

PROPOSED AMENDMENTS TO PWCA REGULATIONS

Affected sections: 1 CCR 1314, 1321, 1322, 1323, 1324, 1332, 1334, 1354, 1390, 1392, 1395, 1398

1314. Absence of an Appointed Arbitrator

~~Prior to selection of the Arbitrator or in~~ In the absence of ~~the an~~ appointed Arbitrator, the Office of Administrative Hearings may decide, with consent of the Petitioner and Respondent, procedural and discovery questions as necessary to avoid delay in the expeditious completion of the Arbitration proceedings.

Note: Authority cited: Sections 10240.5 and 10245.2, Public Contract Code.

Reference: Sections 10240.5 and 10245.4, Public Contract Code.

1321. Selection of Arbitrators

(a) Unless the Petitioner and Respondent otherwise agree, there shall be only one Arbitrator who shall be selected as hereinafter provided.

(b) The Petitioner and Respondent shall have until 20 days after service of the complaint upon Respondent to agree on the selection of an Arbitrator. If no such agreement is reached, the Petitioner and Respondent shall, within 30 days after service of the complaint upon Respondent, file a list of 5 acceptable Arbitrators ranked in order of preference with the Office of Administrative Hearings. Notwithstanding Section 1305, this list need not be sent to the other parties. OAH shall strike any names over five. If either or both Petitioner or Respondent fails to submit a list or to include five names on its list the Office of Administrative Hearings shall compose or complete the list with names of persons selected at random, who have been enrolled on the panel certified by the Public Works Contract Arbitration Committee and who have indicated a willingness to serve as an Arbitrator in the location for the hearing. Names selected at random shall be listed and accorded preference in the order of their selection. If one or more names appear in common on both lists submitted by the Petitioner and Respondent, the Office of Administrative Hearings shall appoint the Arbitrator from among such names and in accordance with the preferences indicated by the lists.

(c) If no name on the lists of five names appears in common, the Office of Administrative Hearings shall combine the listed names with ten additional names from the certified panel and submit simultaneously to the Petitioner and Respondent a list of names so constituted. The names selected from the certified panel shall be selected at random from those who have indicated a willingness to serve as an Arbitrator in the location for the hearing unless the Petitioner and Respondent agree that those so named be limited to persons with expressly designated special technical expertise or qualifications.

(d) The Petitioner and Respondent each shall ~~have~~ within 15 days from the mailing date ~~in which to~~ of the list, cross off any names to which it objects, number the remaining names indicating the order of preference, ~~and return file~~ the list ~~to with~~ the Office of Administrative Hearings with a copy to each other. If either or both Petitioner or

Respondent does not return the list within the time specified or does not indicate an order of preference, all persons named therein shall be deemed equally acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the Office of Administrative Hearings shall appoint the Arbitrator. If for any reason the appointment cannot be made from the submitted list, the Office of Administrative Hearings shall repeat the submission process with an entirely different list of 20 names selected at random from those who have indicated a willingness to serve as an Arbitrator in the location for the hearing. If after this second submission or six months from the filing of the complaint, whichever comes first, an Arbitrator has not been selected, either Petitioner or Respondent may petition the Superior Court to ~~appoint the Arbitrator~~ select one or more Arbitrators in order of preference from among those who have indicated a willingness to serve as an Arbitrator in the location for the hearing.

(e) If the name of a person is submitted as an acceptable Arbitrator and the person is not enrolled on the certified panel of Arbitrators, the Petitioner or Respondent submitting such name at the same time shall also submit a statement of qualifications similar to that required of persons on the certified panel. Failure to submit the required statement of qualifications shall result in elimination of that person's name from the list submitted.

Note: Authority: Sections 10240.5 and 10245.2, Public Contract Code.

Reference: Sections 10240.3, 10240.5, 10245.3 and 10245.4, Public Contract Code.

~~1322.~~ 1323. Notice to Arbitrator of Appointment

Notice of the appointment of the Arbitrator shall be mailed to the Arbitrator by the Office of Administrative Hearings, together with a copy of these Rules and an oath of office as prescribed by the Office of Administrative Hearings.

Note: Authority cited: Sections 10240.5 and 10245.2, Public Contract Code.

Reference: Sections 10240.5 and 10245.4, Public Contract Code.

~~1323.~~ 1322. Disclosure and Challenge Procedure

(a) The Office of Administrative Hearings shall notify the arbitrator of selection as arbitrator. On notice of selection, the prospective Arbitrator, including one selected by the Superior Court, shall disclose to the Office of Administrative Hearings any circumstances likely to prevent prompt hearing and decision or to create a presumption of bias, ~~including any past or present relationship with the Parties, their officers or employees, or their counsel, or other representative~~. The disclosures shall satisfy the requirements of Standards 1, 4, 5, 6, 9, 10, and 11; Standard 2 (a) through (c), (h) through (n), and (q); and Standard 7 except for subdivision (b)(12) of the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Cal. Rules of Court, Appendix, Div. IV.

(b) Upon disclosure, the Office of Administrative Hearings shall advise the Parties of ~~such~~ the information in writing. ~~Within ten days from the date of receipt of such information, the~~ The prospective Arbitrator shall be disqualified by the Office of

Administrative Hearings if an objection is made to the Office of Administrative Hearings by Petitioner or Respondent within ten days from the date of receipt of the information. If neither Petitioner or Respondent objects within the time specified, the prospective Arbitrator shall be deemed acceptable.

~~(b) An Arbitrator, once selected has a continuing duty to disclose to the Office of Administrative Hearings any circumstances likely to prevent a prompt hearing and decision or to create a presumption of bias, including any past or present relationship with the Parties, their officers or employees, or their counsel, or other representative. Upon disclosure, the Office of Administrative Hearings shall advise the Parties of such information in writing. Within ten days from the date of receipt of such information, the Arbitrator shall be disqualified by the Office of Administrative Hearings if an objection is made to the Office of Administrative Hearings by the Petitioner or Respondent and if the Office of Administrative Hearings determines good cause for disqualification exists. If neither Petitioner or Respondent objects within the time specified, the Arbitrator shall continue to be deemed acceptable.~~

(c) After appointment, an arbitrator has a continuing duty to make any disclosures required in subdivision (a) to the Office of Administrative Hearings. Upon disclosure, the Office of Administrative Hearings shall advise the Parties of the information and their right to object. In addition, a party who becomes aware that an arbitrator has made a material misrepresentation or material omission in his/her disclosures, may within 15 days of becoming aware of the misrepresentation or omission, object to the Office of Administrative Hearings, clearly describing the material misrepresentation or material omission and how and when he/she became aware of it. If a timely objection is made to the Office of Administrative Hearings by the Petitioner or Respondent and the Office of Administrative Hearings determines good cause for disqualification exists, the arbitrator shall be disqualified. If neither Petitioner or Respondent objects within the time specified, the Arbitrator shall continue to be deemed acceptable.

Note: Authority cited: Sections 10240.5 and 10245.2, Public Contract Code.
Reference: Sections 10240.5 and 10245.4, Public Contract Code.

1324. Vacancy

If after selection appointment, any Arbitrator shall die, refuse, or be unable to perform the duties of office or be disqualified during the course of the proceeding, a substitute Arbitrator shall be identified from the list of names as preferred by the Petitioner and Respondent and from which the original Arbitrator was selected if possible or in the manner set forth in Section 1321. If a vacancy as described above occurs, the merits of the matter shall be reheard unless otherwise agreed to by the Petitioner and Respondent.

Note: Authority cited: Sections 10240.5 and 10245.2, Public Contract Code.
Reference: Sections 10240.3, 10240.5 and 10245.4, Public Contract Code.

~~1332. Acceptance of the Work~~

~~If is disputed acceptance of the work is disputed, an Arbitrator will be appointed pursuant to Section 1342. Unless the Parties agree otherwise, the Arbitrator selected under this section shall decide only the issue of whether the contract work was or should have been accepted.~~

Note: Authority cited: Sections 10240.5 and 10245.2, Public Contract Code.

Reference: Sections 10240.5 and 10245.4, Public Contract Code.

1332. Appointment of Special Arbitrator to Determine Acceptance of the Work

(a) If prior to Arbitrator selection a dispute arises regarding acceptance of the work, the Office of Administrative Hearings shall, upon request of one or more of the Parties, cause a special arbitrator to be appointed pursuant to Section 1342 for the sole purpose of resolving that dispute.

(b) The special arbitrator selected under this section shall after a hearing provide a written decision on only the issue of the timeliness of the filing of the complaint in Arbitration under the Public Contract Code Section 10240.2 provision for arbitration 240 days after acceptance of the work and whether the requirements of that section have been met. If the special arbitrator decides that the requirements have been met, the Office of Administrative Hearings shall cause a new Arbitrator to be selected pursuant to Section 1321 to handle the Arbitration on the merits. If the special arbitrator decides that the requirements have not been met, the Office of Administrative Hearings shall dismiss the complaint in Arbitration without prejudice to the filing of a timely complaint.

Note: Authority: Sections 10240.5 and 10245.2, Public Contract Code.

Reference: Section 10240.5, Public Contract Code.

1334. Lack of Prosecution

(a) The Arbitrator shall have discretion to dismiss any claim complaint where the Petitioner or Cross-complainant fails to prosecute the claim matter by failing to perform discovery or otherwise fails to take any significant action to move the case to hearing for a period of 18 consecutive months, measured from the filing of the complaint or the last significant action.

(b) The Arbitrator shall dismiss any claim complaint where the Petitioner or Cross-complainant fails to prosecute the claim matter by failing to perform discovery or otherwise fails to take any significant action to move the case to hearing for a period of ~~three years~~ 36 consecutive months, measured from the filing of the complaint or the last significant action.

(c) For purposes of this section "significant action" means an action, which is timely served and filed by the Petitioner or Cross-complainant pursuant to Section 1305, and which is designed to move a complaint to hearing. It shall

include good-faith requests for discovery, good-faith motions to eliminate issues and pre-hearing briefs requested by the Arbitrator.

~~(e)~~ (d) The Arbitrator shall dismiss ~~a claim~~ **a complaint** if the hearing has not commenced within five years after the filing of the complaint.

~~(d)~~ (e) If an Arbitrator has not been selected or is absent due to resignation, death or disability, the Office of Administrative Hearings shall have authority to dismiss the ~~claim~~ **complaint** as specified in ~~(a) or (e)~~ (b) or (d).

Note: Authority: Sections 10240.5, 10240.11 and 10245.4, Public Contract Code.

Reference: Sections 10240.5, 10240.11 and 10245.4, Public Contract Code.

1354. Answer

(a) Not later than 30 days after service of the complaint Respondent shall file an answer to the complaint.

(b) If an objection to the complaint is filed under Section 1356, time to answer is extended until 30 days after the Arbitrator has ruled on the objection. The time to answer may be extended by agreement of the relevant Parties, but an extension of time to answer does not extend the time to file an objection to the complaint under Section 1356.

(c) The answer or objection will not be filed unless the Respondent submits a non-refundable filing fee, established by and payable to the Office of Administrative Hearings, and proof of service required in section 1305. The Office of Administrative Hearings may defer a Public Agency's timely submission of the filing fee due to delay in enactment of the state budget or similar circumstances out of the control of the Public Agency.

Note: Authority: Sections 10240.5 and 10245.2, Public Contract Code.

Reference: Sections 10240.5 and 10245.4, Public Contract Code.

1390. Decision on the Merits

(a) A written Decision on the Merits shall be filed with the Office of Administrative Hearings and shall contain a summary of the evidence, reasons underlying the decision and, unless the Parties otherwise agree, findings of fact and conclusions of law. A copy of the decision shall be served by the Office of Administrative Hearings on each of the Parties.

(b) Objections to findings and conclusions may be filed by any Party within 15 days of receipt of the written decision. **Any response to objections shall be filed within 15 days of receipt of the objections to findings and conclusions.** The Arbitrator shall consider the objections and may notice a hearing thereon.

Authority cited: Sections 10240.5 and 10245.2, Public Contract Code.

Reference: Sections 10240.5, 10240.8 and 10245.4, Public Contract Code.

1392. Decision on Costs and Attorney's Fees

(a) The cost of conducting the Arbitration shall be borne equally by the Parties and in no case awarded to the prevailing Party. These costs shall include:

- (1) The Arbitrator's fee.
- (2) The costs of recording and transcribing the proceedings.
- (3) Any fees necessary to secure and maintain a hearing room.
- (4) Any fees for expert or technical advisors requested pursuant to Section 1333.

(b) Other costs, including the filing fee, witness fees, costs of discovery, or any other cost necessarily incurred by one Party, other than attorney's fees, may be awarded to the prevailing Party in the Arbitrator's discretion on the same basis as is allowed in civil actions. These costs shall be taxed as in civil actions.

(c) Reasonable attorney's fees may be awarded in accordance with Public Contract Code Section 10240.13 or other applicable law, if any.

(d) A petition for interest, costs and attorney's fees must be filed by any Party within 15 days of receipt of the decision on any objections filed pursuant to Section 1390(b) or, if there is no objection, within 30 days of receipt of the Decision on the Merits. **Any response to a petition for interest, costs and attorneys fees shall be filed within 15 days of receipt of the petition.** Any petition for interest, costs or attorney's fees shall be promptly determined and assessed by the Arbitrator in a separate hearing, as necessary, following the Decision on the Merits of the claim, and a Decision on Costs issued.

Authority cited: Section 10240.5, Public Contract Code.

Reference: Sections 10240.5 and 10240.13, Public Contract Code.

Article 11. Certification of Arbitrators by the Public Works Contract Arbitration Committee

1395. Standards and Qualifications

(a) Arbitrators should have substantial experience in or directly related to public works construction projects, particularly large-scale complex projects with or on behalf of federal, state or local governmental agencies. Extensive experience in the resolution of disputes arising out of such projects is desirable. Knowledge of California construction law is necessary.

(b) Applicant qualifications are evaluated on an individual basis by the Public Works Contract Arbitration Committee. The experience in subdivision (a) may be met by a combination of factors, which should include any one or more of the following:

(1) Five or more years' experience at the managerial or supervisory level in public works construction contracting with extensive experience in the resolution of disputes arising out of public contract claims.

(2) Five or more years' experience as an attorney representing parties in negotiating, litigating, or arbitrating public works construction contract claims.

(3) Five or more years' experience as a judge or arbitrator. This should include extensive experience in adjudicating or otherwise resolving public works construction contract claims or other large-scale and/or complex commercial litigation.

Authority cited: Sections 10240.5 and 10245.3, Public Contract Code.

Reference: Sections 10240.5, 10240.7, and 10245.3, Public Contract Code.

1398. Recertification of Arbitrators

Arbitrators certified to the panel will be required to apply for recertification every seven years to remain on the panel. Arbitrators will be evaluated for recertification on the basis of the current standards and qualifications.

Authority cited: Sections 10240.5 and 10245.3, Public Contract Code.

Reference: Sections 10240.5 and 10245.3, Public Contract Code.