

# PUBLICATION

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## American Arbitration Association Revises Construction Industry Rules and Mediation Procedures [Ober|Kaler]

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**The American Arbitration Association (AAA) recently revised its Construction Industry Rules and Mediation Procedures (Rules). The revised Rules, which took effect on July 1, 2015, are intended to provide a more efficient and cost-effective process for arbitrating construction disputes.**

A major focus of the revisions was to provide arbitrators with more authority to manage the arbitration process. This is reflected primarily in two new rules: Rule R-25 (Enforcement Powers of the Arbitrator) and Rule R-60 (Sanctions).

Under Rule R-25, an arbitrator now has authority to issue any orders necessary to enforce the conduct of the arbitration (as established by Rule R-23) and the exchange of documents between the parties (as established by Rule R-24). The arbitrator's expanded authority includes issuing confidentiality orders for the production of documents, imposing search parameters for electronic discovery, allocating costs for the production of documents, and drawing adverse inferences or excluding evidence against a party that willfully fails to comply with any order by the arbitrator. Rule R-60, in turn, provides the arbitrator with authority to "order sanctions where a party fails to comply with its obligations under the rules or with an order of the arbitrator."

Additional changes to the Rules include the following.

- Rule R-7 (Consolidation or Joinder) provides early deadlines for consolidating related arbitrations or joining parties to an existing arbitration. The previous version of this rule did not have any deadlines.
- Rule R-10 (Mediation) requires the parties to mediate claims or counterclaims that exceed \$100,000. This revision, however, may have little or no impact because any party whose arbitration agreement does not require mandatory mediation may unilaterally opt out of this rule upon notification to the AAA and the other parties.
- Rule R-23 (Preliminary Management Hearing) provides a more detailed checklist (the P-2 Checklist) that the parties and the arbitrator should discuss during the preliminary management hearing. The arbitrator has discretion about scheduling this hearing "depending on the size and complexity of the arbitration."
- Rule R-34 (Dispositive Motions) allows an arbitrator to consider "motions that dispose of all or part of a claim, or narrow the issues in a case." While this type of provision has existed in other AAA rules, it is new to the construction industry rules.
- Rule R-39 (Emergency Measures of Protection) allows a party to seek emergency relief from the AAA before an arbitration panel is convened. The party in need of relief may petition the AAA to appoint a single emergency arbitrator to rule on the issue. The rule also provides that a "request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate." Thus, under the rule, a party may seek emergency relief from either the AAA or a court without violating the arbitration agreement.

The revised Rules, along with a detailed summary of the changes, are available on the AAA's website. Time will tell if the revisions are successful in streamlining the arbitration process. In the meantime, if your

construction contracts contain an arbitration clause requiring use of the Rules, you should check to see if the revisions apply. Some contracts require the parties to use the Rules in effect at the time of contracting, while others require the parties to use the Rules in effect at the time of the dispute.

You should also consider if the revised Rules provide for the dispute resolution process that you want. For example, parties often think that arbitration imposes a lesser burden for producing documents when compared with litigation in a court system. The revised Rules, however, expand an arbitrator's authority to require that documents in the possession or custody of a party, including electronically stored documents, be produced in a specified format. See Rule R-24. This could make the burden of producing documents in arbitration similar to the burden typically encountered in court – something you may not have anticipated when choosing arbitration as the method to resolve your construction disputes.