

**PART 21
PROTESTS AND DISPUTES**

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21.1 GENERAL DISCUSSION.

21.1.1 General Policies.

POLICY: It is BPA policy to pursue its purchasing activities in a reasonable, commercial manner. This includes taking actions that treat actual and potential offerors, as well as contractors, in a reasonable and equitable manner. The procedures and remedies provided for disagreements

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with BPA depend on the action(s) being disputed. For disagreements involving BPA's actions relating to the contract solicitation or award, a potential or actual offeror may file a protest pursuant to section 21.2 of the BPI. For disagreements involving BPA actions relating to matters arising under or relating to the contract, a contractor may file a claim pursuant to section 21.3 of the BPI. BPA will conduct its response to any protest of claim in accordance with this Part 21 of the BPI.

21.1.2 Applicable Law.

POLICY: Procurement contracts entered into by BPA, a federal agency, are subject to, construed under, and interpreted according to federal procurement law of the United States. Where there is no applicable federal procurement law, the laws of the State of Oregon apply.

21.1.2.1 Clause Usage Prescription.

POLICY: The CO shall insert clause 21-5, Applicable Law in all solicitations and contracts.

21.2 PROTESTS.

21.2.1 Authorities.

POLICY: In accordance with Executive Order 12979, 3 C.F.R. 417 (1996), reprinted as amended in 41 U.S.C. §253b, notes at 432 (2008) and pursuant to section 2(f) of the Bonneville Project Act (16 U.S.C. § 832a(f)), the Chief Executive Officer has developed procedures, as contained in this chapter, for resolving protests at the agency level as an alternative to more formal processes outside of the agency. The authority to review and decide protests within the agency has been delegated to the Head of the Contracting Activity (HCA) under BPAM Chapter 20. The HCA has established protest policy and procedures for acquisitions subject to the Bonneville Purchasing Instructions (BPI), as set forth in this subpart 21.2.

21.2.2 Definitions.

INFORMATION: As used in this part –

"Interested party" means an actual or prospective offeror whose direct economic interest would be affected by the award of or failure to award a particular contract.

"Protest" means a written objection by an interested party to (1) the solicitation or other requests for a contract; (2) the cancellation of such solicitation or request; (3) an award or proposed award of a contract; or (4) improprieties in the cancellation or termination of the award or proposed award of a contract for the acquisition of supplies, services and construction by BPA.

"Protester" means an interested party who has filed a formal, written protest with the HCA.

"Solicitation" means a Request for Offers issued by BPA.

21.2.3 Pre-Protest Resolution.

POLICY:

(a) It is BPA policy to attempt resolution of issues in controversy by mutual agreement at the CO level. Prior to submission of an agency protest, the parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

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(b) Upon notification by an interested party of its objection, the CO shall seek legal advice from OGC. After consultation with OGC, the CO shall promptly arrange to conduct discussions with the interested party. The CO shall advise the interested party that the discussions are intended to clarify issues, remove misunderstandings, informally resolve the objections, and to remind the interested party of its protest rights (see Clause 21-1, Protests Against Award).

(c) In the event the objection has not been resolved, the CO shall provide the interested party with a copy of this subpart, which explains the processes for protest to the HCA.

(d) The CO shall document in the file all communications with an interested party related in any manner to potential or actual objections or protests. The date that discussions are terminated, and by whom, shall be documented.

21.2.4 Filing Protests with the General Accounting Office or the Court of Federal Claims.

POLICY: It is BPA policy to attempt to resolve any protest at the agency level instead of resolving protests before the General Accounting Office (GAO) or the Court of Federal Claims. Nevertheless if an actual or potential offeror elects to pursue a protest before the GAO or Court of Federal Claims, it must provide BPA with two copies of its complete protest and any other materials filed in these venues. Such copies shall be sent to (1) the Contracting Officer and (2) the HCA within one day of filing with the GAO.

21.2.5 GAO Recommendation.

POLICY: The HCA, in consultation with and on advice from the CO and OGC, shall review and consider GAO's recommendations. The HCA shall determine BPA's implementation of the GAO recommendation and shall direct the CO on required actions. If GAO recommends that the agency pay the protestor's costs, the CO shall use best efforts to reach an agreement on those costs.

21.2.6 Filing of Protest to the HCA.

PROCEDURE:

(a) An interested party may file a written protest with the BPA HCA. Protests based on alleged improprieties in a solicitation shall be received before the closing date for receipt of proposals. In all other cases, protests shall be received no later than 10 calendar days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely received.

(b) The protest shall contain: (1) the name and address of the protester; (2) identity of the CO and the solicitation or contract involved; (3) all facts relevant to, and grounds or basis in support of the protest; and (4) a request for a specific decision or remedy by BPA.

(c) The HCA shall immediately send an acknowledgment of any written protests received to the protester along with a statement that filing a protest with BPA will not toll any deadlines required by GAO or the Court of Federal Claims. The HCA shall also request from the involved CO a complete written statement which fully explains BPA's position. However, where the protest fails to comply with the requirements in (a) or (b) above, or is patently without merit, the HCA may dismiss the protest without requesting a statement from the CO.

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(d) Interested parties may file a Freedom of Information Act (FOIA) request with BPA's Information Officer to receive copies of requested documents relating to their protest action.

21.2.7 Award Pending Protest Resolution.

PROCEDURE: Generally, a contract shall not be awarded until the HCA or GAO has resolved a pending protest. However, in any instance where the CO determines, for good cause, that award should be made before a decision is rendered on the protest, the CO shall prepare a written statement justifying the award for the approval of the HCA. When relevant, the statement shall include information pertaining to considerations (1) through (5) in 21.2.9(a). On the basis of this statement and other considerations, including those listed in 21.2.9(a) which may be applicable, the HCA may approve the award. Upon receipt of approval by the HCA, the CO may proceed with award.

21.2.8 Protest Received After Award.

PROCEDURE:

(a) When a protest is received by the HCA or GAO after contract award, the HCA shall notify the interested parties of the protest. The HCA shall also notify the awardee that performance under the contract may be temporarily suspended if necessary.

(b) If filed with the HCA or GAO, the standard of review for determining if a stay of performance is appropriate is whether (1) the performance is in the best interest of the government or (2) urgent and compelling reasons, as set forth in 31 U.S.C.§3553(c) and (d). The HCA shall determine if a stay of performance is appropriate.

21.2.9 CO Responsibilities.

PROCEDURE:

(a) Within five working days of HCA request, the CO shall submit a statement to the HCA. The CO's statement shall record whether or not informal discussions were held with the protester and when they were terminated, and provide a brief summary of the issues discussed. It shall also contain a timeline of events, including the dates of the solicitation, amendments thereto, negotiations, other notifications to interested parties, extensions requested or granted, and the award. Each of the issues addressed by the protester shall be specifically answered, and the CO's position clearly stated and supported by facts. The statement shall be accompanied by appropriate supporting documentation including, but not limited to:

- (1) Evaluations;
- (2) Document of Award Decision;
- (3) Relevant portions of proposals;
- (4) Other relevant data or correspondence submitted by the protester; and
- (5) Correspondence from other parties relating to the protest.

(b) The CO, when directed by the HCA, shall request an extension of acceptance of offer time. Any other communications with interested parties shall be through the HCA or through OGC.

(c) The CO shall seek the advice of the HCA regarding the request of any party for payment of costs incurred in connection with protests of solicitations or contract awards, or the defense

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against protests of such solicitations or contract awards. Pursuant to paragraph (b), Clause 21-1, Protests Against Award, such costs are allowable, only when the costs incurred in connection with protests of solicitations or contract awards, or in defense of a protest are incurred pursuant to a written request from the CO.

21.2.10 Agency Decision on the Protest.

PROCEDURE:

(a) Upon receipt of a written protest and a complete statement from the CO as described under 21.2.9(a) the HCA, as the agency decision-maker, shall decide the protest, and so advise the protester, CO and all other interested parties in writing. The notification to the protester will be in writing and will be sent by any method which will obtain a receipt for delivery. The HCA's decision will include the grounds for the decision.

(b) The HCA shall consider and balance the needs of BPA with the requirement of fairness to all interested parties. The HCA shall determine the appropriate agency action, which may include recompeting the requirement, reevaluating the offers, upholding the original award decision, terminating the contract, or other such actions as the HCA deems appropriate.

(c) The CO shall place a copy of the HCA's decision in the official file..

21.2.10.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall insert clause 21-1, Protests Against Award, in solicitations exceeding \$100,000.

21.2.11 Other Protests.

PROCEDURE: There are no formal procedures for resolution of protests against transactions less than \$100,000, or for protest for contracts for commercial supplies and/or services, including construction. The CO shall attempt to resolve any such protests. However, if this is not possible, the HCA will decide all such protests.

21.3 CONTRACT DISPUTES.

21.3.1 Definitions.

INFORMATION: As used in this part –

“Accrual of claim” means the date when all events that fix the alleged liability of either BPA or the contractor and permit assertion of the claim were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

“Alternative dispute resolution (ADR)” means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudsmen.

“Civilian Board of Contract Appeals (CBCA)” means the board of contract appeals with jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency under P.L. 109-163, section 847. The Department of Energy Board of Contract Appeals was terminated effective January 6, 2007 by this provision. This Board has been consolidated with the

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Department of Agriculture, General Service Administration, Department of Housing and Urban Development, Department of Interior, Department of Labor, Department of Transportation and Department of Veterans Affairs Boards of Contract Appeals into the new Civilian Board of Contract Appeals.

“Claim” means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Contract Disputes Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the CDA. The submission may be converted to a claim by complying with the submission and certification requirements of this part, if it is disputed as to liability or amount or is not acted upon in a reasonable time.

“Defective certification” means a certificate which alters or otherwise deviates from the language in 21.3.7, or which is not executed by a person duly authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed a defective certification.

“Issue in controversy” means a material disagreement between BPA and the contractor that:

- (1) May result in a claim; or
- (2) Is all or part of an existing claim.

“Misrepresentation of fact” means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter at hand, made with intent to deceive or mislead.

21.3.2 Disagreements Relating to Contractor Performance Evaluation.

POLICY:

(a) Contractor inquiries on performance evaluations should be handled in a prompt, courteous and helpful manner. Informal debriefings are the preferred means to provide resolution to any contractor concerns.

(b) Explanations of performance evaluations should clearly set forth the factual basis of the COs decision, and may be done orally or in writing. In those cases where there is disagreement on factual matters or allegations that the CO’s judgment is arbitrary or capricious, the CO should advise the contractor to refer the issue to the HCA. The HCA will not review matters solely related to the application of the CO’s business judgment.

(c) BPA will not provide information in response to inquiries about disputes concerning performance evaluations relating to other contractors. Contractors making such inquiries should be advised that BPA will not respond except to the extent required under FOIA (See Subpart 5.2).

21.3.3 Contract Disputes Act.

POLICY:

(a) BPA’s policy is to try to resolve all contractual issues in controversy by mutual agreement at the CO level. Reasonable efforts should be made to resolve controversies prior to submission of a claim. BPA encourages the use of ADR procedures to the maximum extent practicable. Any agreement between the parties to pursue binding arbitration shall comply with BPA’s arbitration

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policy, "Bonneville Power Administration's Guidance for the Use of Binding Arbitration for BPA Contracts," dated October 9, 2009.

(b) This Part 21.3 implements BPA's compliance with the Contract Disputes Act of 1978 (CDA), as amended (41 U.S.C. § 601-613), which establishes procedures and requirements for asserting and resolving claims subject to the CDA. In addition, the CDA provides for:

- (1) The payment of interest on contractor claims;
- (2) Certification of contractor claims;
- (3) A civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

21.3.4 Applicability.

POLICY:

(a) Except as specified in paragraph (b) of this section, this part applies to any express or implied contract covered by the BPI.

(b) This subpart does not apply to any contract with a foreign government or agency of that government, or an international organization or a subsidiary body of that organization, if the HCA determines that the application of the CDA to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to CO decisions on matters "arising under" or "relating to" a contract. Clause 21-2 recognizes the "all disputes" authority established by the CDA and states certain requirements and limitations of the CDA for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the CDA or to constrain the authority of the CBCA in the handling and deciding of the contractor appeals under the CDA.

21.3.5 Reserved.

21.3.6 Initiation of a Claim.

PROCEDURE:

(a) Contractor claims shall be submitted, in writing, to the CO for a decision within six years after the accrual of a claim, unless the contracting parties agreed to a shorter time period. This six year time period does not apply to contracts awarded prior to October 1, 1995. The CO shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the CO.

(b) The CO shall issue a written decision on any BPA claim against a contractor within six years after accrual of the claim, unless the contracting parties have agreed to a shorter time period. The six year period shall not apply to contracts awarded prior to October 1, 1995, or to a BPA claim based on a contractor claim involving fraud.

21.3.7 Contractor Certification.

PROCEDURE:

(a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding \$100,000.

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(b) The certification requirement shall not apply to issues in controversy that have not been submitted as all or part of a claim.

(c) The certification shall state as follows:

“I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes BPA is liable; and that I am duly authorized to certify the claim on behalf of the contractor.”

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met.

(e) The certification may be executed by any person duly authorized to bind the contractor with respect to the claim.

(f) A defective certification shall not deprive a court or the CBCA of jurisdiction over that claim. Prior to entry of a final judgment by a court or a decision by the CBCA, however, the court or CBCA shall require a defective certification to be corrected.

21.3.8 Interest on Claims.

PROCEDURE:

(a) BPA shall pay interest on a contractor's claim on the amount found due and unpaid from the date that the CO receives the claim (certified if required by 21.3.7).

(b) Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the CDA, which is applicable to the period during which the CO receives the claim and then at a rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(c) With regard to claims having defective certifications, interest shall be paid from the date that the CO initially receives the claim.

21.3.9 Suspected Fraudulent Claims.

PROCEDURE: If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the CO shall refer the matter to the Office of General Counsel through the HCA.

21.3.10 Contracting Officer's Authority.

POLICY: Except as provided in this section, COs are authorized, within the specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the CDA (see BPI 2.2.2.). In accordance with BPI policy in 21.3.14, COs are authorized to use ADR procedures to resolve claims. The authority to decide or resolve claims does not extend to:

- (1) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or
- (2) The settlement, compromise, payment, or adjustment of any claim involving fraud.

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21.3.11 Contracting Officer's Decision.

PROCEDURE:

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the CO shall:

- (1) Review the facts pertinent to the claim;
- (2) Secure assistance from the HCA, OGC, and other advisors;
- (3) Coordinate with the appropriate program office contacts; and
- (4) Prepare a written decision that shall include:
 - (A) a description of the claim or dispute;
 - (B) a reference to the pertinent contract terms;
 - (C) a statement of the factual areas of agreement and disagreement;
 - (D) a statement of the CO's decision, with supporting rationale; and
 - (E) paragraphs substantially similar to the following:

"This is the final decision of the CO. You may appeal this decision to the Civilian Board of Contract Appeals (CBCA). If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the CBCA and provide a copy to the CO from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

"With regard to appeals to the CBCA, you may, solely at your election, proceed under the Board's:

1) Small claim procedure for claims of \$50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less; or

2) Accelerated procedure for claims of \$100,000 or less.

"Instead of appealing to the CBCA, you may bring an action directly in the United States Court of Federal Claims within 12 months of the date you receive this decision"; and

- (5) Prepare, when appropriate, a demand for payment prepared as follows:
 - (A) A description of the debt owed by the contractor to BPA, including the debt amount;
 - (B) The basis for an amount of any accrued interest or penalty;
 - (C) For debts resulting from specific contract terms (e.g., debts resulting from incentive clause provisions, Cost Accounting Standards, price reduction for

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defective pricing), a notification stating that payment should be made promptly, and that interest is due in accordance with the terms of the contract. Interest shall be computed from the date specified in the applicable contract clause until repayment by the contractor. The interest rate shall be the rate specified in the applicable contract clause. In the case of a debt arising from a price reduction for defective pricing, or as specifically set forth in a Cost Accounting Standards (CAS) clause in the contract, interest is computed from the date of overpayment by the Government until repayment by the contractor at the underpayment rate established by the Secretary of the Treasury, for the periods affected, under 26 U.S.C. § 6621(a)(2).

(D) For all other contract debts, a notification stating that any amounts not paid within 30 days from the date of the demand for payment will bear interest. Interest shall be computed from the date of the demand for payment until repayment by the contractor. The interest rate shall be the interest rate established by the Secretary of the Treasury, as provided in Section 611 of the Contract Disputes Act of 1978 (Public Law 95-563), which is applicable to the period in which the amount becomes due, and then at the rate applicable for each six-month period as established by the Secretary until the amount is paid.

(6) Prepare a statement advising the contractor—

(A) To contact the contracting officer if the contractor believes the debt is invalid or the amount is incorrect; and

(B) If the contractor agrees, to remit a check payable to the agency's payment office annotated with the contract number along with a copy of the demand for payment to the payment office identified in the contract or as otherwise specified in the demand letter in accordance with agency procedures.

(7) Notification that the payment office may initiate procedures, in accordance with the applicable statutory and regulatory requirements, to offset the debt against any payments otherwise due the contractor.

(8) Notification that the debt may be subject to administrative charges in accordance with the requirements of 31 U.S.C. § 3717(e) and the Debt Collection Improvement Act of 1996.

(9) Notification that the contractor may submit a request for installment payments or deferment of collection if immediate payment is not practicable or if the amount is disputed.

(b) The CO shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement shall apply to decisions on claims initiated by or against the contractor.

(c) The CO shall issue the decision within the following statutory time limitations:

(1) For claims of \$100,00 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over \$100,000, 60 days after receiving a certified claim; provided, however, that if a decision will not be issued within 60 days, the CO shall notify the contractor, within that period, of the time within which a decision will be issued.

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(d) The CO shall issue a decision within a reasonable time, taking into account:

- (1) The size and complexity of the claim;
- (2) The adequacy of the contractor's supporting data; and
- (3) Any other relevant factors.

(e) The CO shall have no obligation to render a final decision on any claim exceeding \$100,000 which contains a defective certification, if within 60 days after receipt of the claim, the CO notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) Any failure of the CO to issue a decision within the required time periods will be deemed a decision by the CO denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(g) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

21.3.12 Contracting Officer's Duties upon Appeal.

PROCEDURE: To the extent permitted by any agency procedures controlling contacts with CBCA personnel, the CO shall provide data, documentation, information, and support as may be required by the CBCA for use on a pending appeal from the CO's decision.

21.3.13 Obligation to Continue Performance.

(a) **POLICY:** In general, before passage of the CDA, the obligation to continue performance applied only to claims arising under the contract. However, at 41 U.S.C. § 605(b), the CDA authorizes agencies to require a contractor to continue contract performance in accordance with the CO's decision pending final resolution of any claim arising under, or relating to, the contract. A claim arising under a contract is a claim that can be resolved under a contract clause, other than the disputes clause that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the disputes clause. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the disputes clause. This distinction is recognized by the disputes clause at 21-2(i).

(b) **PROCEDURE:** In all contracts that include the disputes clause (21-2), in the event of a dispute not arising under, but relating to, the contract, the CO shall consider providing, through appropriate procedures, financing of the continued performance; provided, that BPA's interest is properly secured.

21.3.14 Alternative Dispute Resolution.

INFORMATION:

The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include:

- (1) Existence of an issue in controversy;
- (2) A voluntary election by both parties to participate in the ADR process;

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(3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and

(4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

PROCEDURE:

(a) Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use alternative means of dispute resolution under CDA.

(b) When appropriate, a neutral person may be used to facilitate resolution of an issue in controversy using procedures chosen by the parties. These procedures are commonly referred to as Alternative Dispute Resolution, or "ADR," and include evaluation, negotiation, mediation, as well as binding arbitration.

(c) The confidentiality of ADR proceedings shall be protected consistent with 5 U.S.C. § 574. These procedures may include evaluation, negotiation, and mediation as well as binding arbitration.

(d) If the CO rejects a contractor's request for ADR proceedings, the CO shall provide the contractor a written explanation citing one or more of the conditions as specified in the BPAM or, if the request is for binding arbitration, such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of BPA for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(e) ADR procedures may be used at any time that the CO has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may be applied to all or a portion of the claim. When ADR procedures are used subsequent to the issuance of a CO's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the CO's final decision and does not constitute a reconsideration of the final decision.

21.3.15 Binding Arbitration.

PROCEDURE: As used in ADR:

(1) A solicitation shall not require binding arbitration as a condition of award, unless binding arbitration is otherwise required by law. COs have flexibility in selecting the appropriate ADR procedure to resolve the issues in controversy as they arise.

(2) Binding arbitration, as an ADR procedure, may be agreed to only after consultation and approval of BPA's Office of General Counsel.

(3) An agreement to use binding arbitration shall be negotiated and drafted by OGC, and shall specify a maximum award that may be issued by the arbitrator, as well as any other conditions limiting the range of possible outcomes.

21.3.15.1 Clause Usage Prescriptions.

PROCEDURE:

(a) The CO shall include Clause 21-2, Disputes, in solicitations and contracts unless the conditions in 21.3.4 apply.

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21.50 TEXT OF CLAUSES.

Clause 21-1	Protests Against Award
Clause 21-2	Disputes
Clause 21-3	Reserved
Clause 21-4	Release of Claims
Clause 21-5	Applicable Law

Clause 21-1 PROTESTS AGAINST AWARD (Aug 11)(BPI 21.2.10.1)

(a) Interested parties agree that any protest against award will be filed with the BPA Head of the Contracting Activity prior to filing with any other forum, pursuant to 16 U.S.C. § 832a(f) and Subpart 21.2 of the Bonneville Purchasing Instructions.

(b) Interested parties who are unable to resolve disagreements informally with the Contracting Officer may send a formal, written protest to the Head of the Contracting Activity. In order to be considered by the Head of the Contracting Activity, a protest based on alleged apparent improprieties in a solicitation shall be received before the closing date for receipt of proposals. In all other cases, protests shall be received no later than 10 calendar days after the basis of protest is known or should have been known, whichever is earlier.

(c) The protest shall contain: (1) the name and address of the protester, (2) the identity of the contracting officer and the solicitation or contract involved, (3) all facts relevant to and grounds in support of the protest, and (4) a request for a specific ruling by BPA. It shall be sent to: Head of the Contracting Activity, Bonneville Power Administration, P. O. Box 3621, Portland, Oregon 97208 (Street Address: 905 N. E. 11th Avenue, Portland, OR 97232).

(d) For protests filed with the General Accountability Office (GAO), two copies shall be served on the BPA by obtaining written and dated acknowledgement of receipt. The copies of the protest and all other materials filed shall be received in the BPA CO's office and in the HCA's office, respectively, within one day of filing a protest with the GAO.

(End of clause)

Clause 21-2 DISPUTES (May 11)(BPI 21.3.15.1)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. § 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d) (1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within six years after accrual of the claim to the Contracting Officer for

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a written decision. A claim by BPA against the Contractor shall be subject to a written decision by the Contracting Officer.

- (2) (i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.
(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.
(iii) The certification shall state as follows:

“I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes BPA is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.”

- (3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For contractor-certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by BPA is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) BPA shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if the date is later, until the date of payment. With regard to claims having defective certifications, as defined in BPI 21.3.1, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Secretary of the Treasury during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

(End of clause)

Clause 21-3 RESERVED

Clause 21-4 RELEASE OF CLAIMS (Sep 98)(BPI 21.3.10)

After completion of work, and prior to final payment, the Contracting Officer may, at his or her option, require the Contractor to furnish a release of claims against BPA arising out of the contract, other than claims specifically excepted from the operation of the release.

(End of clause)

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Clause 21-5 APPLICABLE LAW (May 11)(BPI 21.1.2.1)

This agreement shall be construed in accordance with and governed by federal procurement laws of the United States. Where there is no applicable federal procurement law, the laws of the State of Oregon shall prevail.

(End of clause)