

JAMS Dispute Resolution Rules for Surety Bond Disputes

Effective February 2015



JAMS DISPUTE RESOLUTION RULES FOR SURETY BOND DISPUTES

JAMS provides arbitration and mediation services worldwide. We resolve some of the world's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained, experienced ADR professionals are dedicated to the highest ethical standards of conduct.



TABLE OF CONTENTS

Rule 1.	Scope of Rules.	3
Rule 2.	Party-Agreed Rules.	3
Rule 3.	Amendment of Rules	4
Rule 4.	Conflict with Law	4
Rule 5.	Commencement and Appointment	4
Rule 6.	Preliminary and Administrative Matters	6
Rule 7.	Interpretation of Rules and Jurisdictional Challenges	7
Rule 8.	Representation.	7
Rule 9.	Withdrawal from Adjudication	8
Rule 10.	<i>Ex Parte</i> Communications	8
Rule 11.	Adjudicator Disclosures and Replacement	8
Rule 12.	Ascertainment of Facts and Law	8
Rule 13.	Decision of the Adjudicator	9
Rule 14.	Confidentiality and Privacy	9
Rule 15.	Waiver.	10
Rule 16.	Disqualification of the Adjudicator as a Witness or Party and Exclusion of Liability.	10
Rule 17.	Fees	10

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Rule 1. Scope of Rules

(a) The JAMS Dispute Resolution Rules for Surety Bond Disputes (“Rules”) govern disputes concerning a surety’s liability pursuant to a performance bond (“Bond”) following a demand by an obligee.

(b) JAMS may, in its discretion, assign the administration of the dispute resolution process to any of its Resolution Centers.

(c) The term “Party” as used in these Rules includes Parties to the adjudication process and their counsel or representatives.

(d) “Electronic filing” (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. “Electronic service” (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a Party, attorney or representative under these Rules.

(e) “Dispute” means a disagreement as to the Surety’s liability pursuant to the Bond following the Obligee’s Demand.

(f) Terms not defined herein shall have the meaning ascribed to them in the Bond.

Rule 2. Party-Agreed Rules

The Parties may agree on any Rules not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies. The Parties shall promptly notify JAMS of any such Party-agreed Rules and shall confirm

such Rules in writing. The Party-agreed Rules shall be enforceable as if contained in these Rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Adjudication (as defined in Rule 5) shall apply to that Adjudication, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed to by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rules in conflict, and no other Procedure will be affected.

Rule 5. Commencement and Appointment

In the event that a Principal, Surety and Obligee are unable to agree whether a Surety is liable to perform pursuant to a Performance Bond, and to ensure that such disputes are determined quickly, a Surety or Obligee may initiate an Adjudication with JAMS as follows:

(a) The Surety or the Obligee shall demand Adjudication by filing a Demand for Adjudication, Adjudication Statement and a copy of the Performance Bond (including Schedules attached thereto) electronically with JAMS, and serving electronic copies by email upon the Principal and the Obligee, utilizing the electronic forms and filing directions provided by JAMS on its website at www.jamsadr.com. The Adjudication statement shall set forth in detail the factual and legal issues submitted for Adjudication and shall be sent no later than 10 days following the Obligee's Demand.

(b) Within three (3) business days after the Adjudication statement is filed and served, the parties shall appoint an Adjudicator, who shall be a panelist on the JAMS Global Engineering & Construction Panel ("JAMS GEC Panel"). JAMS shall appoint an Adjudicator administratively from the JAMS GEC Panel if the Adjudicating Parties fail to appoint an Adjudicator within the three day-period.

(c) The Adjudication shall commence on the date that JAMS receives the Demand, Adjudication statement, a copy of the Performance Bond and initial deposit of funds, and confirms the appointment of the Adjudicator. Unless the Adjudicator decides otherwise, the Principal, the Surety

and the Obligee shall pay the final fees and expenses of Adjudication as set forth in the Agreement.

(d) If a Party that is obligated to submit to the Adjudication process fails to agree to participate, JAMS shall confirm in writing that Party's failure to respond or participate, and the Adjudicator shall schedule, and provide appropriate notice of, a Hearing or other opportunity for the Party demanding the Adjudication to demonstrate its entitlement to relief.

(e) **Electronic Filing.** The Adjudicator may at any time require electronic filing and service of documents in an Adjudication. If an Adjudicator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

Every document electronically filed or served shall be deemed to have been signed by the Adjudicator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address and telephone number of a signing attorney. Typographical signatures shall be treated as personal signatures for all purposes under these Rules. Documents containing signatures of third parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper format.

Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the Party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the Party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the

Party initiating e-service, and that Certificate shall serve as proof of service. Any Party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party that was unknown to the sending Party; (2) a failure to process the electronic document when received by JAMS Electronic Filing System; (3) the Party was erroneously excluded from the service list; or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may, for good cause shown, permit the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Adjudication.

(b) Each Party is responsible to pay its share of the fees and expenses of JAMS and the Adjudicator. In an Adjudication in which the Adjudicator determines that the Principal and Surety are aligned with the same commonality of interest against the Obligee, the Principal and Surety jointly shall be charged with one share, and the Obligee shall be charged with one share.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS 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 Adjudication shall proceed, and the amount of that advance deposit will be taken into consideration in the Adjudicator's decision, consistent with Rule 17. An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Adjudication. If the Parties wish to have any

documents returned to them, they must advise JAMS in writing within thirty (30) calendar days of the conclusion of the Adjudication. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing, and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for thirty (30) calendar days following the conclusion of the Adjudication.

Rule 7. Interpretation of Rules and Jurisdiction Challenges

(a) Once appointed, the Adjudicator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Adjudication process. The resolution of the issue by the Adjudicator shall be final.

(b) Jurisdictional disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Adjudication is sought, and who are proper Parties to the Adjudication, shall be submitted to and ruled on by the Adjudicator. The Adjudicator has the authority to determine jurisdiction and issues as a preliminary matter.

(c) Disputes concerning the appointment of the Adjudicator shall be resolved by JAMS.

Rule 8. Representation

(a) The Parties, whether natural persons or legal entities such as corporations, LLCs or partnerships, may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to JAMS and the other Parties of the name, address, telephone and fax numbers and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

Rule 9. Withdrawal from Adjudication

No Party may terminate or withdraw from an Adjudication after the Commencement (see Rule 5), except by written agreement of all Parties to the Adjudication.

Rule 10. Ex Parte Communications

No Party may have any *ex parte* communication with the Adjudicator regarding any issue related to the Adjudication. The Adjudicator may authorize any Party to communicate directly with the Adjudicator by email or other written means as long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

Rule 11. Adjudicator Disclosures and Replacement

(a) If, for any reason, the Adjudicator who is selected is unable to fulfill the Adjudicator's duties, a successor Adjudicator shall be chosen in accordance with these Rules. JAMS will make the final determination as to whether an Adjudicator is unable to fulfill his or her duties, and that decision shall be final.

(b) Any disclosures regarding the selected Adjudicator shall be made immediately upon the Adjudicator's appointment. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it. The Parties and their representatives shall disclose to JAMS any circumstances likely to give rise to justifiable doubt as to the Adjudicator's impartiality or independence, including any bias or any financial or personal interest in the result of the Adjudication or any past or present relationship with the Parties or their representatives. The obligation of the Adjudicator, the Parties and their representatives to make all required disclosures continues throughout the Adjudication process. The Adjudicator shall be under a duty at all times to act impartially and fairly and shall serve as an independent neutral.

Rule 12. Ascertainment of Facts and Law

Upon commencement of the Adjudication, the Adjudicator is empowered to take the initiative in ascertaining the facts and the law, and to exercise sole discretion in managing the Adjudication process. Among other things, the Adjudicator may require the parties to make additional factual submissions such as sworn witness statements and business documents. The Adjudicator may interview important witnesses after notice to the parties and affording opportunity

to attend, may request and consider expert reports and may call for memoranda on legal issues. Notwithstanding the foregoing, the Adjudicator must decide the following questions:

- (a) Is the Principal in default of the Principal's Obligations?
- (b) Has the Obligee complied in all material respects with its obligations in good faith pursuant to the Design Build Agreement?
- (c) Is the Surety liable to perform in accordance with Paragraph 6 of the Bond?

Rule 13. Decision of the Adjudicator

(a) The Adjudicator shall issue a written decision ("Decision"), which shall be binding upon and enforceable by the parties through the completion of the Principal's Obligations. The Decision shall be issued through JAMS as soon as practicable but in no event later than thirty (30) calendar days of the Adjudication Commencement Date or within any later time agreed upon by the Parties. This 30-day period also may be extended by the Adjudicator in his or her sole discretion for up to 14 days in the event that JAMS has requested any Party to make an additional fee and expense deposit and funds have not been deposited as requested or advanced by another Party pursuant to Rule 17.

(b) Any Party may request clarification of the Decision within five (5) business days after issuance, and the Adjudicator shall endeavor to respond within an additional five (5) business days, and any payment or performance in accordance with the Decision shall be made immediately thereafter. Unless the Parties agree otherwise, the Decision shall state reasons therefor and shall be admissible in later administrative, arbitral or judicial proceedings between the Parties. The Parties shall comply with the Decision, unless and until subsequently vacated or modified, through Substantial Completion of the Design Build Agreement.

Rule 14. Confidentiality and Privacy

(a) JAMS and the Adjudicator shall maintain the confidential nature of the Adjudication proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of a Decision, or unless otherwise required by law or judicial decision.

(b) The Adjudicator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

Rule 15. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails to object promptly in writing, the objection will be deemed waived, unless the Adjudicator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Adjudicator, such challenge must be made promptly, in writing, to the Adjudicator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Adjudicator.

Rule 16. Disqualification of the Adjudicator as a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Adjudicator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Adjudication. The Adjudicator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Adjudicator, Case Manager and/or JAMS from any subpoenas from outside parties arising from the Adjudication.

(c) The Parties agree that neither the Adjudicator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Adjudication or the subject matter of the Adjudication, and neither the Adjudicator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Adjudication conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Adjudicator.

Rule 17. Fees

(a) Each Party shall pay its *pro rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Adjudication, unless the Parties agree on a different allocation of fees and expenses. JAMS' agreement to render services is jointly

with the Party and the attorney or other representative of the Party in the Adjudication. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Adjudication from time to time during the course of the proceedings and prior to the Hearing. The Adjudicator 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.

(c) The Parties are jointly and severally liable for the payment of JAMS fees and the Adjudicator's compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Adjudicator may award against any Party any such fees, compensation and expenses that such Party owes with respect to the Adjudication.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS' assessment of fees. JAMS 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 at the Adjudication.

