mediator by the parties.
- (e) Any party may provide an interpreter, at any time, at their own expense, to assist in the mediation process.

RULE-M7 APPOINTMENT OF MEDIATOR

The appointment of the mediator shall follow the following procedures:

- (a) There shall be one mediator assigned to the case and appointed by the case administrator unless the parties mutually select and agree on a mediator from among the CDRS ADR Specialists. If there is a request for a co-mediation by all of the parties to the mediation the two mediators shall be appointed by the case administrator unless the parties mutually select and agree on both mediators from among the CDRS ADR Specialists.
- (b) If there is a request by all of the parties for a specific mediator(s), that mediator(s) will be assigned and appointed by the case administrator as long as the mediator(s) is available and accepts the appointment. If a selected mediator is not available or chooses to not mediate the case, a new mediator(s) shall be selected according to Rule-M7(a).
- (c) If a mediator is disqualified or needs to be relieved of his/her responsibilities for any reason, such as an illness, after his/her appointment, the CDRS case administrator shall appoint a replacement mediator according to Rules-M7(a) and/or (b).
- (d) If a second, third, fourth, etc. mediation is required for one project, the same mediator(s) shall continue as appointed by the case administrator unless there is an objection by one or more of the parties. An objection by less than all of the parties is not a reason to automatically disqualify the mediator and the final decision will remain with the mediator and case administrator.

RULE-M8 MEDIATOR DISCLOSURE AND DISQUALIFICATION

A mediator must be a neutral person who is impartial and must maintain his/her neutrality and impartiality throughout the entire mediation process, up to the binding mediation section if applicable.

- (a) A mediator must disclose any information that could be considered a reason that might affect his/her impartiality and neutrality. The mediator's disclosure should not be considered as an admission that the mediator considers the disclosed information to affect his/her ability to remain impartial and neutral.
- (b) The mediator shall complete and submit, to the CDRS case administrator, a *Mediator's Disclosure Statement* as soon as he/she realizes that there might be a perceived loss of impartiality or neutrality because of a prior relationship or dealing with any of the parties to the mediation or with any other person, company or entity involved in the mediation.
- (c) The case administrator shall forward a copy of the *Mediator's Disclosure Statement* to all of the parties to the mediation. The parties must return the *Mediator's Disclosure Statement* indicating either their acceptance or non-acceptance of the mediator continuing to serve as the mediator in the mediation. If all of the parties request a new mediator, the case administrator shall appoint a new mediator according to Rule-M7(a) and/or (b). If less than all of the parties request a new mediator, the mediator, with the assistance of the case administrator, shall determine whether he/she shall be dismissed as the mediator.
- (d) If a replacement mediator is appointed, the case administrator shall notify all of the parties to the mediation as to whether there will be a delay in the schedule of the mediation or any other appropriate information concerning the continuance of the mediation.
- (e) If there is a replacement mediator appointed, the new replacement mediator shall determine if any prior information concerning the mediation shall be repeated at the continuance of the mediation process or prior to rendering a decision on any unresolved items at the end of the mediation session.

RULE-M9 LOCATION OF THE MEDIATION

The case administrator shall be responsible to select and specify the location of the mediation. The case administrator shall make every effort to accommodate the requests of the parties and the mediator(s) as to a convenient and cost effective location. The case administrator shall notify the parties and the mediator(s) of the location of the mediation in writing using the *Notice of Mediation* form.

RULE-M10 DATE(S) OF THE MEDIATION

The case administrator shall be responsible to select and specify the date(s) of the mediation session. The case administrator shall make every effort to accommodate the requests of the parties and the mediator(s) as to a convenient date(s) to conduct the

mediation. The case administrator shall notify the parties and the mediator(s) of the date(s) of the hearing in writing using the *Notice of Mediation* form.

- (a) If additional time shall be required at the end of the scheduled mediation, the mediator and/or the case administrator shall select and specify the additional date(s) for the continuance of the mediation. The mediator and/or the case administrator shall make every effort to accommodate the requests of the parties as to a convenient date(s) to conduct the continuance of the mediation. The case administrator shall be responsible to notify the parties of the date(s) for the continuance of the mediation.
- (b) By mutual consent of the parties and the mediator, the scheduled mediation may be rescheduled. The case administrator shall notify the parties of the rescheduled date(s).
- (c) If a party to the mediation or the mediator determines that a jobsite visit by the mediator will help to expedite the mediation process and/or clarify the disputed items involved in the mediation, especially when the mediation is a “binding mediation”, the case administrator shall have the responsibility to schedule that jobsite visit and will coordinate the date and time of the jobsite visit between the parties and the mediator.

RULE-M11 POSTPONEMENT OR CANCELLATION

The following rules and procedures shall be followed in relation to the postponement or cancellation of a mediation session.

- (a) Upon a request by any of the parties to the mediation, the mediator shall determine if there is good cause or compelling circumstances that would merit a postponement or cancellation of the mediation. If the mediator approves the request for a postponement, the mediator and/or the case administrator shall select and specify the rescheduled date(s) of the mediation session. The mediator and/or the case administrator shall make every effort to accommodate the requests of the parties as to a convenient date(s) to conduct the rescheduled mediation session.
- (b) If the mediator determines that the mediation session needs to be postponed due to an illness or injury to one of the parties or to the mediator, due to inclement weather, due to non-payment of fees due to CDRS, due to travel arrangement problems or due to any other reason where the mediator decides that a postponement is necessary, the case administrator will notify the parties as soon as practicable as to the postponement and the date(s) of the rescheduled mediation session. The case administrator shall make every effort to accommodate the requests of the parties as to a convenient date(s) to conduct the rescheduled mediation session.
- (c) Any scheduled mediation that is cancelled more than 22 days in advance of the scheduled ADR process date shall receive a 75% deposit refund less applicable administrative charges incurred and any billable time and expenses from the mediator. Any scheduled ADR process that is cancelled between 8 and 21 days in advance of the scheduled ADR process date shall

receive a 50% deposit refund less applicable administrative charges incurred. Any scheduled ADR process that is cancelled less than 7 days in advance of the scheduled date shall receive a 25% deposit refund less applicable administrative charges incurred. If the session is permanently cancelled or postponed for more than 60 days, all time and expenses of the CDRS ADR Specialist that have accumulated and all prepaid expenses such as airfare expenses, non-refundable meeting room rentals, etc. are also fully chargeable to the parties and are to be considered reimbursable expenses and shall be deducted from any refunds.

- (d) Any dispute resolution session that is cancelled or postponed less than 72 hours prior to the scheduled session is subject to an additional \$300.00 cancellation or postponement fee which is payable by the party responsible for the cancellation or postponement. If the session is permanently cancelled, all time and expenses that have accumulated and all prepaid expenses such as airfare expenses are also fully chargeable and are reimbursable to CDRS.
- (e) Special postponement and cancellation fees may be arranged with the Administrator prior to signing the "Agreement to Mediate".

RULE-M12 PRE-SESSION ADMINISTRATIVE CONFERENCE

An administrative conference, to be held with the CDRS case administrator and/or the mediator, may be held at the request of any of the parties or at the request of the case administrator or the mediator for the purpose of answering various administrative questions or discussing items such as: discussing mediator appointment, discussing time tables and the dates of the mediation session, discussing CDRS fees, costs and expenses, discussing potential witnesses or specialists, discussing the rules and procedures of the mediation and other administrative matters. The administrative conference may be held in person or by telephone and should be conducted by the case administrator and/or the mediator.

RULE-M13 MEDIATION SESSION PROCEDURES

The following are the general procedures that the mediator follows in conducting a mediation session:

- (a) The mediator shall open the session by introducing himself/herself and will check the identities of all of the parties and any other individuals attending the mediation session.
- (b) The mediator shall review the general rules, procedures and the manner in which the mediator shall conduct the mediation.
- (c) The mediator shall review the issues as presented in the *Request for Dispute Resolution Services* and a general discussion shall be held to review the items in dispute.

- (d) The mediator shall allow all of the parties the opportunity to present an uninterrupted opening statement followed by an uninterrupted response by the other party(s). A general discussion will follow.
- (e) If necessary, the mediator shall separate the parties into different rooms for the purpose of conducting private discussions with the parties to discuss the issues of the mediation. These separate sessions are commonly called "caucuses". The mediator will discuss the issues with the parties and will transmit offers to each of the parties only with their authorization to transmit those offers. The mediator may share any information shared by the parties with the mediator during a caucus session unless the party specifically requests that certain information not be shared with the other party. The mediator may call the parties back together when he/she feels that a settlement has been reached or is about to be reached on any of the disputed items. The mediator may again revert to caucuses to discuss other disputed items in the mediation. This process shall be repeated as often as the mediator determines is necessary to reach full settlement on all of the disputed items.
- (f) **MEDIATION** - When the mediator(s), with the agreement of the parties, determines that agreement has been reached on all items that are going to be resolved through the mediation process, he/she/they shall assist the parties in writing a *Settlement Agreement* on all of the items that have been resolved. If all of the items in dispute are settled during the mediation session, the mediator shall declare the mediation closed after the *Settlement Agreement* has been properly executed and signed by all of the parties to the mediation. If binding mediation or med-arb has not been specified, the unresolved items shall be handled by the dispute resolution method that is specified in the event that the mediation process is not totally successful.
- (g) **BINDING MEDIATION** - If "Binding Mediation" has been specified in the agreement, contract or other document that stipulates the dispute resolution process, and there is one or more unresolved items after the *Settlement Agreement* has been executed and signed, the mediator shall continue the mediation and will conduct a new settlement session in which the mediator shall be authorized to interview the parties and have them present and review any information that will help the mediator to render a decision on the remaining unresolved items that will be binding upon the parties. The mediator shall determine the manner in which he/she shall conduct this special settlement session. At the end of this special settlement session, the mediator will render a decision on the unresolved items and will assist the parties in writing up an additional or new *Settlement Agreement*, which will be binding on all of the parties to the mediation, even if one or both parties does not sign the *Settlement Agreements*. The one or two *Settlement Agreements* will constitute the final binding mediation settlement agreement and all of the parties shall be bound by the terms and conditions of these agreements. After the parties have executed one or both *Settlement Agreements*, the mediator will declare the binding mediation session to be closed.
- (h) If at the close of a standard mediation session the parties have reached impasse and do not reach a settlement on any or all of their disputed items,

they may elect to change the process to a binding mediation with the mediator being charged to render his decision to settle the dispute. The mediator's decision shall be written up on a new *Settlement Agreement* and shall be final and binding on the parties even if one or both of the parties chooses not to sign the *Settlement Agreement*. The parties must first sign a "Binding Mediation Addendum" prior to the mediator serving as the binding mediator which indicates that the parties realize that the mediator may have been given confidential, private and/or privileged information during the mediation and that the mediator/arbitrator's decision may be rendered in part due to that information. A fee adjustment may also be required by the Mediator and CDRS.

- (i) **MED-ARB** - If "Med-Arb" has been specified in the contract, agreement or other document that specifies the dispute resolution process, and there is one or more unresolved items after the *Settlement Agreement* has been executed and signed, the mediator shall declare the mediation session to be closed and the parties will be instructed to check with the CDRS case administrator for instructions on how to commence the arbitration section of the med-arb process. That arbitration process shall be conducted according to the *CDRS Arbitration Rules and Procedures* and shall be conducted at a later date. If all of the parties and the mediator agree, the same mediator may go on to serve as the arbitrator to render an award on the unresolved issues. The parties must first sign a "Mediator's Med-Arb Addendum" which indicates that the parties realize that the mediator may have been given confidential, private and/or privileged information during the mediation and that the mediator/arbitrator's decision may be rendered in part due to that information. A fee adjustment may also be required by the arbitrator and CDRS.
- (j) The CDRS case administrator will issue a certified copy of the executed and signed *Settlement Agreements* to the parties within thirty (30) business days of the conclusion of the mediation, binding mediation or med-arb process, unless a delay in the issuance may be necessitated according to Rule 15(b).

RULE-M14 APPEALS

The terms and conditions of the fully executed and signed *Mediation Settlements* are not subject to appeal, may not be contested by any of the parties to the mediation, are binding upon the parties and are enforceable as a matter of contract law in a court of competent jurisdiction. The mediator generally destroys all records, documents and notes related to the mediation. The case administrator retains only the appropriate documents necessary for the proper record keeping as determined by CDRS.

RULE-M15 FEES, COSTS AND EXPENSES

All fees, costs and expenses of the mediation should be specified and agreed upon in advance of the mediation session in the *Agreement to Mediate*, *Addendum to the Agreement to Mediate* and/or in other documents relating to the mediation.

- (a) A deposit shall be required in all mediations as specified in the *Agreement to Mediate* unless there is a written agreement specifying other payment arrangements. Non-payment of the deposit may necessitate the postponement or cancellation of the mediation.
- (b) At the conclusion of the mediation, the mediator may collect the final balance due to CDRS from the parties or the case administrator shall invoice the parties for the applicable portion of the mediation fees, costs and expenses including any applicable sales taxes or gross receipts taxes. Failure to pay the CDRS mediator or to pay the invoices when due may delay the issuance of the certified copies of the final *Settlement Agreements*. If the CDRS mediator collects the balance due, he/she may give the parties a copy of the *Settlement Agreement* and CDRS shall send the parties a certified copy of the *Settlement Agreement*. Under no circumstances shall the mediator distribute copies of the *Settlement Agreement* to the parties until the balance due to CDRS is paid in full.
- (c) If one of the parties fails to make its payment when required, the other party may make the outstanding payment to facilitate the issuance of the certified copy of the *Settlement Agreement* and may have a cause of action in a court of competent jurisdiction against the party who was delinquent in their payment.

RULE-M16 ADDITIONAL MEDIATIONS

If other items, concerning the same project, come into dispute after the execution and signing off of a mediation *Settlement Agreement*, a new mediation will need to be scheduled and the same procedures shall be followed for the new mediation process. The same case administrator shall administer the new mediation and the same mediator shall mediate the case unless all of the parties request a new mediator who shall be selected according to Rule M-7(a) and or (b).

RULE-M17 COURT ACTIONS

The parties (or their legal representatives) to the mediation shall not subpoena or demand that the mediator or any CDRS representative to appear in any subsequent legal or administrative process. The parties (or their legal representatives) shall not subpoena or demand the production of any records, notes, documents or work product of CDRS or the Mediator(s) in any subsequent legal or administrative proceeding concerning this dispute. If a client causes a subpoena to be issued violating this Rule-M17, the responsible party shall pay the mediator's attorney's fees and costs or the CDRS's attorney's fees and costs incurred to defend, resist the subpoena and enforce

the privacy terms of the *Mediation Agreement*. Time spent by the mediator and any additional time and expenses incurred by CDRS in the defense of the subpoena or in attempting to resist the subpoena shall be billable to the responsible party at the same hourly rate that was charged to the parties during the mediation.

RULE-M18 AUTHORIZED USE OF RULES AND PROCEDURES

As these Mediation Rules and Procedures are copyrighted by CDRS, any ADR procedure(s) that are utilized and/or any ADR procedure that is conducted according to these Rules and Procedures, that is not in conjunction with a case being administered by CDRS, must first attain written permission from CDRS before utilizing these Rules and Procedures in any way. Any individual or entity that violates the terms of this rule shall be subject to the fees and expenses as specified by CDRS.

RULE-M19 INTERNATIONAL MEDIATION RULES AND PROCEDURES

International Mediations conducted by CDRS shall be conducted according to the “CDRS International Mediation Rules and Procedures” or by the rules and procedures as agreed to and specified by the parties.