

201 CMR: OFFICE OF CONSUMER AFFAIRS AND BUSINESS REGULATION

201 CMR 14.00: HOME IMPROVEMENT CONTRACTOR ARBITRATION AND GUARANTY FUND

Section

- 14.01: Purpose
- 14.02: Definitions
- 14.03: Arbitration Requests
- 14.04: Role of OCABR
- 14.05: Processing of Requests for Arbitration Forms
- 14.06: The Arbitrator
- 14.07: Settlement by Submission of Documents for Claims of \$10,000 or Less
- 14.08: Notification and Scheduling of Arbitration Hearings
- 14.09: Disclosure of Information
- 14.10: Rescheduling Arbitration Hearings
- 14.11: Failure to Appear
- 14.12: Withdrawal
- 14.13: The Hearing
- 14.14: Determining Actual Loss
- 14.15: The Decision
- 14.16: Disputing the Arbitrator's Decision
- 14.17: The Award
- 14.18: Establishment of the Guaranty Fund
- 14.19: Contractor Fees to the Guaranty Fund
- 14.20: Duties of Fund Administrator
- 14.21: Payments from Guaranty Fund
- 14.22: Miscellaneous

14.01: Purpose

(1) Purpose. 201 CMR 14.00 sets forth procedures for operation of private arbitration services program within the Office of Consumer Affairs and Business Regulation (OCABR) to consider disputes between homeowners and contractors, or subcontractors, and in the case of deceased contractor, or subcontractors, their administrator, executor or personal representative, as required by M.G.L. c. 142A, § 4. It is designed to promote the speedy, efficient and fair disposition of disputes arising out of the improvement of an owner-occupied, one-to-four family residential home by a registered contractor or subcontractor. It also sets forth procedures for homeowner access to a Guaranty Fund. The Guaranty Fund, established by M.G.L. c. 142A, § 5, compensates homeowners for actual losses they incur as a result of registered contractor or subcontractor conduct found by an approved arbitrator or court of competent jurisdiction to be work performed in a poor or unworkmanlike manner or which is a common law violation or a violation of any statute or regulation designed for the protection of consumers.

(2) Applicable Regulations. Other regulations applicable to M.G.L. c. 142A include:

- (a) 201 CMR 18.00: *Registration and Enforcement of Home Improvement Contractor Program* promulgated by the director of the Office of Consumer Affairs and Business Regulation.
- (b) 940 CMR 8.00: *Mortgage Brokers and Mortgage Lenders* promulgated by the Office of the Attorney General.
- (c) 209 CMR 42.00: *The Licensing of Mortgage Lenders and Mortgage Brokers* promulgated by the Division of Banks and Loan Agencies.

(3) Scope. 201 CMR 14.00 shall apply to all home improvement transactions with a written contract between a homeowner and a contractor or subcontractor registered with the Office of Consumer Affairs and Business Regulation.

14.02: Definitions

Unless otherwise stated, terms used in 201 CMR 14.00 are as defined or used in M.G.L. c. 142A.

14.02: continued

Actual Loss. Amounts payable for the cost of repair, replacement, completion or performance under the terms of a written residential home improvement contract with respect to which a Guaranty Fund claim is made.

Applicant. The owner occupant, authorized tenant or registrant covered by provisions of M.G.L. c. 142A who files a request, on an approved form, for arbitration before an OCABR approved arbitrator claiming a failure of performance under a residential home improvement contract. A request for arbitration may be filed only once with respect to a registrant's failure to perform a contract.

Arbitrator. Any person who has been certified by OCABR to perform home improvement contractor, or subcontractor arbitration services. These appointed individuals issue binding decisions pursuant to M.G.L. c. 142A and 201 CMR 14.00.

Business Days. Monday through Friday, except for state or federal holidays.

Claimant. An owner and resident of a residential building, containing at least one but not more than four dwelling units, who has entered into a residential home improvement contract with a contractor, or subcontractor to carry out construction work on said building, and who is making a claim against said contractor, or subcontractor for failure of performance under said contract pursuant to M.G.L. c. 142A. A claimant may only recover once up to and no more than \$10,000 from the Guaranty Fund to compensate for actual loss.

Clear and Conspicuous. Shall be defined in a manner which is consistent with the definition provided by the applicable sections of the Attorney General's Retail Advertising Regulations, 940 CMR 6.01: *Definitions* and 6.01: *Clear and Conspicuous*(f) and the Attorney General's Mortgage Brokers and Mortgage Lenders Regulations, 940 CMR 8.03: *Definitions*. 201 CMR 14.00 provides that clear and conspicuous shall mean that the material representation being disclosed is of such size, color, contrast, or audibility and is presented so as to be readily noticed and understood by a reasonable person to whom it is being disclosed.

Contract. A written agreement between a home improvement contractor and an owner contained in one or more documents for the performance of certain residential contracting work, including all labor, material, goods and services set forth under said agreement.

Contractor. Any person who owns or operates a contracting business who, through himself or others, undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid for residential contracting work. For purposes of 201 CMR 14.00, the Office of Consumer Affairs and Business Regulation shall deem a contractor, or subcontractor to be duly registered if the contractor, or subcontractor is registered in accordance with M.G.L. c. 142A and 201 CMR 18.00: *Registration and Enforcement of Home Improvement Contractor Program* on the contract signing date with the owner. In the case of the deceased contractor, or subcontractor, their administrator, executor, or personal representative is substituted where applicable.

Customary and Reasonable Efforts to Collect. Such efforts as are customarily undertaken by or on behalf of judgment creditors in Massachusetts for the purpose of collecting a judgment, taking into account the amount of the judgment, and the likely cost of continued collection efforts. Without limiting the generality of the foregoing, the owner's obligation to exhaust all customary and reasonable efforts to collect the judgment of a court of competent jurisdiction may be satisfied by having a writ of execution for the amount of the judgment served in hand by a constable or sheriff upon the judgment debtor, and demand made, unless such service and demand cannot be made because the judgment debtor cannot be found or the judgment debtor has filed for bankruptcy. An arbitration award must be converted to a court judgment in order to obtain a writ of execution for service by a constable or sheriff upon the contractor, or subcontractor.

This standard may be satisfied by the following:

14.02: continued

(a) District or Superior Court Supplementary Process; Writ of Execution. Submitting evidence to the fund administrator that a writ of execution for a monetary court judgment was served upon the contractor, or subcontractor by a constable or sheriff at the contractor's, or subcontractor's last known business address. In the alternative, evidence of attendance of a supplementary process hearing is sufficient.

(b) Small Claims Court Notice to Show Cause; Writ of Execution. If a claim is properly made before a small claims court, submitting evidence to the fund administrator that a writ of execution for a monetary court judgment was served upon the contractor, or subcontractor by a constable or sheriff at the contractor's, or subcontractor's last known business address. In the alternative submitting evidence to the fund administrator that a notice to show cause has been served upon the contractor, or subcontractor by a constable or sheriff at the contractor's, or subcontractor's last known business address, that the contractor, or subcontractor has failed to pay the claim and has failed to defend the claim.

(c) Bankruptcy. Submitting evidence to the fund administrator from the United States Bankruptcy Court confirming that the contractor, or subcontractor, or their estate, has filed for bankruptcy.

(d) Contractor or Subcontractor Fled Jurisdiction. Submitting evidence to the fund administrator that a service of court or arbitration order was attempted at all known addresses of the contractor, or subcontractor by a constable, sheriff, or agent of the state.

Designated Agent. A party any individual designated, in writing, to represent him or her. A designated party need not be an attorney.

Fund Administrator. The administrator of the Residential Contractor's Guaranty Fund, appointed by the director of the Office of Consumer Affairs and Business Regulation.

Guaranty Fund (including the term Fund). The Residential Contractor's Guaranty Fund established pursuant to M.G.L. c. 142A.

OCABR. The Office of Consumer Affairs and Business Regulation.

Owner (including the term Homeowner). Any owner of a pre-existing owner-occupied building which is an existing building at the time of a contract, containing at least one but not more than four dwelling units, or a tenant authorized by the homeowner thereof, who orders, contracts for, or purchases the services of a contractor or subcontractor. An owner occupying a condominium unit in a building containing no more than four dwelling units qualifies as an owner under 201 CMR 18.01(2): *Owner*; provided, however, that the owner owns a total of not more than four condominium units. A condominium association, a corporation, partnership, (incorporated or unincorporated), trust, charitable organization, or any other business entity does not qualify as an owner.

Owner-occupied. The residential building of at least one but not more than four dwelling units and occupied by the owner as a primary residence.

Person. Any individual, partnership, corporation, society, trust, association, or any other legal entity.

Registrant. Any person duly registered as a home improvement contractor or subcontractor under the provisions of M.G.L. c. 142A and 201 CMR 18.00: *Registration and Enforcement of Home Improvement Contractor Program* on the date of the contract with the owner.

Registration Number. The number assigned to the contractor or subcontractor after he or she has been approved for registration by the OCABR.

Residential Contracting. The reconstruction, alteration, renovation, repair, modernization, conversion, improvement, removal, demolition, or the construction of an addition to any pre-existing owner occupied building containing at least one but not more than four dwelling units, which building or portion thereof is used or designed to be used as a residence or dwelling unit, or to existing structures which are adjacent to such residence or building including, but not necessarily limited to: garages, sheds, cabanas, pool houses, gazebos.

14.02: continued

Request for Arbitration Form. The form provided by the director of OCABR to applicants filing for arbitration.

Subcontract. A contract, written or verbal, in any amount, between a home improvement contractor and a subcontractor or between two subcontractors for the performance of any part of the home improvement contractor's or subcontractor's contract.

Subcontractor. Any person other than a supplier of material or labor, who enters into a contract, written or verbal, with a contractor or subcontractor for the performance of any part of the contractor's contract, or who enters into a contract with any other subcontractor for the performance of any part of the subcontractor's contract, and who does not perform work other than as a subcontractor.

Unworkmanlike Manner. Materials that are used and methods which are employed that are of substandard, unreasonable, imprudent, or inadequate quality or are inconsistent with good construction practices; that materials used and methods employed are wholly or partially inaccurate or unacceptable in final appearance or function; or, that materials used and methods employed are unsafe or may result in an unsafe or non-functional final product.

14.03: Arbitration Requests

(1) List of Approved Arbitrators. The director of OCABR shall maintain a list of arbitrators who have been approved to arbitrate home improvement disputes under M.G.L. c. 142A and 201 CMR 14.00. Such list shall be public and shall be made available upon request.

(2) Arbitration Application. Any eligible party seeking arbitration pursuant to M.G.L. c. 142A of a home improvement dispute shall submit a request for arbitration to the OCABR on a form supplied by the OCABR.

(3) Application Requirements. To be eligible for arbitration, the request for arbitration must:

- (a) comply with 201 CMR 14.03(2);
- (b) be complete;
- (c) be for a one-to-four unit, owner-occupied residence or property located in Massachusetts;
- (d) include a narrative description of the problem;
- (e) involve a contractor or subcontractor, or in the case of a deceased contractor or subcontractor, their administrator, executor, or personal representative, registered with the OCABR as of the date of the contract;
- (f) include a copy of the written contract; and
- (g) include a monetary amount sought.

(4) Homeowner Arbitration Eligibility. If an applicant is a homeowner, the applicant is eligible for arbitration only if the contractor, or subcontractor is duly registered with the director of the OCABR and the parties have a written agreement and the request for arbitration complies with 201 CMR 14.03(3). The contractor or subcontractor may file a counterclaim.

(5) Contractor Arbitration Eligibility. If a registered contractor or subcontractor, or their administrator, executor, or personal representative files a request for arbitration, the parties' written agreement must contain an arbitration clause and must be separately signed and dated by the parties. If the arbitration agreement is not separately signed and dated by the parties, the contractor may pursue arbitration only with written permission by the homeowner. In such an event, the homeowner may file a counterclaim.

(6) Application Deadline. The OCABR must receive a request for arbitration within two years of the date of the contract signed by the registrant and the homeowner. A request for arbitration form shall be deemed timely filed if it is date stamped or postmarked within this time period.

(7) Arbitration Attendance. If an applicant's request for arbitration is accepted, the parties and their designated agents must attend the arbitration, except as provided in 201 CMR 14.13.

14.03: continued

(8) Eligible Places for Arbitration. All arbitration hearings must take place in a neutral location within a 50-mile radius of the residence or property in dispute, unless the parties agree otherwise.

(9) Parties to Arbitration. Absent a court order, only the homeowner or owner-authorized tenant and the registered contractor or subcontractor, their administrator, executor or personal representative, shall be parties to an arbitration conducted under M.G.L. c. 142A. The arbitrator and OCABR do not have authority to join third parties.

(10) Prohibition Against Consolidation. Absent a court order or the written approval of OCABR, the arbitrator shall not consolidate an arbitration case with another arbitration case.

(11) Tolling of Application Deadline. A request for arbitration must be filed within two years of the effective date of the contract between the parties. However, the two-year statute of limitations shall be tolled by the OCABR in those instances where an aggrieved homeowner enters into formal mediation proceedings or where equity so requires.

14.04: Role of OCABR

(1) Duties. The OCABR is responsible for the daily administrative duties of the program and for providing information to prospective applicants. These duties include, but are not be limited to, reviewing cases for technical acceptability; checking the status of the contractor or subcontractor to determine if he or she is registered with OCABR; collecting arbitration hearing fees; providing information to the parties prior to the hearing; providing recording devices for the hearing if applicable; providing training sessions for new arbitrators where necessary; reviewing arbitrators' decisions; acting on requests for technical corrections; providing recordings of the hearing if requested by the parties; providing statistical reports of the program; printing and distributing all applications and materials necessary to the program (except that OCABR will create the application form and provide a basic consumer information pamphlet for the program); and providing general recordkeeping functions.

(2) Document Retention. The OCABR shall retain any documents, tapes and materials involved in arbitrations for at least three years.

14.05: Processing of Request for Arbitration Forms

(1) Request Intake. The OCABR shall date-stamp and assign a case number upon receipt of a submitted request for arbitration form.

(2) Request Review. The OCABR shall review submitted request for arbitration forms for completeness and compliance with 201 CMR 14.03 within 14 business days of receipt.

(3) Notification of Status. The OCABR shall promptly provide written notice of the status of the request for arbitration:

(a) Eligibility. If the application satisfies the eligibility requirements, the eligibility notice shall include a conflict of interest form for listing any potential witnesses, attorneys, or other persons, that might appear on behalf of the parties. The form shall be provided to the arbitrator at the time of appointment to determine whether any conflicts of interest exist between the potential arbitrator and any of the parties to the arbitration case. Upon receipt of the conflict of interest form, OCABR shall appoint an arbitrator, and advise the claimant of the arbitration hearing fee due.

(b) Incomplete. Incomplete forms shall be returned to the applicant for completion. Such forms when completed must be received by OCABR within 30 business days or the applicant's period of eligibility for filing the request, whichever is later. OCABR may reject any request that is not timely filed.

(c) Ineligibility. If a request is rejected, a written statement of the reasons for the rejection shall be sent to the applicant promptly.

14.05: continued

(4) Hearing Fee. Within ten business days of the request for fee payment, the claimant must submit to OCABR the hearing fee in accordance with the fee schedule established by OCABR. Failure to timely remit the arbitration fee shall result in the dismissal of the defaulting party's claim.

(5) Counterclaim Deadline and Fee. All counterclaims must be submitted to OCABR within ten business days after notice from OCABR of acceptance of the case. The party filing a counterclaim must pay a fee in accordance with the fee schedule established by OCABR. The fee must be paid upon filing. In the absence of extraordinary circumstances, the arbitrator may grant a party no more than one seven business day extension of the time in which to respond to the demand for arbitration or to submit a counterclaim.

(6) Request Processing. Upon receipt of the hearing fee, OCABR shall send to both parties acknowledgment that the case has been accepted. The acceptance date shall trigger a 90 business day period in which the hearing must be held and all evidence must be presented.

(7) Rescission of Acceptance. The OCABR may rescind any acceptance of a request for arbitration granted in error because of incomplete or erroneous information or misrepresentation on the part of the applicant.

14.06: The Arbitrator

(1) Selection of Arbitrator. The OCABR shall appoint the arbitrator when the applicant is deemed eligible for arbitration. A single arbitrator shall conduct each hearing.

(2) No Party Approval Power. The choice of the arbitrator is not subject to the approval of either party.

(3) Lack of Bias Requirement. The arbitrator shall not have a personal interest in the outcome of any hearing, nor be acquainted with any of the participants except as such acquaintance may occur in the hearing process, nor hold any prejudice or bias toward any individual party or class of parties which might be involved in the proceedings.

(4) Disclosure of Conflicts. If an arbitrator is currently, or has been in the past, a contractor or subcontractor, either part-time or full-time, or if the arbitrator has been the claimant or respondent for any action pursuant to M.G.L. c. 142A, he or she must disclose this fact to the parties prior to the hearing. Either party may then request another arbitrator with a showing of good cause that the conflict will affect the arbitration outcome.

(5) Arbitrator Disqualification. If either party has a reasonable basis to believe that an arbitrator has violated either 201 CMR 14.06(3) or (4) that party may request that the arbitrator be disqualified by submitting the request in writing to the OCABR before the hearing if based on information known at that time. Any such request shall be submitted in writing to the OCABR no later than ten business days from the date the OCABR provides notice of the appointment of the arbitrator to the involved parties.

(6) Code of Ethics. The arbitrator shall be guided by the standards of ethical conduct established in *The Code of Ethics for Arbitrators in Commercial Disputes* prepared by a Joint Committee consisting of a Special Committee of the American Arbitration Association and a Special Committee of the American Bar Association.

14.07: Settlement by Submission of Documents for Claims of \$10,000 or Less

(1) Written Hearing Presumption. Where no party's claim exceeds \$10,000, exclusive of claimed interest and arbitration fees or costs, the dispute shall be resolved by submission of documents (hereinafter called a written hearing), unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. A party desiring an oral hearing must notify the OCABR and the opposing side within ten business days of the notice of acceptance of the case, or, in the event a counterclaim is timely filed, within five business days after notice of the arbitrator's acceptance of the counterclaim. After that time, an oral hearing may only be granted with the arbitrator's consent.

(2) Written Hearing Procedures. The written hearing shall conform to the following procedures:

(a) The parties submit in writing to the OCABR their respective contentions, including a sworn statement of facts, together with such proofs properly verified, as they wish to submit. Briefs or written arguments may also be submitted at this time.

(b) All such documents and proofs submitted by each party shall be filed with the OCABR no later than ten business days after the mailing of the notice by the OCABR calling for their filing. Failure of a respondent to submit documents and proof within the ten business day period shall be deemed a waiver of his or her right to reply subject to the arbitrator's discretion.

(c) All documents and proofs submitted by each party shall be sent to the other party and to the OCABR in duplicate.

(d) Each party may file one written reply to such statements and proofs within a period of ten business days from the date of the arbitration firm's letter to the parties requesting replies. Failure of any party to make such a reply within the specified period of time shall be deemed to be a waiver of the party's right to reply.

(e) When all of the statements, proofs and replies (if any) have been received by OCABR, they shall be transmitted to the arbitrator.

(f) The arbitrator shall examine the documents and request further evidence from either party, or both parties, if necessary, within ten business days of receipt. The documents submitted to the arbitrator and OCABR for the written hearing shall be the official record of the hearing. If the arbitrator does not request further evidence, the written hearing is declared closed at this time and the requirements of 201 CMR 14.15 and 14.16 apply.

(g) Either party may request, on no more than one occasion, that the arbitrator give a seven business day extension following the date of submission required by the arbitrator. Such request must be made prior to the date of submission and shall be granted only upon a showing of good cause.

14.08: Notification and Scheduling of Arbitration Hearing

(1) Preliminary Telephone Conference. The parties, their attorneys or representatives shall hold a preliminary telephone conference at a reasonable date soon after the appointment of the arbitrator, unless the arbitrator determines that a preliminary telephone conference is unnecessary, or unless the parties agree to dispense with the preliminary telephone conference and the arbitrator does not object to such dispensing. The preliminary telephone conference may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement.

(2) Place of Hearings. When scheduling hearings, the arbitrator shall attempt to accommodate the geographic and time-of-day needs of the parties.

(3) Weekday Presumption. Evening and weekend hours may be made available for hearings if justified and mutually agreed upon by the parties and the arbitrator.

(4) Notice of Arbitration Acceptance. Within seven business days after the acceptance of a request for arbitration form, OCABR shall mail notice thereof to the parties.

(5) Additional Claims and Amendments. Additional claims and amendments may not be submitted without leave from the arbitrator. Leave shall not be granted later than ten business days prior to the hearing.

14.08: continued

- (6) Notice of Hearing. The OCABR shall mail notice of the date, time, location of the hearing, and name of the arbitrator to both parties no later than 21 business days prior to the hearing, unless both parties agree to an earlier date acceptable to the arbitrator.
- (7) Hearing Date. The date of the hearing shall be fixed by the arbitrator and shall be within 90 business days of the acceptance of the request for arbitration form. The arbitrator may extend the 90 business day hearing period only upon a showing of extraordinary circumstances or upon the written consent of both parties.
- (8) Hearing Confirmation. The OCABR may call both parties to confirm the hearing date. A call placed within seven business days prior to the hearing shall constitute sufficient notice of the hearing should either party claim non-receipt of the notice provided for in 201 CMR 14.08(6).

14.09: Disclosure of Information

- (1) Document Disclosure and Settlement of Disputes. Each party shall provide to the other party any documents or information that he or she intends to present at the hearing no later than ten business days before the hearing including copies of all hearing exhibits. The arbitrator shall decide any disputes over the production of information.
- (2) Home Inspections by Registrant. Upon reasonable request by the registrant, if such request is received no later than seven business days prior to the scheduled date of the hearing, the homeowner shall permit the registrant to inspect his or her residence or property, whichever is the subject of the dispute. The homeowner shall have the right to be present at such inspection. The registrant shall use no tools other than diagnostic tools and shall not make any repairs or adjustments.
- (3) Prohibition Against Discovery. There shall be no discovery except as provided in 201 CMR 14.09(1) and 14.09(2), unless each party consents or unless discovery is ordered by the arbitrator for the following reasons:
 - (a) The arbitrator finds that the discovery is likely to be necessary to render a proper arbitration decision; or
 - (b) The arbitrator finds that the discovery is likely to be necessary for a party to present a material element of the case against the other party.
- (4) Additional Information Deadline. The parties shall comply with the arbitrator's requests for additional information within seven business days, or within such period as the arbitrator designates.
- (5) Inspections by Arbitrator. At either party's request, and if the arbitrator deems it appropriate, the arbitrator may view the residence or property that is the subject of the dispute. Upon reasonable notice to both parties, the arbitrator may view the site alone or he or she may be accompanied by both parties, their designated agent or by such person or persons whom he or she may deem necessary.
- (6) Representation by an Attorney. Any party represented by an attorney or other authorized agent must disclose the name, address and telephone number of the representative to OCABR, the arbitrator and the opposing side at least seven business days prior to the first scheduled hearing date or date for submission of documents as set forth in 201 CMR 14.09(1).
- (7) Correspondence Copies. Copies of all correspondence any party sends to the arbitrator or OCABR for the arbitrator after the acceptance of the request for arbitration shall be sent to the other party.

14.10: Rescheduling Arbitration Hearings

- (1) Rescheduling. Either party may request, in writing, to OCABR for the arbitrator on no more than one occasion, that the arbitrator reschedule the arbitration hearing. Such request must be made prior to the day of the hearing and shall be granted only upon a showing of good cause.
- (2) New Hearing Date. If a request for rescheduling is granted, the arbitrator shall record the date the request was received, and assign a new hearing date and location if at all possible falling within the original 90 business days period provided for in 201 CMR 14.08(7). The arbitrator shall notify both parties of the new date as soon as practical and by any means appropriate for the time then remaining before the hearing.
- (3) Good Cause Rescheduling. The arbitrator may reschedule any hearing for good cause. If at all possible, the new hearing date shall be within the original 90 business days period provided for in 201 CMR 14.08(7).
- (4) Notice of Rescheduled Hearing. The arbitrator shall notify both parties of the reason for the delay and the new date as soon as is practical.

14.11: Failure to Appear

- (1) Failure to Appear Default. If a party fails to appear at the hearing, the arbitrator may enter a finding by default against that party upon a determination that the appearing party has made a showing of sufficient facts to warrant an award.
- (2) Default Forgiveness. If the defaulting party, within ten business days after the hearing, demonstrates good cause to the arbitrator for failing to appear, the arbitrator may set aside the default. A new hearing may then be scheduled pursuant to 201 CMR 14.10(2) or a written hearing may be used to resolve the dispute pursuant to 201 CMR 14.07.
- (3) Failure to Appear Arbitration. An arbitration may proceed in the absence of any party or representative who has received due notice pursuant to 201 CMR 14.08(6) and (8), but fails to be present or fails to obtain a postponement.

14.12: Withdrawal

Arbitration Request Withdrawal. Either party may withdraw his or her request for arbitration at any time prior to the hearing by notice to the arbitrator and to the other party. Cases withdrawn at any time as a result of a settlement agreement between the parties may be refiled if either party fails to honor the settlement terms.

- (a) Withdrawals without Prejudice. A withdrawal received prior to the day of the hearing shall constitute a withdrawal without prejudice from the arbitration system. Cases must be refiled two months after the first voluntary withdrawal.
- (b) Withdrawals with Prejudice. A withdrawal received on or after the day of the hearing or as a result of a default without good cause shall be a withdrawal with prejudice and may not be refiled.
- (c) Non Refundable Arbitration Fee. If either party withdraws his or her request for arbitration at any time, the arbitration fee shall not be refunded.

14.13: The Hearing

- (1) Single Arbitrator. A single arbitrator shall preside over each hearing, unless otherwise determined by OCABR. The conduct of the hearing shall encourage a full and complete disclosure of the facts.

14.13: continued

- (2) Four Hour Hearing Limit. The hearing shall last no longer than four hours. If the arbitrator determines that additional time is necessary to obtain sufficient evidence to render an award, the arbitrator may extend the hearing time. The hearing may also be extended upon the agreement of each of the parties and the arbitrator. When a hearing is extended, the arbitrator may charge an hourly rate for the additional time, which will be equally shared by the parties. The arbitrator shall be required to account for the additional time in the final award. The arbitrator may not charge for site inspections and consultations and such fees will not be considered in calculating the four-hour hearing limit.
- (3) Arbitration Hearing Record. The arbitrator shall record the hearing. Said recording shall be the official record of the hearing and the parties may not make independent recordings of the hearing. Copies of the official recording may be obtained from OCABR for a nominal fee. The formal rules of evidence shall not apply.
- (4) Oath. The arbitrator shall administer an oath or affirmation to each individual who testifies.
- (5) Evidence Presentation. The parties may introduce any relevant evidence that will assist the arbitrator in making a decision. Unduly repetitious or clearly irrelevant evidence may be excluded. It shall, however, be in the arbitrator's sole discretion whether to allow such evidence.
- (6) Completeness Responsibility. Each party is responsible for presenting all his or her evidence in a concise manner on the day(s) of the hearing.
- (7) Questions of Opposing Party. The arbitrator shall allow each party to question the other after his or her presentation and shall allow questions of each witness after his or her testimony. The arbitrator may question any party or witness at any time.
- (8) Order of Hearing. The arbitrator shall determine the order of the hearing.
- (9) Oral Hearing Presumption. The hearing procedure presupposes that both parties and their designated agent will be present. However, within the arbitrator's discretion, either party may offer written testimony only, so long as the arbitrator and the other party are informed of such and are in receipt of the evidence at least seven business days prior to the day of the hearing. Written hearings shall be conducted pursuant to the procedures set out in 201 CMR 14.07(2).
- (10) Sworn Statement. All written testimony shall include a statement signed by the witness under oath that his or her testimony is true.
- (11) Discretionary Arbitrator Consultations. The arbitrator may consult with the building inspector or any other expert witness for technical advice or testimony. The arbitrator shall provide a report of any such consultation to all parties. The arbitrator may in his or her discretion allow rebuttal to the report.
- (12) Unmanageable Hearings. After a warning, the arbitrator may terminate any hearing that becomes unmanageable due to the behavior of either party and enter judgment by default against the party whose behavior made the hearing unmanageable.
- (13) Additional Good Cause Hearings. For good cause shown as determined by the arbitrator, the arbitrator may schedule one additional hearing after the initial hearing within a reasonable time period as determined by the arbitrator. The arbitrator shall charge an hourly rate for his or her time.
- (14) Non-compliance Orders. If either party fails to comply with 201 CMR 14.00, the arbitrator or OCABR shall make such orders as are just.

14.14: Determining Actual Loss

The calculation of Actual Loss for determining payments from the Guaranty Fund shall be measured by the following methods:

14.14: continued

- (1) Calculation When No Work Is Performed. If the contractor, or subcontractor abandoned the contract without doing any work, the actual loss shall be the amount the homeowner paid to the contractor, or subcontractor under the terms of the contract.
- (2) Calculation When Some of the Work is Performed. If the contractor, or subcontractor partially and properly completed some of the work which was agreed to under the terms of the contract, the actual loss shall be totalled by adding the amount of the reasonable cost of completing the contract and, if necessary, repairing the contractor's, or subcontractor's defective performance, and by subtracting the part of the contract price that has not been paid by the owner.
 - (a) Determination of Grossly Underbid Contracts. Upon a determination by the arbitrator or OCABR that the contractor, or subcontractor grossly underbid the contract with the result that competent workmanship to finish the contract will cost significantly more than the original contract price, the actual loss will not include the owner's cost to complete the contract.
 - (b) Calculation for Grossly Underbid Contracts. Upon such a determination, the actual loss shall be the amount which the owner paid to the contractor or subcontractor, minus the value of any work properly completed, minus the cost of any materials properly used, plus, if necessary, the cost to correct that portion of the contracted work that was improperly completed.
- (3) Calculation When All of the Work is Performed, but Performed Incorrectly. If the contractor, or subcontractor fully but improperly completed work that was agreed to under the terms of the contract, the actual loss shall be the amount required to correct the improperly completed work.

14.15: The Decision

- (1) Decision Deadline. The arbitrator shall submit an arbitration decision to OCABR no later than 14 business days from the date the hearing is closed, unless the arbitrator requests and is granted a reasonable extension by OCABR upon a showing of good cause. The OCABR shall mail a copy of the decision to both parties.
- (2) Form of Decision. The arbitrator shall insure that all decisions are in writing, dated and signed. The written decision shall contain a finding of facts, and a clear calculation of the monetary award if any. If the homeowner prevails, the written decision shall include the homeowner's actual loss, if any.
- (3) Payment of Registrant Counterclaims. If the contractor registrant prevails on a properly filed counterclaim, the arbitrator may require the homeowner to pay the contractor a monetary amount.
- (4) Limitations of Arbitration Award Content. Any monetary award may include contractual damages, consequential damages, arbitration fees, and punitive damages. No monetary award shall include attorney's fees.

14.16: Disputing the Arbitrator's Decision

- (1) Technical Corrections. "Technical correction" means a non-substantive computational correction, typographical correction or other minor correction. If a party contends that a technical correction is needed with respect to any award issued by an arbitrator, that party shall, within ten business days of the mailing date of the award, request in writing to OCABR that such a correction be made specifying the technical correction requested, and stating briefly the basis for the belief that the requested correction qualifies as a technical correction. Upon receipt of such written request, OCABR may itself make the technical correction or may submit the request to the arbitrator for his or her decision as to whether the requested change constitutes a technical correction. Such request shall not stop the running of the 21 day appeal of award period specified in M.G.L. c. 142A, § 4.

14.16: continued

(2) Appeals. A dissatisfied party may file an appeal within 21 days after the mailing date of the arbitrator's decision in superior or district court pursuant to M.G.L. c. 142A, § 4. The party requesting the appeal must notify OCABR if the appeal is allowed.

14.17: The Award

(1) Award Completion Deadline. All monetary awards must be paid within 21 business days of the mailing date of the award.

(2) Legal Status of Findings of Fact. An arbitrator's findings of fact shall be *prima facie* evidence in any subsequent appeal brought by either party ensuing from the matter considered in arbitration.

(3) Homeowner Award Confirmation Notice. A prevailing homeowner shall contact OCABR no sooner than 21 business days and no later than 30 business days after the mailing date of the arbitrator's decision to confirm whether the contractor or subcontractor, has complied with the award. If no such notice is received, OCABR shall contact the homeowner promptly. If the contractor or subcontractor has not complied with the award, OCABR may then notify the home improvement contractor, or subcontractor registration authority and the attorney general in order to recommend any appropriate sanction against the contractor, or subcontractor which may be available to assure compliance of the order.

(4) Extension of Award Compliance Deadline. For good cause shown, OCABR may extend the due date for compliance with the award for a reasonable period of time. Such extension shall not exceed ten business days from the original due date absent extraordinary circumstances. OCABR shall provide the extended due date and the reason for the extension to the parties in writing.

14.18: Establishment of the Guaranty Fund

(1) Establishment of the Guaranty Fund. Pursuant to M.G.L. c. 142A, there shall be established a Residential Contractor's Guaranty Fund within OCABR.

(2) Purpose of Fund. The purpose of the fund is to compensate eligible owners for actual losses as defined by 201 CMR 14.14 and M.G.L. c. 142A incurred as a result of a registrant's conduct which has been found by an approved arbitrator or a court of competent jurisdiction to be work which is:

- (a) performed in a poor or unworkmanlike manner;
- (b) a common law violation or a violation of any statute or regulation designed for the protection of consumers, including but not limited to M.G.L. c. 93A and prohibited acts listed in M.G.L. c. 142A, § 17.

(3) Fund Administrator. A Fund Administrator, appointed by the director of OCABR, shall be responsible for implementing the provisions of M.G.L. c. 142A and 201 CMR 14.00.

(4) Fund Claim Requirements. A homeowner may make a claim to the fund only if he or she has complied with the provisions of M.G.L. c. 142A, §§ 5 and 7 and has filed his claim with the fund within six months after the owner has obtained a judgment or arbitration award. All claims shall be filed within this six month period, even if the owner has not exhausted all collection efforts.

(5) Fund of Last Resort Requirements. Payment from the fund may not be made to the homeowner unless the owner has exhausted all such customary and reasonable efforts as defined in 201 CMR 14.02 to collect the judgment or award.

14.19: Contractor Fees to the Guaranty Fund

(1) Registrant Fees. Every person registered under M.G.L. c. 142A as a home improvement contractor, or subcontractor shall pay a fee to the Guaranty Fund with his or her application for registration.

(2) Fee Amounts. The amount of the fee shall be determined on a sliding scale based upon the number of persons in the registrant's employ at the time of the application as follows:

Number of Employees	Guaranty Fund Contribution
less than four	\$100
four to ten	\$200
11 to 30	\$300
more than 30	\$500

(3) Fee Refunds. If the home improvement contractor registration authority denies an application for registration, the registrant's payment to the Guaranty Fund shall be refunded.

(4) Presumption Against Multiple Fees. No registrant shall be required to pay the Guaranty Fund fee more than once unless the fund administrator makes a determination that the amount of the fund is insufficient to maintain it at a level commensurate with claims made against it.

(5) Annual Fee Limitation. No registrant shall be required to pay the Guaranty Fund fee more than once in any 12 month period.

(6) Additional Assessments. If the Fund Administrator determines that the amount of the fund is insufficient to maintain it at a level commensurate with claims made against it, after a public hearing and upon consultation with the Fund Administrator each registrant may be assessed an appropriate fee which shall not exceed the amount of the registrant's original assessment.

(7) Suspension for Non-payment. The Fund Administrator shall recommend that the registrant's registration be suspended if he or she fails to pay the required assessment to the Guaranty Fund within 30 days of submittal of registration application or notification of a reassessment, pursuant to 201 CMR 18.04(2)(a).

(8) Administrative Penalties. Administrative penalties assessed for violations of any provisions of M.G.L. c. 142A committed by registrants or unregistered contractors shall be deposited into the Guaranty Fund. *See* 201 CMR 18.04 (1) and (2).

14.20: Duties of Fund Administrator

(1) Notice to Contractor. No less than 30 days prior to the payment of a claim, and again when a claim has been paid, the Fund Administrator shall provide written notice to the contractor, or subcontractor, or their administrator, executor or personal representative, found responsible for the claim that such payment will be, or has been made. The notice shall be sent to the last known address of the contractor, or subcontractor by certified mail, return receipt requested, and shall include information about the contractor's or subcontractor's responsibility to reimburse the fund as well as any sanctions which may be imposed pursuant to M.G.L. c. 142A for non-payment. In the case of a deceased contractor, or subcontractor, notice shall be sent to the contractor, or subcontractor's administrator, executor, or personal representative.

(2) Fund Reimbursement. When a payment from the fund is awarded to an owner as a result of a claim against a registered contractor or subcontractor, the Fund Administrator shall, at his or her discretion:

- (a) require the contractor or subcontractor to reimburse the fund in full within 30 days of notification that a claim has been paid; or
- (b) initiate an agreement with the contractor, or subcontractor allowing said contractor, or subcontractor to reimburse the fund by installment, the frequency and amount of which shall be determined by the Fund Administrator.

14.20: continued

(c) 201 CMR 14.20 does not pertain to cases where the contractor filed for bankruptcy.

(3) Revocations of Registration for Non-reimbursement. If the contractor or subcontractor fails to reimburse the fund pursuant to 201 CMR 14.20(2), the Fund Administrator shall recommend that the contractor's, or subcontractor's registration be revoked pursuant to M.G.L. c. 142A, § 8 and 201 CMR 18.00: *Registration and Enforcement of Home Improvement Contractor Program.*

(4) Non-reimbursement-notification to the Attorney General. If the registrant does not reimburse the amount paid from the fund, plus interest, according to the terms as set forth by the Fund Administrator pursuant to 201 CMR 14.20(2), the Fund Administrator may notify the Attorney General who shall be authorized to initiate legal proceedings in superior court against said contractor or subcontractor for failure to reimburse the fund pursuant to M.G.L. c. 142A, § 8.

(5) Non-reimbursement-ineligibility of Contractor to Receive Registration. If a contractor's, or subcontractor's registration is revoked pursuant to M.G.L. c. 142A, § 15(b), the contractor, or subcontractor will not be eligible to receive a new or renewed registration or to operate under another registration until the entire amount of the claim, plus a reasonable amount of interest to be determined by the Fund Administrator, has been repaid to the fund in full, beginning from the time said claim was disbursed from the fund.

(6) Fund Administrator Reports. The Fund Administrator shall provide a written report to the director of OCABR on a semiannual basis relative to the fund. Said report shall: provide general information about the fund, including, but not limited, to investment and interest income, liquidity of funds, contractor contributions, claims and other disbursements paid from the fund relative to the health of the fund, and any recommendations pertaining to maintaining the solvency of the fund. Said report shall be made available to the general public upon request.

14.21: Payments from the Guaranty Fund

(1) Award Amounts. The Fund Administrator may award:

- (a) to any claimant no more than \$10,000 or the amount necessary to compensate the claimant for his or her actual loss, whichever is less; and
- (b) no more than \$75,000 per 12 month period in aggregate claims which are the result of a single registrant's actions pursuant to M.G.L. c. 142A, unless the registrant has repaid the fund for the full amount required pursuant to M.G.L. c. 142A, § 8; provided, however, that it is within the discretion of the fund administrator to waive the limit of aggregate claims with cause.

(2) Registered Contractor Requirement. Payments from the fund may only be awarded to an "Owner" who entered into a written contract with a registered contractor, or subcontractor, as defined in 201 CMR 14.02.

(3) Unregistered Contractors. Payments from the fund may not be awarded in cases where the home improvement contractor, or subcontractor, was unregistered on the date of the contract.

(4) Building Permit Requirement. Payments from the fund may not be awarded to an owner who secured his or her own building permit for the contracted work in dispute unless the contractor, or subcontractor failed to inform the homeowner, as required by M.G.L. c. 142A, § 2, that homeowners who secure their own permits will be so excluded from the fund.

(5) Actual Loss Payments. Payments from the fund may only be awarded for actual losses as defined by 201 CMR 14.14 and M.G.L. c. 142A and may not be awarded for consequential or punitive damages, personal injury, attorney's fees, court or arbitration costs or interest.

(6) Required Process. Payments from the fund may be awarded to an owner only if he or she has brought an action to enforce any provision of M.G.L. c. 142A in court or, in the alternative, through the state approved arbitration program as outlined in 201 CMR 14.00, and has exhausted all such customary and reasonable efforts to collect the judgment or award, and has filed his or her claim within the six month statutory period pursuant to 201 CMR 14.18(4).

14.21: continued

(7) Application. Payments from the fund may be awarded to an owner only after the fund administrator receives a completed application form provided by OCABR.

(8) Additional Application Documents. Accompanying the application form, the homeowner shall submit a copy of any court or arbitration judgment obtained against the registrant including findings of fact and conclusions of law, if any. In addition, a notarized affidavit signed and sworn to by the homeowner shall be submitted, affirming that:

- (a) he or she has complied with all the requirements of M.G.L. c. 142A;
- (b) he or she has obtained a court judgment or arbitration finding;
- (c) all or some specified portion of the court judgment or arbitration finding remains unpaid;
- (d) all required evidence has been submitted demonstrating that the claimant has exhausted customary and reasonable efforts to collect.

(9) Application Review. Upon receipt by OCABR of the application with all required attachments and notarized affidavit, the Fund Administrator shall inspect all documents for their veracity. If the Fund Administrator determines that said documents verify that the owner has exhausted all customary and reasonable efforts to collect the award without success, the fund administrator may order payment out of the Guaranty Fund for the amount of the owner's actual loss.

(10) Six Month Application Deadline. Payments from the fund may be awarded only if the Fund Administrator receives an application from the claimant within six months of the date upon which a court judgment or arbitration finding was issued against the registrant.

(11) Claims Procedure for Exhausted Fund. If at any time the money deposited in the fund is insufficient to satisfy the approved claim or portion thereof, the Fund Administrator, when sufficient money has been deposited in the fund, shall satisfy the unpaid claims or portions thereof in the order that the claims were originally filed.

(12) Court Judgment or Arbitration Award Requirement. A court judgment or arbitration award required by M.G.L. c. 142A, § 5 and 201 CMR 14.00 may be satisfied by presenting to the Fund Administrator the following:

- (a) documentation from United States Bankruptcy Court confirming that:
 1. the contractor's debts have been discharged;
 2. the bankruptcy case has been closed; and
 3. the homeowner is precluded by the Bankruptcy Court from pursuing a court judgment or arbitration award against the contractor or subcontractor;
- (b) proof of the existence of a valid cause of action arising out of the improvement of an owner-occupied, one-to-four family residential home by a registered contractor or subcontractor for conduct alleged to be work performed in a poor or unworkmanlike manner which is a common law violation or a violation of any statute or regulation designed for the protection of consumers;
- (c) evidence that the claim was presented within two years and six months of the date the contract was signed by the parties;
- (d) proof of actual loss calculated pursuant to M.G.L. c. 142A and 201 CMR 14.14.

(13) Court Judgment or Arbitration Award Requirement in Cases of a Deceased Contractor. A court judgment or arbitration award required by M.G.L. c. 142A § 5 and 201 CMR 14.00 may be satisfied by presenting to the Fund Administrator the following:

- (a) a copy of the deceased contractor's death certificate;
- (b) proof of the existence of a valid cause of action arising out of the improvement of an owner-occupied, one-to-four family residential home by a registered contractor or subcontractor for conduct alleged to be work performed in a poor or unworkmanlike manner which is a common law violation or a violation of any statute or regulation designed for the protection of consumers;
- (c) proof of actual loss calculated pursuant to M.G.L. c. 142A and 201 CMR 14.14; or
- (d) notice of claim form filed in Probate Court within one year of contractor, or subcontractor's death.

14.21: continued

(14) Administrator's Decision on Homeowner Eligibility. The Fund Administrator shall hold a written hearing to consider the evidence and render a decision on the homeowner's eligibility for reimbursement from the Fund, pursuant to 201 CMR 14.07.

14.22: Miscellaneous

(1) OCABR Arbitration Oversight. The OCABR shall maintain oversight responsibility to promote the fairness and efficiency of the private arbitration services program.

(2) OCABR Advisory Opinions. The director of OCABR may from time to time develop internal guidelines for the operation of the private arbitration services program and may issue advisory opinions.

(3) Waiver. The director of OCABR may, in his or her sole discretion, waive any of 201 CMR 14.00, if such waiver would be in the public interest and would further the purpose or intent of the private arbitration services program or guaranty fund

(4) Non-preclusion of Additional Remedies. A claim to the Guaranty Fund shall not limit the availability of other legal or equitable remedies unless the claim made is for the full amount of the value of the work claimed as damages, in which case the registrant, upon repayment to the fund, may use repayment as a defense *via* settlement.

REGULATORY AUTHORITY

201 CMR 14.00: M.G.L. c. 142A and c. 9.