

# **Guided Choice Arbitration: Real time customization of the arbitration process to fit the dispute**

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# The Protocol

- Any claim, dispute or other matter in question arising out of or related to this Agreement concerning the Project shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by any party. However, any party having the right to statutory remedies may perfect any such right, including the timely filing of any notice or lien or obtaining of injunctive relief in a court of law to preserve the status quo.

# Protocol 2

- Any mediation pursuant to this Agreement may be joined with any agreement by which a person or entity has an obligation to mediate disputes relating to the Project with any party to this Agreement.
- The mediation shall be conducted in accordance with the Construction Mediation Rules of the American Arbitration Association unless otherwise agreed to by the parties. The parties are free to agree to use other rules or another administrator or no administrator.

# Protocol 3

- The mediator shall be certified by the International Mediation Institute ([www.imimmediation.org](http://www.imimmediation.org)) and have at least ten years experience as a neutral commercial arbitrator, unless the parties agree otherwise. The cost of the mediation shall be shared among those persons or entities that participate.

# Protocol 4

- If the mediator declares in writing, an impasse in the mediation process, then as a continuing part of the mediation process, the mediator shall assist the persons or entities who participated in the mediation, who shall act in good faith, to design a mutually acceptable arbitration process agreement (“ Design Process Agreement”). If a Design Process does not result in a Design Process Agreement within thirty (30) days from the declaration of impasse, then the parties may pursue other available legal remedies.

# Protocol 5

- This Design Process Agreement does not obligate any party to arbitrate a dispute unless an agreement to arbitrate otherwise exists. The discussions about the Design Process Agreement shall be considered as settlement discussions within the applicable mediation privilege and shall not be admissible in a subsequent legal proceeding. The mediator shall not offer to act as the arbitrator but may consent to do so if so requested by all the parties

# Protocol 7

- If the parties agree, the mediator will be available to continue to assist the parties in reaching a settlement during the arbitration hearings. However, the mediator will continue his/her confidentiality obligations and is prohibited from communicating with the arbitrator(s), or doing any independent investigations. The mediator's sole source of information will be the record in the arbitration or what the parties choose to disclose to the mediator.

# Protocol 6

- The issues to be resolved in the Design Process Agreement include, but are not limited to the following:
- The selection of appropriate arbitrators or arbitrator. Criteria will include experience, cost, availability within time frame of the parties, and ability to understand the issues in dispute.
- The length of the hearings.
- The site of the hearings.
- The form of the award.
- The applicable arbitration rules and governing arbitration law.
- Whether and how issues can be narrowed through a document similar to Terms of Reference.
- Determination of a protocol for discovery, including any e-discovery. Existing protocols from administrators, court rules and opinions and bar associations will be explored for the best ideas with which the parties are comfortable.
- The parties to the arbitration.
- Whether and how the hearings can be expedited without violating perceptions of fairness to the parties.
- In performing his or her role, the mediator shall maintain the confidentiality of information as required by the rules pursuant to which the mediation is conducted and any more stringent by law.